

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 \_\_\_\_\_  
4  
5 August Term, 2019

6  
7 (Argued: September 26, 2019

Decided: September 15, 2020)

8  
9 Docket No. 18-1697

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11 \_\_\_\_\_  
12  
13 UNITED STATES OF AMERICA,

14  
15 *Appellee,*

16  
17 v.

18  
19 CALVIN WEAVER,

20  
21 *Defendant-Appellant.*

22  
23 \_\_\_\_\_  
24  
25 Before: LIVINGSTON, *Chief Judge*, CALABRESI and POOLER, *Circuit Judges*.

26  
27 Appeal from an order of the United States District Court for the Northern  
28 District of New York (Suddaby, C.J.) denying Weaver's motion to suppress a  
29 firearm discovered after police officers pat-frisked Weaver during a traffic stop.

30 We hold that the officers lacked an objectively reasonable belief that Weaver was

1 armed and dangerous. Suppression of the firearm was accordingly warranted as  
2 the fruit of an illegal search conducted in violation of the Fourth Amendment.

3 Reversed and remanded.

4 Chief Judge Livingston dissents in a separate opinion.

5 Judge Calabresi concurs in a separate opinion.

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7 JAMES P. EGAN, Assistant Federal Defender, *for* Lisa  
8 A. Peebles, Federal Public Defender for the Northern  
9 District of New York, Syracuse, NY, *for Defendant-*  
10 *Appellant.*

11  
12 CARINA H. SCHOENBERGER, Assistant United States  
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14 for the Northern District of New York, Syracuse, NY, *for*  
15 *Appellee.*

16  
17 POOLER, *Circuit Judge:*

18 Calvin Weaver appeals from the December 20, 2017 order of the United  
19 States District Court for the Northern District of New York (Suddaby, *C.J.*)  
20 denying his motion to suppress a firearm that police officers discovered in the  
21 course of a pat-down frisk of Weaver's person conducted during a traffic stop.

22 It is well established that the Fourth Amendment permits the police "a  
23 narrowly drawn authority" to conduct "a reasonable search for weapons for the

1 protection of the police officer, where he has reason to believe that he is dealing  
2 with an armed and dangerous individual, regardless of whether he has probable  
3 cause to arrest the individual for a crime.” *Terry v. Ohio*, 392 U.S. 1, 27 (1968).  
4 Here, however, the police lacked an “articulable and objectively reasonable  
5 belief,” *Michigan v. Long*, 463 U.S. 1032, 1051 (1983), that Weaver was “armed and  
6 presently dangerous to the officers or others,” *Terry*, 392 U.S. at 24. At most, the  
7 officers had reason to believe that Weaver possessed something illicit. But the  
8 Constitution requires more: it requires the officers have reason to believe this  
9 something was dangerous. Accordingly, we REVERSE the district court’s denial  
10 of Weaver’s motion to suppress and REMAND for further proceedings  
11 consistent with this opinion.

12 **BACKGROUND**

13 At approximately 5 p.m. on Monday, February 15, 2016, Officers Quonce,  
14 Tom, and Staub of the Syracuse Police Department (“SPD”) observed Weaver  
15 walking along a street curb while they were driving in an unmarked police  
16 vehicle with tinted windows on the westside of Syracuse, a high-crime area. As  
17 the officers drove past, Weaver “stared into [their] vehicle, continued to stare, as  
18 [they] approached, as [they] passed, and continued to stare as [they] proceeded

1 past him.” App’x at 150-51. According to Officer Quonce, Weaver stared for  
2 “probably a few seconds but it seemed longer than typically one would look at a  
3 vehicle.” App’x at 95.

4 The officers then saw Weaver walk towards a gray sedan and “adjust[] his  
5 waistband.” App’x at 151. Officer Tom described this adjustment as “just a subtle  
6 tug of his waistband, like an upward tug motion,” explaining that “his pants  
7 were lower than waist level and it was kind of a tugging upward like  
8 adjusting. . . .” App’x at 152. Weaver sat down in the front passenger seat, and  
9 the car drove away.

10 The officers drove on but encountered the gray sedan again driving on  
11 Davis Street. After the car stopped at a stop sign at the intersection of Davis  
12 Street and Delaware Street, the driver turned on his right indicator light to signal  
13 a turn. This constituted a traffic infraction, as New York Vehicle and Traffic Law  
14 requires that all vehicles signal 100 feet *prior* to a turn. New York Veh. & Traf.  
15 Law § 1163(b). The gray sedan turned onto Delaware Street and then quickly  
16 turned onto South Geddes Street. The officers followed the sedan onto South  
17 Geddes Street, turned on the police vehicle’s emergency lights, and pulled the  
18 sedan over to the right side of the road.

1           When the gray sedan stopped, the officers observed that the rear  
2 passenger's driver's side door quickly opened up into traffic. The officers  
3 "believed that the rear passenger was about to flee from the vehicle." App'x at  
4 103. When Officer Quonce instructed that party to stay in the vehicle, however,  
5 the rear passenger closed his door and remained in the car. That passenger also  
6 complied with police orders directing him to hold his arms in front of him and to  
7 put his hands on his head.

8           Officer Tom observed Weaver sitting in the front passenger seat. As  
9 Officer Tom approached the gray sedan, he testified that "from my vantage point  
10 I can see into the cabin of the vehicle clearly, I see the front passenger with both  
11 hands kind of pushing down on his pelvic area and squirming kinda in the seat  
12 left and right, shifting his hips." App'x at 158. Officer Tom stated that Weaver  
13 used two hands to make a "[d]ownward motion, trying to push something  
14 down." App'x at 159.

15           Officer Tom asked Weaver to show him his hands, and Weaver complied.  
16 Weaver also told Officer Tom, "I don't got nothin'." App'x at 159. Officer Tom  
17 instructed Weaver to put his hands on his head, and he again complied. Officer  
18 Tom then asked Weaver if he possessed identification and "visually inspected his

1 right pocket." App'x at 160. Concluding that "it didn't appear that there was any  
2 bulges in his pocket," Officer Tom asked Weaver "to slowly use his right hand to  
3 remove his ID from his pocket." App'x at 160. Weaver complied and handed  
4 Officer Tom a New York State benefit card.

5       Officer Tom ordered Weaver to step out of the car and place his hands on  
6 the trunk with his legs spread apart. Weaver also complied with this order.  
7 Officer Tom testified that Weaver "was very close to the rear quarter panel of the  
8 vehicle," so he "asked him to take a step back." App'x at 162. Weaver "took a  
9 small step back, and then [Officer Tom] began to pat his waistband area." App'x  
10 at 162. When Officer Tom patted Weaver's waist area, Weaver "immediately  
11 stepped forward and pressed his pelvic area against the quarter panel of the  
12 vehicle." App'x at 162. This prevented Officer Tom "from doing an effective pat  
13 frisk of [Weaver's] waist area," so he asked Weaver "to take a step back and he  
14 did but again he said it was slippery." App'x at 163. Officer Tom then pulled  
15 Weaver "the distance where [Officer Tom] wanted him to be at so [he could]  
16 effectively do a pat frisk," and Weaver "took a step back, his hands remain[ing]  
17 on the rear of the vehicle." App'x at 164. As Officer Tom began to pat frisk  
18 Weaver a third time, Weaver "again thrust his pelvic area against the rear

1 quarter panel of the vehicle." App'x at 164. Officer Tom then placed Weaver in  
2 handcuffs, pulled him away from the vehicle, and conducted a pat frisk of his  
3 waist and front pockets.

4 Officer Tom felt nothing suspicious at Weaver's waist, but he felt a "slight  
5 small bulge" in Weaver's front pocket. App'x at 165. Believing this bulge to be a  
6 narcotic, Officer Tom reached into Weaver's pocket and pulled out a white  
7 powdery substance that field tested as cocaine. Officer Tom continued the pat  
8 frisk, from Weaver's right leg from the top down, and then back up his right leg  
9 before transitioning to the groin area, left leg upper groin area, and left leg. At  
10 that point, Officer Tom "felt something hard," which he believed was a barrel of  
11 a firearm. App'x at 166-67.

12 Officers Tom and Quonce placed the driver and remaining passenger in  
13 handcuffs while Detective Staub secured Weaver. Detective Staub then motioned  
14 Officer Quonce towards the front groin area of the pants Weaver had on. When  
15 Officer Quonce conducted a pat-down frisk of the outside of Weaver's clothing  
16 of that area, he felt the barrel and handle of a gun through Weaver's pants.  
17 Officer Quonce unzipped Weaver's pants and saw that Weaver had "long john  
18 underwear on underneath [his pants] with . . . a button on the fly," so Officer

1 Quonce “unbuttoned the fly and . . . removed the handgun.” App’x at 110. The  
2 officers found live ammunition in the handgun’s magazine.

3 On August 31, 2017, Weaver was charged with one count of being a felon  
4 in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), one count of  
5 possession of a firearm with a removed serial number in violation of 18 U.S.C. §  
6 922(k), and one count of simple possession of a controlled substance in violation  
7 of 21 U.S.C. § 844(a).<sup>1</sup> Weaver moved to suppress the firearm as the fruit of an  
8 unconstitutional search, arguing that the police lacked reasonable suspicion to  
9 conduct a pat-down frisk of his person during the traffic stop.

10 The district court denied Weaver’s motion to suppress after a hearing. The  
11 district court held in relevant part that the officers had reasonable suspicion to  
12 conduct a pat-down frisk based on Weaver’s actions in (1) watching the police  
13 vehicle as it drove past him; (2) pulling up on the waistband of his pants while  
14 walking; (3) slouching down in his seat, pushing in a downward motion on his

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<sup>1</sup> Weaver was initially charged in state court with criminal possession of a  
weapon in the second degree in violation of New York Penal Law § 265.03(3). On  
June 29, 2016, Onondaga County Court issued an order suppressing the firearm  
evidence on grounds that the SPD lacked reasonable suspicion to conduct a pat-  
down search of Weaver’s person, and therefore, the search violated the Fourth  
Amendment.



1 pelvic area with both hands, and squirming or shifting his hips left to right; (4)  
2 telling Officer Tom that he “don’t got nothing”; and (5) trying to prevent the  
3 officers from frisking his waist area, though it held that reasonable suspicion was  
4 present even absent this last fact. The court also considered that the search  
5 occurred in a high-crime area and another passenger in the car had swung his  
6 door open immediately when the police stopped the car.

