NEW MEXICO LAW REVIEW

Volume 24
Issue 3 *Summer 1994*

Summer 1994

Criminal Law - Terry Stops and Gang Members in New Mexico: State v. Jones

Monique M. Salazar

CRIMINAL LAW—*Terry* Stops and Gang Members in New Mexico: *State v. Jones*

I. INTRODUCTION

In *State v. Jones*,[1] the New Mexico Court of Appeals held that a police officer must have individualized, particularized suspicion that an individual is presently engaged in criminal activity in order to stop and frisk that individual. The effect of the holding in *Jones* was to invalidate a stop by officers of a known gang member who was walking in a high crime area. Despite an officer's training in gang activity, the Court found that unless an officer can point to specific facts that allow him to reasonably believe that the individual is engaged in criminal activity, the individual's Fourth Amendment rights allow him to walk the streets without fear of police confrontation.

This Note first describes the decision in *Jones*. It then provides an overview of the "stop and frisk" doctrine and reviews the evolution of the doctrine in both federal and state law. Finally, the rationale of the *Jones* court is examined, and the implications of the decision are explored.

II. STATEMENT OF THE CASE

Two officers of the Albuquerque Police gang unit were patrolling Trumbull Park, an area in Albuquerque known for gang activity ranging from graffiti to drive-by shootings. The officers noticed the defendant Jones walking in this area with two other men. The officers observed the following facts that led them to believe that Jones was a gang member: (1) he was wearing a blue and gold sweat suit, colors favored by the Crips, a Los Angeles gang; (2) his sweatpants were sagging down his buttocks, a common way for gang members to wear their pants; and (3) he was wearing a brand of athletic shoes favored by the Crips.[2] The officers also knew one of the two other men, identified in the State's brief as Keith Pounds, as a member of the Crips and a narcotics trafficker. On prior occasions, when the officers had encountered Mr. Pounds, they had routinely stopped and frisked him and asked questions. On this occasion, when Mr. Pounds saw the officers approaching, he assumed the typical "frisk" position without being asked. In the interests of safety, the officers decided to frisk both Mr. Pounds and Jones.

While frisking Jones, one of the officers felt an object that he believed was a deadly weapon in Jones's pocket. The officer told Jones that he was going to remove the object, at which point Jones struggled with the officer, hitting him several times before breaking free. Jones was caught

---

1. 114 N.M. 147, 835 P.2d 863 (Ct. App. 1992).

2. State's Answer Brief at 12, State v. Jones, 114 N.M. 147, 835 P.2d 863 (Ct. App. 1992) (No. 12392).

by two other officers after a brief chase and placed under arrest. The subsequent search of Jones produced a plastic bag containing rock cocaine which had been in Jones's right front pocket.[3]

At trial, Jones moved to suppress all evidence of the rock cocaine and the battery of the police officer. The trial court denied the motion, stating that the officers had "reasonable cause" to stop and frisk Jones. Jones was convicted of trafficking cocaine, battery upon a peace officer and resisting a peace officer.[4] On appeal, after an analysis of *Terry v. Ohio*,[5] the court of appeals reversed the conviction and held the evidence that Jones had been carrying cocaine should have been suppressed.[6] In arriving at its holding, the court in *Jones* balanced the interest of the State in controlling the increasing problem of gang violence against a defendant's Fourth Amendment right to be protected from unreasonable searches and seizures. The court concluded that, without specific articulable facts that Jones was about to be involved in criminal activity, the stop and frisk by the officers violated the defendant's Fourth Amendment rights.[7] Further, the court of appeals concluded that the following factors were insufficient to satisfy the less stringent reasonable suspicion test which would suffice for a *Terry* stop: (1) defendant was wearing Crips colors with the pants sagging down; (2) in a high crime area; (3) while walking with a known narcotics trafficker.