7 Weaver subsequently entered a guilty plea to the three charges pursuant to  
8 a conditional plea agreement that allowed him to appeal the district court’s  
9 denial of suppression. App’x at 232. Weaver was sentenced principally to 87  
10 months’ imprisonment and three years’ supervised release.

11 Weaver timely appealed.

## 12 DISCUSSION

13 “On review of a challenged suppression order, we examine the district  
14 court’s findings of fact for clear error, reviewing *de novo* questions of law and  
15 mixed questions of law and fact, including the existence of reasonable suspicion  
16 to stop or extend a stop.” *United States v. Santillan*, 902 F.3d 49, 56 (2d Cir. 2018).  
17 We look at the totality of the circumstances from the view of a reasonable and  
18 cautious officer on the scene. *Id.*

1           The Fourth Amendment protects “[t]he right of the people to be secure in  
2 their persons, houses, papers, and effects, against unreasonable searches and  
3 seizures.” U.S. Const. amend. IV. Generally, “searches conducted outside the  
4 judicial process, without prior approval by judge or magistrate, are *per se*  
5 unreasonable under the Fourth Amendment—subject only to a few specifically  
6 established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347,  
7 357 (1967) (footnote omitted).

8           In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized one such  
9 exception when it held that police officers can stop someone whom they  
10 reasonably suspect is involved in the commission of a crime and conduct a  
11 protective search of this person for weapons, even absent a warrant or probable  
12 cause for an arrest. Critically, this does not provide the police with a free pass to  
13 search for *anything* illicit. The Court’s central preoccupation was the need to  
14 protect officers from dangerous weapons, and its holding was tailored  
15 accordingly: “When an officer is justified in believing that the individual whose  
16 suspicious behavior he is investigating at close range is *armed and presently*  
17 *dangerous* to the officer or to others, it would appear to be clearly unreasonable to  
18 deny the officer the power to take necessary measures to determine whether the

1 person is in fact carrying a *weapon* and to neutralize the *threat of physical harm.*" *Id.*  
2 at 24 (emphasis added).

3 To establish that an officer is justified in neutralizing such a threat, the  
4 "police officer must be able to point to specific and articulable facts which, taken  
5 together with rational inferences from those facts, reasonably warrant that  
6 intrusion." *Id.* at 21. We apply "an objective standard: would the facts available  
7 to the officer at the moment of the seizure or the search warrant a man of  
8 reasonable caution in the belief that the action taken was appropriate?" *Id.* at 21-  
9 22 (internal quotation marks and citation omitted). While we have explained that  
10 "the concept of reasonable suspicion is not susceptible to precise definition, . . .  
11 some minimal level of objective justification is required," not just "inchoate  
12 suspicion or mere hunch." *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000)  
13 (internal quotation marks and citations omitted).

14 *Terry* has since been extended to a number of contexts, including that of  
15 protective searches in the specific factual circumstance at issue here: an  
16 investigative stop of an automobile. In *Pennsylvania v. Mimms*, 434 U.S. 106, 112  
17 (1977), the Supreme Court held that police officers can conduct an investigative  
18 stop of an automobile and frisk the driver of the car for weapons, reiterating the

1 *Terry* requirement that the officers have an objectively reasonable and articulable  
2 belief that the driver is armed and dangerous. Similarly, in *Michigan v. Long*, 463  
3 U.S. 1032, 1051 (1983), the Court allowed the police “to conduct an area search of  
4 the passenger compartment to uncover weapons, as long as they possess an  
5 articulable and objectively reasonable belief that the suspect is potentially  
6 dangerous.” In line with its previous admonitions, the Court explicitly warned  
7 that police officers cannot conduct searches “*whenever* they conduct an  
8 investigative stop” of an automobile, because “[a] *Terry* search, unlike a search  
9 without a warrant incident to a lawful arrest, is not justified by any need to  
10 prevent the disappearance or destruction of evidence of crime. . . . The sole  
11 justification of the search . . . is the protection of police officers and others  
12 nearby.” *Id.* at 1049 n.14 (internal quotation marks and citation omitted).  
13 Subsequent Supreme Court cases extended the rule in *Terry* and *Mimms* to  
14 automobile passengers. *See Maryland v. Wilson*, 519 U.S. 408 (1997) (holding that  
15 police officers can order automobile passengers out of the vehicle during traffic  
16 stops); *see also Arizona v. Johnson*, 555 U.S. 323 (2009).

17 *Terry* makes clear that reasonable suspicion must be present at the  
18 “inception” of the officer’s search. 392 U.S. at 20. Thus, our analysis of whether

1 reasonable suspicion was present considers only the facts known to the officer  
2 that prompted him to search or seize. *See Dancy v. McGinley*, 843 F.3d 93, 108-09  
3 (2d Cir. 2016); *United States v. Freeman*, 735 F.3d 92, 96-97 (2d Cir. 2013).

4       The central dispute in this case is whether the SPD had an objectively  
5 reasonable belief that Weaver was “armed and presently dangerous to the  
6 officers or to others.” *Long*, 463 U.S. at 1047 (internal quotation marks omitted). It  
7 did not. None of the facts before us—individually or collectively—is sufficient to  
8 establish that the SPD officers had an objectively reasonable suspicion that  
9 Weaver was armed and dangerous.<sup>2</sup>

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11

12       **I.       The Inception of the Frisk**

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<sup>2</sup> The dissent argues that the majority improperly considers facts piecemeal. With respect, that is simply not true. That we discuss the considerations independently does not mean that we assess each in isolation or fail to evaluate the facts cumulatively. We take a moment to repeat, as we do throughout this opinion, that whether analyzed singly or jointly, the circumstances before the SPD do not support an objectively reasonable suspicion that Weaver was armed and dangerous. Even when the facts and reasonable inferences drawn therefrom are stacked, they provide an insufficient basis for an objective, even cautious, officer to find reasonable suspicion that Weaver was armed or dangerous for the reasons we discuss in section II, *infra*.

1           As an initial matter, we consider only the events that occurred *before*  
2   Officer Tom ordered Weaver to put his hands on the trunk of the car. It is clear  
3   that Officer Tom had effectively initiated a search of Weaver when he instructed  
4   him to place his hands on the trunk with legs spread apart (what may be referred  
5   to as an “in search” position), because there is no other reason in our view to ask  
6   Weaver to assume this position. A frisk is a search. And a search, like a seizure,  
7   may begin before there is any physical contact, at the time when “a reasonable  
8   person would have believed that the search was being initiated.” *Doornbos v. City*  
9   *of Chicago*, 868 F.3d 572, 581 (7th Cir. 2017); *see also Dancy*, 843 F.3d at 108-09  
10   (noting that because “ a stop must be justified ‘at its inception,’ we consider only  
11   the facts known to [the officer] that prompted him to give [the order]” that  
12   would have caused a reasonable person in the suspect’s position to believe “that  
13   he was not free to leave” (internal quotation marks and citation omitted)).<sup>3</sup>  
14   Actually touching a suspect “with the intention of frisking him,” of course,

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<sup>3</sup> The dissent states that our Court’s decision in *Dancy* is inapposite because our analysis focused on when an investigatory stop, not a search, occurred. *Dancy*, 843 F.3d at 108. But it makes little sense, on the one hand, to agree that a seizure for Fourth Amendment purposes may occur before physical force is used, but on the other hand, to maintain that a search only occurs after.

1 constitutes a search. *Dancy*, 943 F.3d at 108 n.12. But in this case, by the time  
2 Officer Tom touched Weaver, he had already instructed Weaver to exit the car  
3 and assume a position that any reasonable person could only have interpreted to  
4 mean that the search had begun. Objectively, the search was therefore initiated  
5 after Officer Tom ordered Weaver out of the car, but no later than the moment  
6 when Officer Tom directed Weaver to assume this “in search” position. It is at  
7 that point that Officer Tom must have had an articulable and objectively  
8 reasonable belief that Weaver had something dangerous.

9         The dissent argues that the majority’s analysis is “both erroneous and  
10 problematic” as it focuses only on conduct occurring before Officer Tom decided  
11 to frisk Weaver. It provides two reasons for this assessment, neither of which is  
12 appropriately explanatory.

13         First, the dissent notes, correctly, that an order to exit a vehicle during a  
14 lawful stop amounts only to a de minimis intrusion on Weaver’s liberty. It then  
15 accuses the majority of elevating this intrusion into something more. The dissent  
16 reaches this conclusion by focusing largely on the order that Weaver get out of  
17 the car and minimizing the order that he place his hands on the car and spread  
18 his feet apart. But when Weaver exited the vehicle, Officer Tom directed him to

1 assume a position that indicated to Weaver that Officer Tom was about to frisk  
2 him. And while asking a passenger to exit a vehicle might be a de minimis  
3 intrusion on the passenger's liberty, ordering someone to spread-eagle on a car is  
4 manifestly not. It is a search!

5         The dissent entirely elides this critical distinction. As *Terry* itself  
6 recognized, a frisk "is a serious intrusion upon the sanctity of the person, which  
7 may inflict great indignity and arouse strong resentment." 392 U.S. at 17; *see also*  
8 *United States v. Tinnie*, 629 F.3d 749, 756 (7th Cir. 2011) (Hamilton, J., dissenting)  
9 ("[W]e must recognize that a frisk is most certainly not a minor intrusion on  
10 privacy."). "[I]t is simply fantastic to urge that [a frisk] performed in public by a  
11 policeman while the citizen stands helpless, perhaps facing a wall with his hands  
12 raised, is a 'petty indignity.'" *Terry*, 392 U.S. at 17-18. But this "fantastic" notion  
13 is precisely what the dissent perpetuates by focusing on the minimally intrusive  
14 order to exit the car while minimizing the maximally intrusive order to position  
15 himself in a way that can only constitute a search. We cannot forget the *Terry*  
16 Court's admonition that a frisk "is not to be undertaken lightly." 392 U.S. at 17.  
17 Officer Tom's actions in ordering Weaver to step out of the car and assume a  
18 position with his hands on the trunk and feet spread apart were undertaken



1 solely in order to frisk Weaver. That is why Officer Tom’s order marks the point  
2 at which reasonable suspicion that Weaver was armed and dangerous was  
3 required.

4         Second, the dissent claims that considering this order of Officer Tom’s to  
5 be the initiation of the search runs afoul of the principle that an officer’s  
6 subjective intentions in frisking are irrelevant. It is true, as the dissent says, that  
7 precedent instructs us to turn a blind eye to an officer’s subjective intentions in  
8 stopping, searching, or seizing. *See Whren v. United States*, 517 U.S. 806, 813  
9 (1996). But this means only that we must ignore intent in determining *why* the  
10 officer took the challenged action. It does not preclude us from looking at intent  
11 in determining *when* the action was initiated. *See United States v. Williams*, 731  
12 F.3d 678, 686 (7th Cir. 2013) (analyzing “the circumstances that [the officer] may  
13 have relied upon in *deciding* to frisk [the defendant]” (emphasis added)).

14         The dissent’s conflation of these two inquiries would significantly narrow  
15 the scope of judicial review over police actions in a manner inconsistent with the  
16 Fourth Amendment’s reasonable-suspicion requirement. Because the purpose of  
17 our inquiry is to ensure that reasonable suspicion was present to justify a frisk,  
18 *see Terry*, 392 U.S. at 20; *see also Mimms*, 434 U.S. at 109 (explaining that

1 reasonableness serves to protect the individual’s right to be “free from arbitrary  
2 interference by law officers”), it makes little sense to rely on conduct postdating  
3 the decision to frisk. Any subsequent events could not possibly factor into that  
4 decision.

5         According to the dissent, a frisk only begins when an officer lays hands on  
6 an individual. We cannot agree with such a formalistic view. “This narrow  
7 definition of a frisk would require us to close our eyes to reality and would  
8 encourage aggressive and intrusive police tactics, especially during pre-textual  
9 traffic stops. . . . Bent over the hood of a car or pressed against a wall in the  
10 middle of the night, most people would be extremely nervous and disoriented. It  
11 would be easy enough for an enterprising officer to find some justification for a  
12 frisk in any nervous responses,” or behavior, “at such a vulnerable moment.”  
13 *Tinnie*, 629 F.3d at 759 (Hamilton, J., dissenting). To assume, as the dissent does,  
14 that a search only begins once there is physical contact would contradict long-  
15 standing precedent that our analysis under *Terry* must be “flexible enough to be  
16 applied to the whole range of police conduct in an equally broad range of  
17 settings.” *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). For these reasons, we

1 respectfully disagree with the dissent's belief that the majority's approach is  
2 "erroneous and problematic."

## 3 **II. Whether Reasonable Suspicion Was Present**

4 Because reasonable suspicion must be present at the inception of the frisk,  
5 *Terry*, 392 U.S. at 20, we therefore only consider the following acts in determining  
6 whether there was reasonable suspicion that Weaver was armed and dangerous:  
7 (1) Weaver's staring at the unmarked police car as it drove by; (2) Weaver's  
8 adjustment of his waistband while walking; (3) Weaver's statement that he had  
9 nothing on him; and (4) Weaver's pushing down his pants and wiggling back  
10 and forth while in the passenger seat.

11 The Government's strongest fact is Weaver's movements in the passenger  
12 seat, which Officer Tom described as "with both hands kind of pushing down on  
13 his pelvic area and squirming kinda in the seat left and right, shifting his hips."  
14 App'x at 158. Officer Tom believed that Weaver was "trying to push something  
15 down." App'x at 159. But nothing in Officer Tom's description that Weaver was  
16 squirming and trying to push something down suggests that this "something"  
17 was a weapon. Weaver's actions were equally consistent with the act of secreting  
18 drugs or other nonhazardous contraband.

1           The distinction between the two is key, as is illustrated in our recent case  
2   *United States v. Hussain*, 835 F.3d 307 (2d Cir. 2016). In *Hussain*, an officer pulled  
3   over a car that defendant Cunningham was driving after it ran a stop sign. *Id.* at  
4   310. After the car had been pulled over, the officer “observed Cunningham’s arm  
5   move up and down in the middle console area.” *Id.* The officers also noticed that  
6   the passenger in the front seat of the car was sitting in an “unnatural” position  
7   that the officers believed was meant to obscure the front seat of the car from  
8   view. *Id.* at 311. As an officer approached the car, he saw Cunningham with a  
9   cellphone in his right hand. *Id.* at 310. Cunningham was ordered out of the car,  
10   and when he complied, he told the officer that he had a knife in his pocket  
11   (which was a legal pocket knife). *Id.* at 311. After discovering the pocket knife,  
12   the officer searched Cunningham’s car and discovered a loaded gun under the  
13   front passenger seat. *Id.* We held that the search was unconstitutional. Although  
14   we acknowledged that “each of the officers subjectively suspected that  
15   Cunningham and [the passenger] were hiding something and up to no good,”  
16   we concluded that the officers had not pointed to articulable facts indicating that  
17   Cunningham posed a danger to them. *Id.* at 314. We noted that the officers knew  
18   Cunningham was holding a cellphone, not a firearm, in the car. *Id.* at 315-16. We

1 also rejected reliance on the passenger’s unnatural seated position, reasoning that  
2 it “may have been enough to believe that [the passenger] sought to hide  
3 something. But insofar as dangerousness is the sole focus of our attention under  
4 Long, [the passenger’s] position by itself sheds insufficient light on whether he  
5 was hiding something dangerous.” *Id.* at 316.

6 *Hussain* is instructive in the present case. We have no doubt that Officer  
7 Tom reasonably suspected that Weaver was hiding *something* based on his  
8 downward motion and wiggling. But there are no specific or articulable facts that  
9 Weaver was hiding something *dangerous*.<sup>4</sup> As *Hussain* and Supreme Court  
10 precedent establish, there is a distinction between hiding something and hiding  
11 something dangerous. It is not enough that officers rely on a suspicion that a  
12 suspect was hiding something, even if that something is contraband like drugs—

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<sup>4</sup> Indeed, in its decision, the district court found only that Officer Tom believed Weaver was “concealing *something*” — not something dangerous. App’x at 218 (emphasis added). This is consistent with Officer Tom’s testimony at the suppression hearing, during which he said only that Weaver’s movements were consistent with hiding “something”; he did not testify that he believed the movements were consistent with hiding something *dangerous*. App’x at 159. We also note that Officer Tom asked Weaver to reach into his pocket and pull out his identification, a fact which certainly calls into question whether the officers believed that Weaver possessed something dangerous.

1 rather, officers must have a suspicion based on articulable facts that the suspect  
2 was “hiding something dangerous.” *Id.* For this reason, Weaver’s actions in the  
3 front passenger seat did not provide the SPD with an objectively reasonable  
4 belief that he was armed and dangerous.<sup>5</sup>

5 The other facts present also fail to support an objectively reasonable  
6 suspicion that Weaver was armed and dangerous. The Government points to  
7 Weaver’s adjustment of his waistband to bolster its claims. We are not convinced  
8 that this action signals that Weaver carried a weapon on his person. Officer Tom  
9 testified that Weaver made a “subtle tug of his waistband.” App’x at 152. But  
10 given that Weaver’s pants were lower than waist level, such a subtle tug is no  
11 more suggestive of a firearm than it is of Weaver simply wanting to raise his  
12 pants because they slipped lower than he preferred.<sup>6</sup> In other words, we cannot

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<sup>5</sup> Our discussion on this point also addresses the Government’s reliance on Weaver’s statement to Officer Tom that he “don’t got nothin’.” App’x at 159. Even if this statement could be interpreted to support Officer Tom’s suspicion that Weaver possessed something illegal, nothing about this statement suggests that Weaver possessed something dangerous.

<sup>6</sup> The dissent makes the assertion that Weaver’s tug “suggest[s] that something hefty could be weighing down his pants.” This is a purely post hoc rationalization. The tug was slight, and there was no other reason at this point to suspect Weaver had a firearm. We are hard-pressed to see how a rational officer at the scene would take the dissent’s view.

1 say that an objectively reasonable officer who witnessed such an action would  
2 conclude that Weaver carried a firearm.

3         This differentiates Weaver’s case from *United States v. Padilla*, 548 F.3d 179  
4 (2d Cir. 2008), in which we held that the officer had reasonable suspicion that  
5 Padilla was armed and dangerous. In doing so, one of the facts (among several  
6 others suggesting suspicious circumstances) that we relied on was Officer  
7 O’Brien’s testimony that he saw Padilla adjust something in the center of his  
8 waistband in a manner “consistent with the adjustment of a gun lodged in one’s  
9 waistband” but *not* “consistent with any innocent explanation” based on his  
10 experience in making nearly ten arrests of suspects carrying firearms in their  
11 waistbands and how his colleagues adjusted their waistbands when carrying  
12 firearms. *Id.* at 183. The magistrate judge, who twice requested that Officer  
13 O’Brien make the same gesture at the suppression hearing, similarly  
14 characterized it as a “distinctive gripping motion, as if holding and adjusting  
15 (first up and then down) something comparable in size, shape, and heft to a  
16 handgun.” *Id.* at 184 (internal quotation marks omitted). This “‘distinctive’  
17 consistency with the adjustment of a firearm” was the focus of much of our  
18 analysis. *Id.* at 189. Given the lack of any “distinctive consistency” in the case at

1 hand—coupled with the lack of other suspicious facts present in *Padilla*, like  
2 *Padilla*’s choice to eschew the lighted path and instead follow a suspected drug  
3 user down a dark path at night<sup>7</sup>—we do not believe Weaver’s subtle tug at his  
4 waistband supports an objectively reasonable suspicion that he was armed.<sup>8</sup>

5         The final bases offered by the Government are so meritless they warrant  
6 little discussion. One is Weaver’s presence in a high-crime area. While relevant,  
7 this factor does not necessarily “contribute meaningfully to a finding of  
8 reasonable suspicion.” *See Freeman*, 735 F.3d at 101. We cannot say that it  
9 contributes meaningfully here. The stop and frisk of Weaver occurred during

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<sup>7</sup> There are no shortage of facts distinguishing Weaver’s case from *Padilla*, but we highlight just one such fact here in particular. Namely, while Officer O’Brien saw *Padilla* reach into his clothing such that *Padilla* may have been reaching for his weapon, *Padilla*, 548 F.3d at 183, Officer Tom saw Weaver pushing something so far down his pants that no bulge was noticeable, suggesting that Weaver was attempting to make that item inaccessible. Practically speaking, then, Officer O’Brien had much greater cause for concern that the suspect was “armed and dangerous” than did Officer Tom.