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. The Emergence of "Reasonable Suspicion": Terry v. Ohio[8]

The Fourth Amendment of the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."[9] In *Terry*, the officer noticed the defendant walk by a store window about twenty-four times, each time pausing to stare in the window.[10] The officer

---

3. The facts in this opinion are set out in *Jones*, 114 N.M. at 149, 835 P.2d at 865.

4. The procedure of the lower court is set out in *Jones*, 114 N.M. at 149, 835 P.2d at 865.

5. 392 U.S. 1 (1968). The Supreme Court in *Terry* set forth the standard for when an officer may stop and frisk an individual without probable cause.

6. However, the court of appeals did not suppress the evidence of the defendant's battery on the police officer. In allowing the evidence of battery, the court of appeals followed a well established exception to the exclusionary rule that was adopted by New Mexico in State v. Chamberlain, 109 N.M. 173, 783 P.2d 483, 485 (Ct. App. 1989) (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). The test as set forth in *Chamberlain* analyzes whether, given that the initial action was illegal (e.g., an illegal stop), the subsequent actions were distinguishable from the initial illegality or were an exploitation of that initial illegality. If the subsequent action is found to be distinguishable from the initial illegality, evidence of the subsequent action will be admitted by the court. *Id.* The court of appeals found that the defendant's battery on the police officer met that test, stating, "There is no evidence that they stopped and frisked defendant in order to have him hit them and run away." *Jones*, 114 N.M. at 151, 835 P.2d at 867.

7. *Id.* at 150, 835 P.2d at 866.

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

9. U.S. CONST. amend. IV.

10. 392 U.S. at 6.

approached the defendant, and, in the course of the investigation, patted down the outer clothing of the defendant to determine whether he was carrying a weapon.[11] The issue for the United States Supreme Court was whether the officer's conduct had violated the defendant's Fourth Amendment protection from unlawful search and seizure.[12]

The Court weighed two competing interests: the traditional Fourth Amendment protection from unreasonable searches and seizures and the desire to give police an escalating set of flexible responses from which an officer can choose in the context of street encounters.[13] The rationale for this set of flexible responses is to enhance officer safety during street encounters and to prevent crime.

The Court balanced the compelling interests by carving out a narrow exception to the traditional requirement that an officer must have probable cause before he may seize and subsequently search a person he suspects of being involved in criminal activity.[14] The Court noted two primary governmental interests in stopping an individual: (1) crime detection and prevention and (2) the safety of police officers.[15] With these interests in mind, the Court held that:

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[16]

Although the *Terry* Court found that the "stop and frisk" procedure did not necessarily violate the Fourth Amendment, it sought to prevent officers from having unbridled discretion to stop and search in a street encounter by the application of a two part test. First, in order for the officer to justify the intrusion, the officer must be able to point to "specific and articulable" facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion on the individual's privacy.[17] Second, the intrusion must be outweighed by a

---

11. *Id.*
12. *Id.* at 8.
13. *Id.* at 13. Although the Court stated that officers need a flexible set of responses to use in street encounters, it discussed only one specific response in the *Terry* opinion: the "stop and frisk" technique. This technique refers to the right of a police officer to make a stop on the street, interrogate the suspected criminal and search the individual for weapons. The "stop" refers to the initial detention and questioning upon suspicion that the individual is suspected of criminal activity; the "frisk" refers to the officer's physical patdown of the individual. *Id.* at 10.
14. *Terry*, 392 U.S. at 11.
15. *Id.* at 22-23.
16. *Id.* at 30.
17. *Id.*

governmental interest in either crime detection and prevention or officer safety.[18] The Court, in balancing the interests at issue, determined that the officer had a reasonable suspicion to stop the defendant.[19]

Despite the narrowness of the Court's holding, the importance of the *Terry* decision is that it carved out a new reasonable suspicion exception to traditional Fourth Amendment analysis. In determining the constitutionality of police stops in the context of street encounters, the courts must now evaluate an officer's conduct in light of the reasonable suspicion standard. Because the officer's formation of reasonable suspicion depends on the facts upon which his suspicion is based, the cases after *Terry* necessarily involve a thorough analysis of the facts.

B. The Supreme Court After Terry: Applying Reasonable Suspicion

In the cases after *Terry*, the Supreme Court further considered the factors that will support a finding that an officer had the requisite reasonable suspicion for a stop and frisk. The Supreme Court initially adhered to the *Terry* balancing test of the individual's Fourth Amendment rights against the State's interest in crime prevention and officer safety. In *Ybarra v. Illinois*,[20] one of the first cases in which the Supreme Court applied the *Terry* analysis, police officers obtained a search warrant for the Aurora Tap Tavern. The officers believed that the bartender there was a narcotics trafficker,[21] but while at the bar, the officers searched not only the bartender, but every patron.[22] The Supreme Court found the search of Ybarra, one of the patrons, unconstitutional. The Court stated, "Ybarra made no gestures indicative of criminal conduct, made no movement that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers . . . mere propinquity to others independently suspected of criminal activity, does not, without more, give rise to probable cause to search that person."[23] In *Ybarra*, then, the Court established that mere physical proximity to suspected criminals is not a specific, articulable fact sufficient to support a search.

In the same year that *Ybarra* was decided, the Supreme Court rendered its decision in *Brown v. Texas*.[24] In *Brown*, the police officers observed the defendant and another man walking away from each other in a high crime area.[25] When the officers stopped Brown to ask him some questions Brown refused to identify himself, and the officers then arrested him under a Texas statute making it illegal for a person to refuse to identify himself to a police officer.[26] The Court held the stop and the statute

18. *Id.* at 22.
19. *Id.* at 28.
20. 444 U.S. 85 (1979).
21. *Id.* at 87.
22. *Id.*
23. *Id.* at 91.
24. 443 U.S. 47 (1979).
25. *Id.* at 48.
26. *Id.* at 49.

unconstitutional, stating that an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.[27]

However, two years later, in *United States v. Cortez*,[28] the Supreme Court recast the *Terry* balancing test in a light more sympathetic to police officers. *Cortez* involved Border Patrol agents, who, after investigating a series of distinctive footprints in an area known for smuggling illegal aliens, stopped the defendant's truck as it drove in from Mexico.[29] In holding that the stop was constitutional, the Court reviewed the requirements necessary to prove reasonable suspicion. The Court first stated that "[t]he essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account."[30] The Court then went on to explain that when courts assess the totality of the circumstances, they must do so in the following fashion.[31] First, the court must make its assessment based on all the circumstances, which include "objective observations, information from police reports, and consideration of the modes or patterns of operation of certain kinds of lawbreakers."[32] In making this assessment, the Court noted that the evidence should be weighed not as scholars would weigh it, but as it would be weighed by trained law enforcers.[33]

Second, the court must find the existence of specific facts to justify the stop.[34] The *Cortez* Court based this requirement on Chief Justice Warren's opinion in *Terry*, where he noted, "[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*"[35]

Despite the Court's acknowledgement that *Terry* demands specific facts to support a stop, the Court actually eroded some of *Terry*'s strength by its suggested deference to the judgment of police officers in the field. The new requirement that a court must weigh the evidence the way a trained officer would weigh it would appear to load the balancing test in favor of the arresting officer.