<sup>8</sup> The dissent believes the majority misreads *Padilla* and by focusing on how the movement in *Padilla* was inconsistent with any innocent explanation. Respectfully, the dissent misreads the majority opinion. We highlight the singular nature of the movement in *Padilla* only to explain why this case does not compel a finding of reasonable suspicion here. As we have said, it is the absence of this distinctive consistency factor *and* other suspicious actions present in *Padilla* that makes *Padilla* distinguishable.



1 daylight,<sup>9</sup> and Officer Tom acknowledged that he did not witness Weaver or the  
2 other occupants of the car engaging in criminal activity. The other basis the  
3 Government puts forth is Weaver’s staring at the unmarked police vehicle as it  
4 drove by. Officer Tom testified that as their vehicle drove past Weaver, he stared  
5 at the car for “a few seconds.” App’x at 174. Besides the fact that there is nothing  
6 objectively unusual about staring at an unmarked car with tinted windows  
7 driving by slowly, citizens are well within their rights to stare at others in public,  
8 including police officers. Very little, if anything, can be gleaned from such an act.  
9 *Cf. Dancy*, 843 F.3d at 110 (“[L]ooking over one’s shoulder at an officer in slow  
10 pursuit is not suspicious behavior.”). To conclude otherwise would yield the  
11 troubling result of adverse consequences for the exercise of basic rights—  
12 something we see far too much of in the case law as it is. *See generally* I. Bennett  
13 Capers, *Criminal Procedure and the Good Citizen*, 118 Colum. L. Rev. 653 (2018).

14 The dissent takes issue with our conclusion that there is nothing unusual  
15 about Weaver’s staring. It believes that it indicates that Weaver was “attempting

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<sup>9</sup>The dissent emphasizes Officer Tom’s testimony that it was dusk. While testifying that it was dusk, Officer Quonce twice confirmed that it was “still light out.” App’x at 116, 144.

1 to avoid police surveillance.” But such an inference is insupportable. Given that  
2 the vehicle was unmarked, and therefore Weaver would not have known that it  
3 contained police officers, the dissent makes too great a leap. And even if Weaver  
4 had been concerned about encounters with the police, the hard reality is that, in  
5 light of incidences of police brutality and discriminatory policing, minority  
6 citizens across the country fear encounters with the police, whether guilty or  
7 innocent. *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (Sotomayor, J., dissenting) (“For  
8 generations, black and brown parents have given their children ‘the talk’ —  
9 instructing them never to run down the street; always keep your hands where  
10 they can be seen; do not even think of talking back to a stranger — all out of fear  
11 of how an officer with a gun will react to them.”); *Illinois v. Wardlow*, 528 U.S. 119,  
12 132 (2000) (Stevens, J., concurring in part and dissenting in part) (explaining that  
13 “[a]mong some citizens, particularly minorities and those residing in high crime  
14 areas,” there may be a belief “that contact with the police can itself be  
15 dangerous”).<sup>10</sup>

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<sup>10</sup> The dissent makes a similar presumption when it claims that the rear passenger of the vehicle “appears to have been ‘about to flee,’ as Officer Tom’s partner put it rather than being caught by law enforcement in the [dangerous or illicit] item’s vicinity.” The record is bereft of any indication as to why the rear

1           In sum, we do not believe that any of the facts the Government raises can  
2 support an objectively reasonable suspicion that Weaver was armed and  
3 dangerous. Whether assessed independently or collectively, *at most* the SPD had  
4 a reasonable suspicion that Weaver was hiding something. But the Fourth  
5 Amendment requires more.

6           The dissent disagrees. Despite agreeing that a *Terry* frisk involves a “more  
7 specific analysis, requiring the officer to hold a reasonable suspicion that the  
8 subject is ‘armed and dangerous’ as opposed to being generally suspicious,”  
9 *Williams*, 731 F.3d at 686 (citation omitted), the dissent would have us hold that  
10 Weaver’s ambiguous conduct gave rise to reasonable suspicion that he was  
11 armed and dangerous. According to the dissent, the presence of alternative  
12 explanations does not negate reasonable suspicion. But what we must look at is  
13 “the degree of suspicion that attaches to particular types of noncriminal acts.”  
14 *United States v. Sokolow*, 490 U.S. 1, 10 (1989). We agree that officers are not

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passenger opened the door, and we therefore cannot say what his intentions were. But we are wary of imputing his conduct to Weaver. *See United States v. I.E.V.*, 705 F.3d 430, 438 (9th Cir. 2012) (rejecting the district court’s partial reliance on the defendant’s proximity to a “fidgety” individual in assessing whether the frisk of the defendant was constitutional).

1 required to rule out every innocent explanation, but that does not mean, as the  
2 dissent would have us believe, that any conduct consistent with, or possibly  
3 suggestive of, weapon possession satisfies the reasonable-suspicion standard.  
4 That proposition is belied by our decision in *Hussain*, 835 F.3d at 316. And while  
5 we give “due weight” to officers’ reasonable inferences, *Ornelas v. United States*,  
6 517 U.S. 690, 699 (1996), due weight is not determinative weight.

7         The importance of Fourth Amendment rights demands careful scrutiny of  
8 those facts offered by the police to support reasonable suspicion. This need is  
9 perhaps even greater when searches or seizures do result in criminal evidence.  
10 “When a search uncovered criminal evidence, enterprising cops soon learned  
11 what was expected of them: an additional fact besides the violation of some  
12 traffic law. Articulating something out of the ordinary—a nervous glance,  
13 shaking hands, a revealing smell—when asked for one in a court of law was  
14 especially easy when they caught someone red-handed.” Sarah A. Seo, *Policing*  
15 *the Open Road* 237 (2019). But as Seo explains, “Requiring an ‘unusual’ fact did  
16 little to eliminate pretextual stops.” *Id.* “In practice, more often than not, ‘all the

- 1 facts and circumstances’ rationalized discretionary” —and often discriminatory,
- 2 we might add —“policing of people who were, in fact, guilty.” *See id.*<sup>11</sup>

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<sup>11</sup> The dissent laments that “the majority . . . forgets the[] lessons of the Warren Court” regarding the dangers facing officers. It worries that our decision today invites unnecessary risks for officers and threatens to undermine the safety of “the broader community.” We think such a concern to be overstated, and to the extent the dissent devolves into such speculation on consequences, we caution that unfettered deference to officer discretion paves the road for the sort of threats to community safety the dissent augurs.

“The erosion of Fourth Amendment liberties comes not in dramatic leaps but in small steps . . . .” *Tinnie*, 629 F.3d at 754 (Hamilton, J., dissenting). Drawing the inferences the dissent asks us to draw and concluding that such weak facts support reasonable suspicion would be far reaching. Officers could subject individuals to the humiliations and dignitary harms incident to unwarranted frisks based on mundane acts, such as a look, a nervous response, or an adjustment of one’s clothes. This unfettered discretion in turn “could lead to harassment of minority groups and severely exacerbate police-community tensions.” *Dancy*, 843 F.3d at 111 (internal quotation marks and citation omitted).

As we have seen time and again, such harassment is neither new nor innocuous, as carefully documented in Seo’s book. Seo notes that “midcentury Americans recognized, to varying degrees, that the police picked on racial minorities.” Seo, *Policing the Open Road* 169. Seo explains that like white citizens, “Black citizens were also policed in their cars, but the experience for them was often much more terrifying than a series of nosy questions.” *Id.* at 214. Communities should not have to “decide between their constitutional rights against unwarranted searches and seizures” and “governmental protection that is readily afforded to other communities.” *United States v. Curry*, 965 F.3d 313, 333 (4th Cir. 2020), as amended (July 15, 2020), as amended (July 16, 2020) (Gregory, C.J., concurring).



1 DEBRA ANN LIVINGSTON, *Chief Judge*, dissenting:

2           It was dusk as Officer (now Detective) Jason Tom approached the vehicle in  
3 which Calvin Weaver was a passenger. Officer Tom, then a two-year veteran of  
4 the Syracuse Police Department's Gang Violence Task Force, was patrolling a  
5 dangerous neighborhood on the near west side of Syracuse where "[t]here's a  
6 typically high volume of shots fired [and] gun-related crime," App'x 93, and  
7 where "there are regularly shots fired, there's been multiple homicides, stabbings,  
8 shootings," App'x 150. When the gray sedan in which Weaver was riding was  
9 lawfully pulled over for a traffic infraction, a rear door quickly opened into  
10 traffic—as if the passenger inside, who remained in the car only on the express  
11 direction of police, was "about to flee from the vehicle." App'x 103. And as  
12 Officer Tom neared the front passenger seat, he observed the passenger, later  
13 identified as Weaver, acting in a manner that Officer Tom, even with some six  
14 years of experience as a police officer, found both highly unusual and frankly  
15 alarming:

16           As I'm approaching the vehicle, I see the front passenger slouched  
17 down pushing down his pelvic area and kind of squirming in his seat.  
18 I'm not up to the front of the window yet to see his head, I can just  
19 see, from my vantage point I can see his pelvic area, his lower part of  
20 his body, his hands. . . . As I'm approaching the vehicle . . . I can see  
21 into the cabin of the vehicle clearly, I see the front passenger with both

1 hands kind of pushing down on his pelvic area and squirming kinda  
2 in the seat left and right, shifting his hips.

3  
4 App'x 158. Weaver was using both hands in a "[d]ownward motion, trying to  
5 push something down." App'x 159. Officer Tom, "concerned because it's  
6 abnormal that he's making these movements," ordered Weaver to "show . . . [his]  
7 hands."<sup>1</sup> App'x 159.

8 By the time Weaver stepped out of the car at Officer Tom's direction, Officer  
9 Tom had his own hand on his holstered firearm, "suspicious of [Weaver's]  
10 actions." App'x 162. This caution proved justified. The protective frisk that  
11 Officer Tom initiated once Weaver was out of the car revealed a fully loaded  
12 semiautomatic handgun in Weaver's pants—a handgun with a detachable  
13 magazine locked into place, ready for use. See App'x 110.

14 The majority admits that Officer Tom's observations, along with others  
15 recounted herein, left "no doubt that Officer Tom reasonably suspected that

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<sup>1</sup> Officer Tom by this time had confirmed that Weaver was the same individual who had drawn Officer Tom's attention earlier that evening when Weaver, then walking on the street, had stared at the officers' unmarked tan Buick as it went by: "As we were driving past him, he stared into our vehicle, continued to stare, as we approached, as we passed, and continued to stare as we proceeded past him." App'x 92, 150–51. Officer Tom at that time also observed that Weaver pulled up his waistband as Weaver walked in the direction of the gray sedan and thereafter got in—a movement suggesting that something hefty could be weighing down his pants. App'x 152–53.