C. The Basis for Reasonable Suspicion Becomes More Lenient: Drug Courier Profiles and Gang Indicators

The Supreme Court contemporaneously began to decide a line of cases determining whether the reasonable suspicion for a stop has been satisfied when the officers have partially relied on "drug courier" profiles provided

---

27. *Id.* at 51.
28. 449 U.S. 411 (1981).
29. *Id.* at 415-16.
30. *Id.* at 417.
31. *Id.* at 418.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

by their agencies.[36] The first of the "drug courier profile" cases, *United States v. Mendenhall,*[37] presented the Supreme Court with a factual situation in which the defendant had been stopped at an airport because she fit a drug courier profile.[38] A *Terry* analysis was not required as the defendant consented to the search.[39] However, the Court took the opportunity to express the strong governmental interest in detecting drug traffickers, indicating that the stop would have been justified without the defendant's consent.[40]

In *Florida v. Royer,*[41] officers in the Miami International Airport noticed that the defendant's appearance, mannerisms, luggage and actions fit a drug courier profile.[42] Even though the Supreme Court did not object to the fact that the officers had formulated their suspicion based on a profile description rather than facts specific to Royer, it upheld the circuit court's reversal of the conviction on the ground that Royer was improperly detained.[43]

The Court in *United States v. Sokolow*[44] held that the DEA agents had a reasonable suspicion that the defendant was a drug courier based on a drug courier profile.[45] In *Sokolow*, the defendant was stopped by DEA agents upon arrival at the Honolulu International Airport. The agents knew when they stopped the defendant that the defendant had: (1) paid $2,100 for two round-trip plane tickets from a roll of $20 bills; (2) traveled under a name that did not match the name under which his phone number was listed; (3) originally intended to go to Miami, a source city for illicit drugs; (4) stayed in Miami only 48 hours; (5) appeared nervous during his trip; and (6) checked none of his luggage.[46] Sokolow appealed his conviction on the basis that the DEA agents had unfairly relied on a profile in deciding to stop him.[47] The Court rejected this argument. Instead, the Court applied the "totality of the circumstances" analysis that had been articulated in *Cortez* and found that the facts

---

36. The "drug courier" profile is a collection of characteristics found to be typical of persons transporting illegal drugs. The profile generally consists of the following characteristics: (1) young individuals; (2) casually dressed; (3) paying for a plane ticket in cash; (4) using large bills to pay for the ticket; (5) carrying heavy luggage; and (6) not fully filling out the luggage tag. Florida v. Royer, 460 U.S. 491, 493 (1983).

37. 446 U.S. 544 (1980).

38. *Id.* at 559-60.

39. *Id.* at 547.

40. *Id.* at 556 (Powell, J., concurring).

41. 460 U.S. 491 (1983).

42. *Id.* at 493; *see also supra* note 36 and accompanying text.

43. *Id.* at 507-08. The officers' actions after stopping Royer consisted of asking him to accompany them to the police room while they retrieved his checked luggage from the plane. They then asked Royer to open the suitcases, and when he produced the key, the officers opened the suitcases. When they saw the marihuana inside, they arrested Royer. This entire proceeding took 15 minutes, and the Court determined that this 15 minute detention violated the *Terry* mandate that individuals be only "temporarily" detained.

44. 490 U.S. 1 (1989).

45. *Id.* at 10.

46. *Id.* at 4-5.

47. *Id.* at 5-6.

supported reasonable suspicion for a stop.[48] In analyzing the agents' reliance on a profile, the Court stated, "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."[49]

The Supreme Court in this line of cases retreated further from the strict requirements for a constitutional stop imposed by *Terry*. Although the Court in *Sokolow* did not explicitly state that a profile may be sufficient to constitute reasonable suspicion, the Court upheld the stop knowing that the agents had relied on the profile. All the factors that the agents relied upon in deciding to stop the defendant were part of the DEA "drug courier" profile. When the Court in *Sokolow* noted that DEA agents are trained to recognize "drug couriers," and that this profile training would not detract from the evidentiary significance of those facts as seen by a trained agent, the Court further extended its deference to police officers. The Court appears to indicate that a trained agent who stops an individual matching a profile has made a reasonable stop despite the *Terry* requirement that an officer have specific and articulable facts in order to stop an individual. A profile, by its very nature, is only a general set of characteristics. By allowing officers to stop individuals because the individual exhibits characteristics similar to a profile, the officer is no longer forced to justify his actions by the *Terry* standard of specific articulable facts. Instead, the officer may rely on a more generalized standard set forth in a profile as the basis for reasonable suspicion. While a more generalized standard is not expressly stated in *Sokolow*, it is not unreasonable to interpret the decision as a further weakening of the *Terry* balancing test.