1 Weaver was hiding *something*” on his person. Majority Opinion (“Maj. Op.”) 22.  
2 But because the evidence adduced by Officer Tom does not rule out the possibility  
3 that this “something” was merely illicit, and not dangerous, the majority  
4 concludes that Officer Tom violated the Fourth Amendment by frisking Weaver  
5 and securing the loaded handgun (with an obliterated serial number) that Weaver,  
6 a convicted felon, could not lawfully possess. Maj. Op. 3.

7 As I explain below, this is a startling and untenable conclusion. *Terry v.*  
8 *Ohio*, 392 U.S. 1 (1968), does not limit protective frisks to circumstances in which  
9 the officer *knows* that a suspect is armed and dangerous, but permits frisks based  
10 on the reasonable belief that a suspect *may* pose such a threat, even when the  
11 suspect’s conduct is “ambiguous and susceptible of an innocent explanation,”  
12 *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). The Warren Court recognized that “a  
13 rigid and unthinking application of the exclusionary rule” to condemn “legitimate  
14 and restrained investigative conduct” (such as a protective frisk in the  
15 circumstances here) would represent but a “futile protest” against *abusive* police,  
16 for whom the exclusion of evidence is an ineffective remedy. *Terry*, 392 U.S. at  
17 15. At the same time, such an approach would “exact a high toll in human injury  
18 and frustration of efforts to prevent crime.” *Id.*



1 weapons when investigating a suspect at close range. Maj. Op. 11; *see also Terry*,  
2 392 U.S. at 24; *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983); *Arizona v. Johnson*,  
3 555 U.S. 323, 327 (2009). The Supreme Court has repeatedly said that the  
4 “protection of police and others can justify protective searches when police have a  
5 reasonable belief that the suspect poses a danger.” *Long*, 463 U.S. at 1049; *see also*  
6 *Johnson*, 555 U.S. at 327 (“To justify a patdown of the driver or a passenger during  
7 a traffic stop, . . . the police must harbor reasonable suspicion that the person  
8 subjected to the frisk is armed and dangerous.”). This carefully articulated  
9 standard in no way authorizes a protective search on the occasion of just any traffic  
10 stop. But the Court has underscored more than once “that roadside encounters  
11 between police and suspects are especially hazardous,” *Long*, 463 U.S. at 1049, that  
12 an “inordinate risk confront[s] an officer as he approaches a person seated in an  
13 automobile,” *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam), and that  
14 it is “too plain for argument” that the public interest in officer safety in such  
15 encounters is “both legitimate and weighty,” *Maryland v. Wilson*, 519 U.S. 408,  
16 412 (1997) (quoting *Mimms*, 434 U.S. at 110). Frisks in the context of traffic stops  
17 (like frisks generally) are thus constitutionally reasonable on considerably less  
18 than either a preponderance of the evidence or probable cause to believe that a

1 suspect is armed and poses a threat: “[W]here a police officer observes unusual  
2 conduct which leads him reasonably to conclude in light of his experience that  
3 criminal activity *may* be afoot and that the persons with whom he is dealing *may*  
4 be armed and presently dangerous . . . he is entitled for the protection of himself  
5 and others in the area to conduct” a protective frisk. *Terry*, 392 U.S. at 30  
6 (emphasis added).

7       The majority acknowledges that the stop of the automobile in which Weaver  
8 was a passenger was lawful and expresses “no doubt” that Weaver engaged in  
9 conduct, albeit ambiguous, that gave Officer Tom reasonable suspicion that  
10 “Weaver was hiding *something*,” Maj. Op. 22—conduct that included, in my view,  
11 not only Weaver’s unusual seat movements suggesting that he was “trying to push  
12 something down,” App’x 159, but also his behavior in staring at an unmarked  
13 police car as it passed by, adjusting his waistband, and volunteering, “I don’t got  
14 nothin’,” App’x 159, as soon as Officer Tom reached the car. To the list of  
15 circumstances giving Officer Tom reason to be suspicious of the car’s occupants, I  
16 would add the rear driver’s side door opening up into traffic after the officers  
17 stopped the gray sedan, App’x 103–104, and the fact that the stop occurred in a  
18 high crime neighborhood at dusk, App’x 149–50.

1           The majority improperly evaluates these facts piecemeal, discarding each as  
2 insufficient to create reasonable suspicion.<sup>2</sup> See *United States v. Arvizu*, 534 U.S.  
3 266, 274 (2002) (“The court’s evaluation and rejection of . . . factors in isolation from  
4 each other does not take into account the ‘totality of the circumstances.’”). But  
5 the majority *first* goes astray by declining even to consider relevant facts that took  
6 place after Weaver exited the car: namely, that when asked to put his hands on the  
7 car with his feet spread apart, Weaver attempted to conceal the loaded handgun  
8 in the area of his groin by positioning his pelvis very close to the car and taking

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<sup>2</sup> The majority insists to the contrary. Maj. Op. 14 n.2. But as set forth below, the majority, among other things: (1) dismisses Weaver’s effort to “push something down” as Officer Tom approached him on the theory that this action was “consistent with the act of secreting drugs or other nonhazardous contraband,” Maj. Op. 21; (2) disregards the adjustment of Weaver’s waistband because it is “not convinced that this action signal[ed] that Weaver carried a weapon on his person” as opposed to “simply wanting to raise his pants,” Maj. Op. 24; and (3) sees “nothing objectively unusual” about Weaver’s staring at the unmarked police vehicle as it passed by, Maj. Op. 26, or that even after the vehicle passed Weaver, “he still appeared to be looking at [the] car” as Weaver stood next to the passenger’s side of the gray sedan, App’x 95. The majority also wholly discounts the dangerous character of the neighborhood on the basis, *inter alia*, that “[t]he stop and frisk . . . occurred during daylight.” Maj. Op. 26. (Officer Tom testified that it was dusk. App’x 149.) I do not see how this is not, contrary to precedent, “spinning out innocent explanations for each factor piece by piece or substituting [the majority’s] view, in hindsight, for that of an experienced officer,” rather than “consider[ing] the entire picture—as understood by the officer—to determine whether his suspicion had a reasonable basis.” *United States v. Santillan*, 902 F.3d 49, 57 n.2 (2d Cir. 2018).

1 only a very “small step back” when asked to reposition so that Officer Tom could  
2 perform the frisk.<sup>3</sup> App’x 162–63.

3 The majority determines that it may not consider these additional facts  
4 because the frisk supposedly “was . . . initiated,” not when the frisk began, but “no  
5 later than the moment when Officer Tom directed Weaver” to place his hands on  
6 the trunk of the grey sedan with legs spread apart. Maj. Op. 16. To be clear, I  
7 conclude that Officer Tom had reasonable suspicion for a protective frisk whether  
8 or not Weaver’s actions in attempting to position his pelvic area against the grey  
9 sedan are considered. But the majority’s conclusion that a frisk commences when  
10 an officer (supposedly) decides to perform a frisk and orders a suspect to assume  
11 what the majority terms an “in search” position is both erroneous and problematic.

12 First, this approach is contrary to *Terry* itself, which defines a frisk as “a  
13 limited search of the outer clothing for weapons,” not as a directive to put one’s  
14 hands on the hood of a car. 392 U.S. at 24; *see also Frisk*, Black’s Law Dictionary

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<sup>3</sup> Weaver told Officer Tom that Weaver was unable to step back because the ground was slippery, but Officer Tom testified that he observed nothing on the ground to lend credence to this excuse. App’x 163. Parenthetically, Weaver’s attempt to conceal the loaded firearm by placing his pelvic area against the car continued even *after* the frisk commenced, requiring Officer Tom first to “pull[ ] [Weaver] the distance where [Officer Tom] wanted [Weaver] to be at so [Officer Tom could] effectively do a pat frisk,” and then, as Weaver continued to press his pelvis against the car, to place him in handcuffs. App’x 164.

1 (11th ed. 2019) (defining a “frisk” as “[a] pat-down search to discover a concealed  
2 weapon”). It is precisely because this search “of the outer surfaces of a person’s  
3 clothing all over his or her body in an attempt to find weapons” is “a severe,  
4 though brief, intrusion upon cherished personal security” that the *Terry* Court  
5 brought it within the Fourth Amendment’s coverage and carefully specified the  
6 particular requirements that render this physical intrusion constitutionally  
7 reasonable. 392 U.S. at 16, 24–25. In so doing, however, the Court emphatically  
8 did *not* determine that safety-related directives issued during the course of a  
9 lawful stop—directives involving no such physical contact—constitute frisks for  
10 which reasonable suspicion is required. In *Mimms*, for instance, the Supreme  
11 Court determined that once a vehicle has been lawfully stopped, its driver may be  
12 ordered to get out of the car because, when assessed against the hazards faced by  
13 police in such encounters, this intrusion, far from being a frisk, *is not even a Fourth*  
14 *Amendment event*. 434 U.S. at 111. And *Wilson* made clear that this holding  
15 extends to a car’s passengers—“that a police officer may as a matter of course”  
16 order both drivers and passengers to exit a lawfully stopped automobile. 519  
17 U.S. at 410.

1           In the course of a lawful stop such as occurred in this case, police sometimes  
2 request that detainees stand apart from each other; that they step out of a less-  
3 than-visible alcove; that they place their hands on their heads, on a wall, in the air,  
4 or (as here) on the hood of a car. When employed properly, such commands  
5 issue from a commendable caution that protects not only the officer's safety but  
6 the detainee's safety, as well as that of others in the vicinity. Officer Tom's  
7 testimony that, by the time he asked Weaver "to place his hands on the trunk of  
8 the vehicle," App'x 161, Officer Tom had his own hand on his holstered firearm  
9 and was "suspicious of [Weaver's] actions" attests to the volatility of such  
10 encounters and the need for such directives for the safety of all. App'x 162.

11           With this backdrop in mind, the majority's approach is inconsistent not only  
12 with *Terry's* definition of a frisk, but also with its recognition that frisks are  
13 constitutionally permissible precisely because it is reasonable for officers acting on  
14 the basis of articulable suspicion that a suspect may be armed and dangerous to  
15 address their "immediate interest . . . in taking steps to assure [themselves] that  
16 the person with whom [they are] dealing is not armed with a weapon that could  
17 unexpectedly and fatally be used against [them]." 392 U.S. at 23. To take such  
18 steps with due care, however, officers must be positioned to assess reasonable



1 suspicion not “in terms of library analysis by scholars,” *Illinois v. Gates*, 462 U.S.  
2 213, 232 (1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)), but in the  
3 context of “the protean variety of . . . street encounter[s]”—encounters which  
4 “range from wholly friendly exchanges . . . to hostile confrontations,” and which  
5 can “begin in a friendly enough manner, only to take a different turn upon the  
6 injection of some unexpected element,” *Terry*, 392 U.S. at 13–15.

7         With respect, I am “unwilling to send police and judges into a new thicket  
8 of Fourth Amendment law,” *Arizona v. Hicks*, 480 U.S. 321, 328 (1987), that requires  
9 them to assess the propriety of a frisk based on the likely judgments of appellate  
10 courts regarding an officer’s intent in issuing an order or appellate judges’ views  
11 as to what constitutes an “in search” position. As the New Jersey Supreme Court  
12 explained in rejecting the view that a frisk commences based on considerations  
13 such as these: “The lack of a bright-line rule [such as ‘a frisk begins when an officer  
14 lays hands on a suspect’] in stop-and-frisk cases places police officers in a  
15 precarious position. Sometimes in a matter of seconds, an officer must determine  
16 whether a protective pat-down is necessary to secure his or her safety.” *State v.*  
17 *Smith*, 134 N.J. 599, 621 (1994); see also *United States v. Gurule*, 935 F.3d 878, 885-86  
18 (10th Cir. 2019) (noting that “even if the officers intended to frisk Gurule after he

1 was on his feet, that does not matter” because the frisk “did not commence until  
2 the officer physically manipulated Gurule’s right-front pocket”); *United States v.*  
3 *Raymond*, 152 F.3d 309, 312 (4th Cir. 1998) (rejecting view that frisk of suspect  
4 commenced when “officers had made the decision to pat him down”);  
5 *Commonwealth v. Clemens*, 66 A.3d 373, 381 (Pa. Super. Ct. 2013) (rejecting claim  
6 that a frisk commenced on the basis of a verbal order “to stand up and turn around  
7 to prepare for the frisk” because “by its very definition, the term ‘frisk’ requires  
8 tactile contact”).

9 Here, the majority concludes that Officer Tom intended to frisk when he  
10 requested Weaver to assume what the majority deems an “in search” position.  
11 And it argues that precedent permits it to consider Officer Tom’s subjective intent,  
12 despite Fourth Amendment precedent disfavoring this approach, so long as it does  
13 so only in “determining *when* the [frisk] was initiated.” Maj. Op. 18. There is no  
14 authority for this proposition, however. The Supreme Court, to the contrary, has  
15 made clear that outside a narrow range of cases not relevant here, it is simply  
16 “unwilling to entertain Fourth Amendment challenges based on the actual  
17 motivations of individual officers.” *Whren v. United States*, 517 U.S. 806, 813  
18 (1996). Contrary to the majority’s position, “the subjective intent of the law

1 enforcement officer is irrelevant in determining whether that officer’s actions  
2 violate the Fourth Amendment” because “the issue is not his state of mind, but the  
3 objective effect of his actions.”<sup>4</sup> *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000);  
4 *see also Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (noting that Supreme Court  
5 has “repeatedly rejected” the approach of examining officers’ subjective  
6 motivations). Thus, even assuming that Officer Tom *did* intend to frisk Weaver  
7 when he asked Weaver to position himself at the back of the car, this fact is not  
8 relevant. Officer Tom’s verbal directive did not constitute a frisk.

9         The majority cites no authority for its contrary conclusion. Indeed, several  
10 of the decisions the majority relies upon do not support its position. The majority  
11 repeatedly invokes the *dissent* in *United States v. Tinnie*, 629 F.3d 749, 754–61 (7th  
12 Cir. 2011), but the panel opinion in that case “deemed a frisk not to have begun  
13 until the officer actually placed his hands on the defendant,” *United States v. Snow*,  
14 656 F.3d 498, 503 n.1 (7th Cir. 2011); *see also Tinnie*, 629 F.3d at 753 & n.3. And in  
15 *Dancy v. McGinley*, 843 F.3d 93, 108 (2d Cir. 2016), we concluded that a “stop  
16 occurred” —not a frisk— “at the very latest when [a police officer] instructed [a

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<sup>4</sup> This is true whether such motivations explain why a search or seizure may have occurred, as in *Whren*, or whether challenged conduct *constitutes* a search or seizure, as in *Bond* or, indeed, this very case.

1 suspect] not to use his phone.” But even then our analysis in *Dancy* did not turn  
2 on the officer’s intention in issuing a verbal command. It focused on whether,  
3 under “all the circumstances, any reasonable person in [the suspect’s] situation  
4 ‘would have believed that he was not free to leave.’”<sup>5</sup> *Id.* at 108 (quoting *United*  
5 *States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)); see also *Florida*  
6 *v. Royer*, 460 U.S. 491, 501–02 (1983) (plurality opinion) (citing Justice Stewart’s  
7 *Mendenhall* opinion as controlling law).

8 In sum, a verbal directive is not a frisk and officer intent has no place in the  
9 Fourth Amendment analysis relevant to this case. See *United States v. Jackson*, 652  
10 F.2d 244, 251 n.6 (2d Cir. 1981) (“Indeed, even if [the detective] had already  
11 planned to search the trunk before probable cause arose, the search would be

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<sup>5</sup> Similarly in *United States v. Williams*, 731 F.3d 678, 682–83 (7th Cir. 2013), another Seventh Circuit decision on which the majority relies, Maj. Op. 18, the officer’s directive that the suspect “step out from the group and submit to a frisk” was analyzed not as the commencement of the frisk, but as a stop. The majority seeks to elide this distinction, seeing no reason “that a seizure for Fourth Amendment purposes may occur before physical force is used, but on the other hand . . . a search only occurs after.” Maj. Op. 15 n.3. To be clear, that is not my position. Many searches (such as electronic surveillance) require no physical intrusion. Similarly, many (but not all) seizures are accomplished by means of it. Focusing, then, on the problem at hand—the *Terry* frisk—the frisk commences on physical contact precisely because it is the greater intrusion occasioned by “[e]ven a limited search of the outer clothing” that requires frisks to be limited to narrower circumstances than stops alone. *Terry*, 392 U.S. at 24. Equating a frisk with a verbal order is thus “simply at odds with the plain meaning of the term ‘frisk’” and with the balance the Court struck in *Terry*. See *Clemens*, 66 A.3d at 382.

1 lawful because, at the moment that the search began, there was probable cause to  
2 search it.”); *Gurule*, 935 F.3d at 885–86 (“We evaluate the circumstance under an  
3 objective standard, and even if the officers intended to frisk [the suspect] after he  
4 was on his feet, that does not matter for our analysis.”); *Tinnie*, 629 F.3d at 753 (“[I]t  
5 is irrelevant that [the officer] decided to frisk [the suspect] before directing him to  
6 exit the car.”). The majority’s contrary conclusion threatens to sow confusion in  
7 an area of law pursuant to which police officers must often make quick judgments  
8 in tense situations as to whether they have a lawful basis to proceed.<sup>6</sup> The  
9 majority errs in its analysis of Fourth Amendment precedent and in its assessment  
10 of constitutional reasonableness.

## 11 II

12 I also diverge from my colleagues in their conclusions regarding “whether  
13 [Officer Tom] ha[d] a ‘particularized and objective basis’ for suspecting” that  
14 Weaver was armed and dangerous based on “the ‘totality of the circumstances.’”  
15 *Arvizu*, 534 U.S. at 273 (quoting *Cortez*, 449 U.S. at 417–18). As already noted,

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<sup>6</sup> Indeed, as the New Jersey Supreme Court concluded in *Smith*, even when an officer announces his intent to frisk at a point at which he may not yet have reasonable suspicion, this fact does not commence the frisk and so does not “debilitate the officer so that he will not later be able to perform a pat-down should sufficient facts come to light.” 134 N.J. at 621. Conversely, the majority’s approach leaves officers in a “precarious position,” *id.*, where they may be unable to do so.

1 *Terry* itself found “ample factual justification” for a frisk, 392 U.S. at 15, even  
2 though all the conduct that Officer McFadden, the policeman in *Terry*, observed  
3 was “ambiguous and susceptible of an innocent explanation,” *Wardlow*, 528 U.S.  
4 at 125. The majority concludes here, however, that while it has “no doubt that  
5 Officer Tom reasonably suspected that Weaver was hiding *something*” from police,  
6 a frisk was still improper on the theory that something illicit is not necessarily  
7 something dangerous. Maj. Op. 3, 22. But “necessarily something dangerous”  
8 is emphatically *not* the *Terry* standard. And the majority arrives at its startling  
9 approach only by ignoring the Supreme Court’s repeated directive that the bases  
10 for an officer’s suspicion are not to be “evaluat[ed] and reject[ed] . . . in isolation  
11 from each other,” with each treated as “perhaps innocent in itself.” *Arvizu*, 534  
12 U.S. at 274 (quoting *Terry*, 392 U.S. at 22). Indeed, *Terry* “precludes [the] sort of  
13 divide-and-conquer analysis” that the majority employs here. *Id.*

14       Officer Tom described Weaver’s strange and bizarre movements as Officer  
15 Tom approached the car by specifically noting that Weaver “slouched down  
16 pushing down his pelvic area and kind of squirming in his seat . . . with both hands  
17 kind of pushing down on his pelvic area and squirming kinda in the seat left and  
18 right, shifting his hips.” App’x 158. Based on that motion, Officer Tom

1 concluded that Weaver was “trying to push something down.” App’x 159. The  
2 majority dismisses this evidence by noting that “Weaver’s actions were . . .  
3 consistent with the act of secreting drugs or other nonhazardous contraband.”  
4 Maj. Op. 21. But based on what he also knew, Officer Tom could reasonably infer  
5 that Weaver was attempting to conceal something that had enough heft that  
6 Weaver felt the need to adjust his pants while walking only moments before—  
7 another basis for suspicion that the majority dismisses as “no more suggestive of  
8 a firearm than it is of Weaver simply wanting to raise his pants because they  
9 slipped lower than he preferred.”<sup>7</sup> Maj. Op. 24. The majority further dismisses  
10 the fact that Weaver stared into the tinted windows of Officer Tom’s unmarked  
11 police vehicle as it passed by, “continued to stare, as [it] approached, as [it] passed,  
12 and continued to stare as [it] proceeded past him,” App’x 150–51—a fact from  
13 which Officer Tom could reasonably infer that perhaps Weaver was attempting to

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<sup>7</sup> The majority also contends that the adjustment of Weaver’s waistband is irrelevant because “there was no other reason at this point to suspect Weaver had a firearm.” Maj. Op. 24 n.6. This is error. The adjustment of the waistband is properly considered *in conjunction with* Weaver’s highly unusual movements in the car, plus all the other relevant factors. It need not on its own meet the reasonable suspicion standard. This is the very point of the Supreme Court’s repeated admonition that the facts are not to be evaluated piecemeal, discarding each as insufficient in isolation. *See Arvizu*, 534 U.S. at 274.