The Supreme Court has not yet dealt with a case concerning "gang indicators."[50] However, it appears likely that the Court would apply the modified *Terry* standard to cases involving gangs, since drug couriers and gangs have common attributes. Both groups are associated with criminal activity and drugs. Both groups are also usually suspected of carrying weapons. The government has the same avowed interest in dealing with individuals in either of these two groups. Officers responsible for apprehending criminals must at the same time be cautious for their own safety. Many police officers are trained to recognize a gang member through "gang indicators." This training is similar to the training enforcement agents receive to recognize drug traffickers.

The state courts are starting to move in the direction of acknowledging the validity of indicators. The California Court of Appeals, in *Matter of Stephen L.*,[51] upheld an officer's stop and subsequent search of an

48. *Id.* at 8.
49. *Id.* at 10.
50. State's Answer Brief at 12, State v. Jones, 114 N.M. 147, 835 P.2d 863 (Ct. App. 1992) (No. 12392).
51. *Id.*

individual even though the stop was partially based on the officer's opinion that the individual was a member of a gang.[52] Although the California court gave lip service to the factors for a reasonable stop articulated in *Terry*, in reality it allowed the officers to rely on "gang indicators" as a substitute for specific and articulable facts to justify a stop.[53] The California court upheld the search in *Stephen L.* because the individual was with other gang members in a park in which there was "freshly painted gang type graffiti" and the park was a known hangout for a particular gang.[54] The court therefore allowed the officers to rely on gang indicators in making their decision to frisk.

D. New Mexico: Reasonable Suspicion

The New Mexico courts have not expanded the boundaries of the *Terry* standard to the same extent as the Supreme Court (deference to judgment of arresting officer, drug courier profile) and California courts (gang indicators). The New Mexico Supreme Court adopted the *Terry* standard for a justifiable stop in *State v. Lewis*,[55] stating, "In appropriate circumstances and in an appropriate manner, a police officer may approach a person to investigate possibly criminal behavior even though the officer may not have probable cause for an arrest. However, to justify such an invasion of a citizen's personal security, the police officer must be able to specify acts which, together with rational inferences therefrom, reasonably warrant the intrusion."[56] Like *Terry*, the New Mexico court requires specific, articulable facts to form the basis for reasonable suspicion that an individual was engaged in criminal activity.

Twenty years after *Lewis* was decided, the court of appeals in *State v. Watley*,[57] reaffirmed the standard necessary to uphold a stop based on reasonable suspicion. The court of appeals first restated the *Lewis* standard, and then went on to note that the "investigatory stop requires an assessment that yields a particularized suspicion, one that is based on the totality of the circumstances."[58] In stating that the investigatory stop requires an assessment of the totality of the circumstances, the New Mexico Supreme Court echoed the language in *Cortez*. However, the court refrained from adopting the *Cortez* position that the totality of the circumstances should be assessed through the eyes of the officer. Instead, the New Mexico court held that if the officer has a "reasonable suspicion, grounded in specific and articulable facts . . . then a *Terry* stop may be made to investigate that suspicion."[59] The New Mexico

52. *In re* Stephen L., 208 Cal. Rptr. 453 (1984).
53. *Id.*
54. *Id.* at 454.
55. 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969).
56. *Id.* at 276, 454 P.2d at 362.
57. 109 N.M. 619, 788 P.2d 375 (Ct. App. 1989).
58. *Id.* at 624, 788 P.2d at 380 (quoting United States v. Cortez, 449 U.S. 411 (1981)).
59. *Id.* (quoting United States v. Hensley, 469 U.S. 221 (1985)).

courts will apparently continue to apply an objective standard to the officer's actions, rather than the evolving subjective standard of weighing the actions from the officer's perspective.