1 avoid police surveillance.<sup>8</sup> Finally, the majority also wholly diminishes other  
2 factors at play, including that Officer Tom patrolled in a dangerous neighborhood  
3 and that whatever Weaver or his associates had in the car was illicit enough or  
4 dangerous enough that the rear passenger appears to have been “about to flee,” as  
5 Officer Tom’s partner put it, rather than being caught by law enforcement in the  
6 item’s vicinity. App’x 103.

7 To be clear, none of these facts nor the inferences reasonably drawn from  
8 them establishes that Weaver was carrying a gun. But “the level of suspicion”  
9 required for reasonable suspicion is “‘considerably less than . . . a preponderance’  
10 . . . and ‘obviously less’ than is necessary for probable cause.” *Navarette v.*  
11 *California*, 572 U.S. 393, 397 (2014) (quoting *United States v. Sokolow*, 490 U.S. 1, 7  
12 (1989)). And officers “‘need not rule out the possibility of innocent conduct.’”

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<sup>8</sup> The majority contends that “such an inference is insupportable” because “the vehicle was unmarked” and “even if Weaver had been concerned about encounters with the police, the hard reality is that . . . minority citizens across the country fear encounters with the police, whether guilty or innocent.” Maj. Op. 27. To begin, staring at an unmarked car in an attempt to discern its occupants is entirely consistent with being wary of a police encounter. And while Weaver’s concern may have been justified by an innocent fear, Officer Tom could reasonably suspect that it was motivated by a fear of being stopped while possessing a gun and drugs—as Weaver ultimately was. The law does not require that police officers—or courts—make all inferences in favor of the suspect. Quite the opposite: we must “give due weight to inferences drawn . . . by . . . local law enforcement officers.” *Ornelas v. United States*, 517 U.S. 690, 699 (1996).



1 *Id.* at 403 (quoting *Arvizu*, 534 U.S. at 277). With the information he had in hand,  
2 it was not unreasonable for Officer Tom to formulate certain common-sense  
3 conclusions—that is, to suspect that the item Weaver was hiding might be  
4 dangerous. Weaver’s actions, the majority insists, “were equally consistent with  
5 the act of secreting drugs . . . .” Maj. Op. 21. But “equally consistent” and “no  
6 more suggestive” mean that Weaver was *just as likely* “secreting” a weapon or  
7 other dangerous instrument. See Maj. Op. 21, 24. And just as the reasonable  
8 suspicion standard does not require officers to rule out every *innocent* explanation  
9 for a suspect’s conduct, they need not rule out every alternative *illicit* (yet non-  
10 dangerous) explanation for the conduct in which a suspect might be engaged to  
11 conclude that he could pose a threat. See *Arvizu*, 534 U.S. at 277 (“A  
12 determination that reasonable suspicion exists, however, need not rule out the  
13 possibility of innocent conduct.”); *Terry*, 392 U.S. at 22 (“[Officer McFadden] had  
14 observed Terry, Chilton, and Katz, go [t]hrough a series of acts, each of them  
15 perhaps innocent in itself, but which taken together warranted further  
16 investigation.”); *Santillan*, 902 F.3d at 57 n.2 (“Judge Pooler devotes considerable  
17 attention to the factor of nervousness in her dissent, and we agree that there may  
18 be innocent explanations for showing some degree of nervousness in the presence

1 of law enforcement officers. We disagree, however, that such possible innocent  
2 explanations negate reasonable suspicion here, where nervousness is just part of  
3 the totality of circumstances that Officer Moreira was permitted to consider.”); *cf.*  
4 *United States v. Falso*, 544 F.3d 110, 128 (2d Cir. 2008) (“The fact that an innocent  
5 explanation may be consistent with the facts alleged . . . does not negate probable  
6 cause.” (quoting *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985)))  
7 (Sotomayor, J.).

8 In an attempt to find support for its position, the majority misreads *United*  
9 *States v. Padilla*, 548 F.3d 179 (2d Cir. 2008). In *Padilla*, a detective on narcotics  
10 surveillance in a high-crime area observed two men follow a third onto an isolated  
11 dark path at around 8:15 at night rather than stay on the lighted sidewalks. *Id.* at  
12 182. The detective suspected that a drug transaction or robbery might ensue. *Id.*  
13 at 183. Encountering the men walking together as they emerged from the  
14 wooded path some thirty seconds later, the detective observed Padilla adjust his  
15 waistband, *id.*—but engage in *no* additional conduct analogous to Weaver’s highly  
16 unusual movements in the car, which the majority concedes left “no doubt that  
17 Officer Tom reasonably suspected that Weaver was hiding *something*” on his  
18 person, Maj. Op. 22. Nevertheless, even in *Padilla*, in which the adjustment of the

1 waistband played a more central role in the reasonable suspicion analysis, the  
2 panel did not, contrary to the majority’s claim here, base its conclusion that  
3 reasonable suspicion existed on the fact that the particular manner in which  
4 Padilla adjusted his waistband was “not consistent with any of the innocent  
5 explanations proposed by defense counsel.” 548 F.3d at 189. That fact may  
6 have strengthened the government’s case, but we nevertheless reiterated in *Padilla*  
7 that “[e]ven conduct that is ‘as consistent with innocence as with guilt’” may give  
8 rise to the reasonable suspicion required to perform a lawful frisk. *Id.* at 187  
9 (quoting *United States v. Villegas*, 928 F.2d 512, 516 (2d Cir. 1991)).

10 In short, officers are—and must be—attuned to dangers that might arise  
11 during traffic stops so that they may act to safeguard themselves and others. *See,*  
12 *e.g., Johnson*, 555 U.S. at 330–31; *Wilson*, 519 U.S. at 412; *Santillan*, 902 F.3d at 59.  
13 Indeed, our precedent directs us to “view the totality of the circumstances through  
14 the eyes of a reasonable *and cautious* officer on the scene.” *Santillan*, 902 F.3d at  
15 56 (emphasis added). And the Supreme Court has emphasized that we must  
16 “give due weight to inferences drawn from those facts by . . . local law enforcement  
17 officers.” *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Demanding that  
18 officers possess specific information as to dangerousness that affirmatively

1 negates the possibility of both innocent behavior and not-dangerous-but-still-  
2 criminal activity places too great a burden on law enforcement as they process the  
3 ever-shifting circumstances around them while on patrol. *See Gates*, 462 U.S. at  
4 231 (“The process does not deal with hard certainties, but with probabilities.”  
5 (quoting *Cortez*, 449 U.S. at 418)). The possibility that Weaver might have been  
6 hiding drugs in his groin area does not negate Officer Tom’s reasonable suspicion  
7 that he was in fact hiding a gun.<sup>9</sup> Contrary to the majority’s suggestion that an  
8 officer must possess dispositive evidence of dangerousness in order to justify a  
9 stop and frisk, *see* Maj. Op. 22, neither *Terry* nor our cases interpreting it imposes  
10 such a requirement.

11 \* \* \*

12 My colleagues suggest that condoning a protective frisk in the  
13 circumstances here will promote discriminatory traffic stops in other cases. But

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<sup>9</sup> Because the government does not raise the argument and because I conclude that Officer Tom had reasonable suspicion for the frisk, I need not address whether, even if Officer Tom *lacked* reasonable suspicion for the frisk, exclusion here can bear its costs. *See United States v. Davis*, 564 U.S. 229, 237 (2011); *Herring v. United States*, 555 U.S. 135, 141 (2009). I note, however, that separate and apart from the other problems with the majority’s analysis, the majority offers no basis for concluding that Officer Tom’s actions were “sufficiently deliberate that exclusion [could] meaningfully deter [them], and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring*, 555 U.S. at 144.

1 the majority concedes that the traffic stop in this case did not violate the Fourth  
2 Amendment. With respect, it is not *Terry* and its progeny, but the Supreme  
3 Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), that limits Fourth  
4 Amendment (but importantly not equal protection) challenges to discrimination  
5 arising from the selective enforcement of traffic laws. *Whren* explicitly concluded  
6 that "the constitutional basis for objecting to intentionally discriminatory  
7 application of laws is the Equal Protection Clause, not the Fourth Amendment,"  
8 and declined to place additional Fourth Amendment constraints (beyond the basic  
9 requirement of probable cause) on the exercise of traffic enforcement discretion.  
10 *Id.* at 813.

11 Conceding that the traffic stop here did *not* violate the Fourth Amendment,  
12 the majority *sub silentio* expresses its disagreement with *Whren* in the *Terry* line of  
13 cases, and thus too quickly dismisses Officer Tom's reasonable safety concerns in  
14 light of Weaver's obviously suspicious conduct as Officer Tom approached.  
15 Again, Officer Tom could not be certain that it was a fully loaded semiautomatic  
16 handgun that Weaver was frantically attempting to "push[] down." App'x 158.  
17 But Officer Tom had a reasonable basis to address his "immediate interest . . . in  
18 taking steps to assure himself that the person with whom he [was] dealing [was]

1 not armed with a weapon” that might well be used against him. *Terry*, 392 U.S.  
2 at 23. Instead of giving future Officer Toms the opportunity to take such steps,  
3 the majority adopts an unreasonable position that effectively “require[s] that  
4 police officers take unnecessary risks in the performance of their duties.” *Id.*

5 As a parting note, the majority also urges the most “careful scrutiny of those  
6 facts offered by the police to support reasonable suspicion,” suggesting that such  
7 facts should be viewed skeptically at best, particularly when “searches or seizures  
8 do result in criminal evidence.” Maj. Op. 29. Here, too, the majority disregards  
9 settled precedent. The Supreme Court, in contrast, has cautioned that appellate  
10 judges in assessing reasonable suspicion on a cold record “should take care both  
11 to review findings of historical fact only for clear error[,] . . . give due weight to  
12 inferences drawn from those facts by . . . local law enforcement officers . . . [and]  
13 give due weight to a trial court’s finding that the officer was credible and the  
14 inference was reasonable.” *Ornelas*, 517 U.S. at 699–700. Rather than  
15 “mind[ing] . . . the limitations of the judicial function in controlling the myriad  
16 daily situations in which policemen and citizens confront each other on the street”  
17 and “only judg[ing] the facts of the case before us,” *Terry*, 392 U.S. at 12, 15, the  
18 majority advocates for a less modest—and even outsized—role for appellate

1 judges in which they construct their own understanding of the facts, unmoored  
2 from the inferences drawn by the officers on the scene and credited by the district  
3 court. One can only hope that the majority's efforts do not thereby accomplish  
4 the opposite of their lofty ambition by "discourag[ing] the employment of other  
5 remedies than the [Fourth Amendment] exclusionary rule to curtail [police]  
6 abuses" (when they do occur) "for which that sanction may prove inappropriate."  
7 *Id.* at 15.

8 In sum, the majority today misapplies basic Fourth Amendment law and  
9 serves neither police, suspects, nor communities well. For the foregoing reasons,  
10 I respectfully dissent.

1 GUIDO CALABRESI, *Circuit Judge*, concurring:

2 I agree completely with the majority opinion and join it fully. I write  
3 separately to express my concern with the state of the law in this area and with  
4 how we got to where we are.

5 The ordinary person looking at the facts of this case would, I believe, no  
6 doubt conclude that the officers decided to search Weaver because of a hunch or a  
7 stereotype, and then went about finding a way to search him.<sup>1</sup> After all, neither  
8 seeing a man pull up his sagging pants nor watching that same man stare at a car  
9 with tinted windows for a few seconds are plausible grounds for suspicion. Yet  
10 these actions led the police to take their next steps. Weaver got in a car, and the  
11 driver of that car then failed to signal within one hundred feet of turning. The  
12 police stopped the car. The search followed. One might ask, how often are most  
13 people stopped and arrested for failing to signal—let alone failing to signal within  
14 a hundred feet of turning? And even if one is stopped for such a trivial traffic

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<sup>1</sup>Of course, precedent instructs that we must turn a blind eye to the officer’s subjective intent in stopping, searching, or seizing. *Whren v. United States*, 517 U.S. 806, 813 (1996). Upon learning this, an ordinary person might wonder whether this instruction makes it much harder for courts to address police violations of the Fourth Amendment.



1 offense, how often would a passenger in the offending car be made to exit the  
2 vehicle, spread eagle himself against the car, and subsequently be frisked?

3         The ordinary person, looking at these facts, would, I believe, readily say:  
4 The officers wanted to search Weaver, they found a way, and hey, they were right.  
5 He was a felon with a gun and cocaine.

6         I think the majority is correct that what was done here violated the Fourth  
7 Amendment’s prohibition of unwarranted searches and seizures, and I join the  
8 court’s opinion. The New York courts reached the same conclusion and excluded  
9 the same evidence when a state conviction was sought in the same case. To allow  
10 the evidence would, as the majority opinion says, require us to go beyond what  
11 we have allowed in the past. But while I disagree with the dissent, and believe in  
12 this case the police went too far, I must concede that my learned and respected  
13 colleague in dissent does not stretch the law all that much in arguing that the  
14 evidence the officers found should be admitted.

15         To put it another way, although there is a gap between police action in this  
16 case and police action in cases where we found the search was justified, like *United*  
17 *States v. Padilla*, 548 F.3d 179 (2d Cir. 2008) (in whose holding I reluctantly joined),  
18 the gap is not enormous. My dissenting colleague argues that we should close that

1 gap. And yet such a result would, in my judgment, and I believe that of the  
2 ordinary person, be absurd if the constitutional mandate against unreasonable  
3 searches and seizures is to have any meaning. As important, the result would go  
4 yet further in making those whom the police suspect and dislike subject to  
5 humiliating treatment and abuse which, not incidentally, is what *Terry v. Ohio*  
6 warned against. 392 U.S. 1, 15 (1968) (“Under our decision, courts still retain their  
7 traditional responsibility to guard against police conduct which is over-bearing or  
8 harassing, or which trenches upon personal security without the objective  
9 evidentiary justification which the Constitution requires.”).

10       How did we get to the point where behavior that to the ordinary person  
11 would seem to be a manifestly unreasonable search is, on the law, a close case? I  
12 believe it is the result of the confluence of two unfortunate doctrines—supported  
13 by opposite sides of the political spectrum—the exclusionary rule and qualified  
14 immunity.

15       The exclusionary rule, as a way of controlling police behavior, has been a  
16 disaster, I think. Don’t get me wrong: some way of keeping the police from  
17 undertaking unreasonable searches and seizures is essential. And exclusion of

1 wrongfully found evidence seems a plausible way. But in practice its effect has  
2 been a slow and steady erosion of rights to be free from unreasonable searches.

3       Courts are—and should be—guided by precedents. A case asserting an  
4 improper search and the exclusion of evidence there found is likely to be, on its  
5 facts, just a step beyond a prior case in which police behavior was justified. The  
6 precedents might not compel the court to take that next step, but another factor  
7 will all too frequently bring that about: the defendant seeking exclusion *is almost*  
8 *always guilty of something* and might be dangerous. As in the case before us, the  
9 officers’ hunch or stereotype was correct! Courts do not want to release criminals,  
10 those who have done and may again do harm. And so, often and understandably,  
11 courts have taken “the next step,” for to do otherwise would have led to the release  
12 of a felon. This “next step” case then becomes the precedent for the subsequent  
13 “close case.” Through a series of holdings, each one driven by the desire to avoid  
14 excluding determinative evidence, we have approved one after another form of  
15 increasingly unreasonable police action, until we find ourselves reviewing actions  
16 that would, on their face, seem obviously improper but which, instead, on our  
17 precedents, on governing law, are “close.”

1           This string of “next step” precedents comes at a cost that courts cannot easily  
2 address. What about all the cases in which the police behavior turned out to be  
3 unjustified? What about all the cases in which the hunch or the stereotype was  
4 wrong, and an honest person was humiliated, searched, and all too often  
5 maltreated? Why don’t the courts see those cases, and in them set down rules  
6 reinforcing the constitutional mandate? Recent events more than suggest that a  
7 multitude of such cases exist. These cases lead to distrust and even hatred of the  
8 police, with dire consequences. Why don’t these cases get to court?

9           The reason is obvious. Persons so searched may well not know that they  
10 can bring a lawsuit, or they may be too disaffected to sue. But even if they go to a  
11 lawyer, the lawyer will tell them—ah yes, you have been mistreated, but you won’t  
12 recover; the case is fairly close and so the officer would surely have qualified  
13 immunity. Sue if you want, but I can’t take your case on a contingent fee because  
14 the odds are too great that, though the behavior was wrong, under current  
15 precedents, we won’t win. And, by the way, you will most likely not even get a  
16 decision on whether the behavior was wrong, because the court is unlikely to reach  
17 that question given the presence of qualified immunity. *See Pearson v. Callahan*,  
18 555 U.S. 223 (2009) (eliminating the requirement that courts first decide whether a

1 public official’s conduct violated the Constitution before reaching qualified  
2 immunity).

3         There may well be hundreds of situations in which searches like the one  
4 before us today turned up nothing. But surely no more than a handful will get to  
5 court. And even these will almost always get decided against the innocent  
6 “searchee” on qualified immunity. All this might not matter if courts knew,  
7 directly and emotionally, from personal experience, the stories of those  
8 unnecessarily, improperly, and humiliatingly searched. But we judges, and our  
9 families and friends, are not likely to be the ones whom the police decide to search  
10 on a hunch. We are not likely to be stopped for failing to signal. And we are most  
11 unlikely to be made to spread eagle, even if stopped.

12         My dissenting colleague is correct that this case is not that many steps  
13 beyond *Padilla*, which itself was only a step or two from the prior precedent. *See*  
14 *United States v. Bayless*, 201 F.3d 116 (2d Cir. 2000). But these are steps we must not  
15 take, and so I join the majority opinion.

16         I write this concurrence in sadness and in hope. It is not for me or for other  
17 judges to find a way out of our current dilemma, hence my sadness. Yet recent

1 events have focused attention on the qualified immunity doctrine.<sup>2</sup> And some  
2 have even suggested alternatives to the exclusionary rule.<sup>3</sup> (Wearing my academic  
3 hat, I have done so myself—but, as is usually the case with purely academic  
4 suggestions, it can only be a beginning. See Guido Calabresi, *The Exclusionary Rule*,  
5 26 HARV. J. L. & PUB. POL'Y 111 (2003).) It is this current attention that gives me  
6 hope.

7 Finding an answer will not be easy. It will require careful and coordinated  
8 thought by the political branches, by the academy, and by judges as well. But we

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<sup>2</sup> Both judges and academics have criticized the doctrine in recent years. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willet, J., concurring dubitante), *withdrawn on reh'g by Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019); *Jamison v. McClendon*, \_\_ F. Supp. 3d \_\_, 2020 WL 4497723 (S.D. Miss. 2020) (Reeves, J.); *Thompson v. Clark*, 2018 WL 3128975, at \*11 (E.D.N.Y. June 26, 2018) (Weinstein, J.); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018). See also Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), [https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3\\_story.html](https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1222 (2015). As I am writing this, some state legislatures are considering or have acted to modify qualified immunity. See, e.g., Conn. HB 6004; Colo. SB 20-217.

<sup>3</sup> See, e.g., Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. 1103 (2017); Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543 (2015); Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241 (2010).

1 must do better. The noxious effects of our current approach are all too obvious,  
2 and are manifested both broadly, in the current protests, and narrowly, in the  
3 instant case.

4           Given where the law is, and the need to avoid further erosion of Fourth  
5 Amendment rights, I fully join the majority in its holding that what the officer did  
6 here went too far, and hence that the evidence must be excluded. Can we do  
7 better? I certainly hope so.