IV. RATIONALE OF THE *JONES* COURT

The court of appeals in *Jones* addressed the question of whether the officers had grounds to form a reasonable suspicion sufficient to justify their stop and frisk of Jones.[60] Both the State and the defense relied on *Terry*. The court concluded, after a review of the facts, that the officers were not sufficiently justified in stopping and frisking Jones. In making its determination, the court applied the *Terry* test in weighing the defendant's Fourth Amendment right to be free from unreasonable searches and seizures against the desirable policy of promoting crime prevention and detection.

The State made two arguments: first, the officers had specific articulable facts necessary to form a reasonable suspicion that Jones was engaged in, or about to be engaged in, criminal activity; and second, the officers were entitled to pat Jones down for their own safety.[61] In its first argument, the State pointed to five specific facts that supported the trial court's finding of reasonable suspicion: (1) the officers' training and expertise as police officers as well as their specialized knowledge of gangs; (2) the recent calls of reported gang activity and drug transactions in the Trumbull Park area; (3) Jones wore clothing in a manner indicative of membership in the Crips; (4) Jones was with a known narcotics dealer and gang member; and (5) the officers' knowledge that gang members are usually armed.[62] The State also listed the gang indicators that would lead the officers to believe that Jones was a member of the Crips.[63] However, despite the similarity between the State's argument and the line of drug profile cases previously decided by the United States Supreme Court, the State did not rely upon or cite those decisions.[64] Instead, the State simply argued that a Tenth Circuit case, *United States v. Bell*,[65] was controlling. The Court in *Bell* had determined that innocent activity can give rise to reasonable suspicion. The court of appeals rejected the State's reliance upon *Bell*, noting, "The state correctly argues that innocent activity can give rise to reasonable suspicion, but in that circumstance

60. State v. Jones, 114 N.M. 147, 835 P.2d 863 (Ct. App. 1992).

61. *Id.*

62. State's Answer Brief at 12, State v. Jones, 114 N.M. 147, 835 P.2d 863 (Ct. App. 1992) (No. 12392).

63. *Id.*

64. It is this author's opinion that the State erred in not analogizing to the line of drug courier cases decided by the Supreme Court. Since both sides relied on *Terry* in making their appellate arguments, the State's analogy to the drug courier cases would have forced the New Mexico Court of Appeals to analyze the facts in *Jones* in light of the Supreme Court's modified *Terry* standard. Because the Supreme Court has increasingly deferred to police officers in the field when applying the *Terry* standard, analogizing to these cases would have strengthened the State's argument that the New Mexico Court of Appeals should also defer to the judgment of officers in the field.

65. 892 F.2d 959 (10th Cir. 1989).

some indicia of criminal conduct, such as furtive mannerisms, must still lead the law enforcement officer to a reasonable suspicion of particular criminal activity."[66]

The court of appeals also rejected the State's argument that the facts the officers had relied on to frisk Jones constituted specific, articulable facts sufficient to support a finding of reasonable suspicion. Although the court conceded that the officers properly determined that Jones was a gang member (referring to defendant as a "gang pedestrian"),[67] the Court held that the officers did not have any specific facts to connect Jones to any crimes.[68] Thus, without any facts connecting Jones to a specific crime, the frisk violated the Fourth Amendment.[69] The court of appeals also distinguished *In re Stephen L.* by noting that the officers in that case were investigating a specific crime, the painting of fresh graffiti.[70] Unlike *Stephen L.*, the court noted that no specific crime was being investigated.[71] The court held that without some kind of individualized, particularized suspicion that Jones had committed a specific crime, he could not be frisked.[72]

In its second argument, the State attempted to emphasize the need for officers to protect themselves in often highly-charged encounters with street gangs.[73] In support of its position, the State cited *United States v. Oates*, a case in which the Second Circuit acknowledged, "We have recognized that to substantial dealers in narcotics, firearms are as much "tools of the trade" as are most common recognized articles of drug paraphernalia."[74] The State analogized this case to the confrontations between officers and gang members, where the gang members are usually armed and dangerous.[75] The State argued that since the Second Circuit had allowed officers greater leeway to stop and frisk this dangerous group (narcotics dealers), then the court of appeals should allow the same leeway to officers dealing with the equally dangerous group of gang members.

The court rejected this argument, stating, "Even assuming . . . that the state made a case for a crisis situation in Albuquerque, we will not dispense with the requirement of individualized, particularized suspicion."[76] The court went on to hold that since the State had presented no evidence that the officers had individualized, particularized suspicion

66. *Id.* at 151, 835 P.2d at 867.
67. *Id.*
68. *Id.* at 150, 835 P.2d at 866.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. State's Answer Brief at 21, *Jones*, 114 N.M. 147, 835 P.2d 863 (No. 12392) (quoting United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977)).
75. *Id.* at 20-21.
76. *Jones*, 114 N.M. at 150, 835 P.2d at 866.

to suspect Jones of a specific crime, the evidence of the cocaine should be suppressed.[77]

V. ANALYSIS AND IMPLICATIONS

The court of appeals in *Jones* acknowledged the proposition that an individual's Fourth Amendment rights are paramount over a police officer's ability to stop and frisk an individual based solely on indicators that he is a member of a gang. In so doing, the court has highlighted two guiding principles for dealing with similar situations. First, that the threat of escalating gang activity will not be permitted to eradicate a citizen's Fourth Amendment rights. Second, gang indicators are not a sufficient basis for a *Terry* stop.

The analysis in *Jones* parallels the analysis in *Terry*. Both courts found that the need for specific articulable facts is indispensable to justify a stop by officers. In *Terry*, Justice Warren stated, "This demand for specificity in the information upon which police activity is predicated is *the central teaching of Fourth Amendment jurisprudence*."[78] The *Terry* Court went on to find that the stop and frisk of the defendant was constitutional, but only after a rigorous examination of the facts available to the officer. The *Jones* court similarly stated, "The officers had no articulable facts that would set defendant apart from an innocent gang pedestrian . . . . As a result, the officers' initial stop of defendant was illegal."[79] With this decision, the court of appeals firmly aligned itself with the *Terry* analysis which requires that an officer's actions must be measured against an objective standard of specific and articulable facts.

In aligning itself so completely with the *Terry* opinion, however, the court of appeals did not address the evolution of the stop and frisk doctrine in the Supreme Court. The two courts diverge sharply, although not explicitly, regarding the amount of officer discretion permitted in establishing a judicial finding of "reasonable suspicion." The line of drug courier cases clearly illustrate the Supreme Court's increasing willingness to defer to officer discretion.

In *Sokolow*, the Supreme Court rejected the Ninth Circuit's requirement that the officer have "evidence of ongoing criminal behavior" before he could execute a legitimate stop. Instead, the Court noted that law enforcement officers are permitted to "formulate certain common-sense conclusions about human behavior," and that judicial review must consider "the totality of the circumstances" surrounding the stop. By rejecting the requirement of evidence of ongoing criminal activity, the Court indicated that in stop and frisk situations, the Court will, in certain circumstances, apply a less stringent standard of judicial review to an officer's actions. The *Jones* court, in contrast, did not adopt the broad discretionary standard of *Sokolow*. Instead, the New Mexico Court of

77. *Id.* at 150-51, 835 P.2d at 866-67.
78. Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968).
79. *Jones*, 114 N.M. at 151, 835 P.2d at 867.

Appeals retained the requirement that the officer be able to establish "some indicia of criminal conduct" in order to sustain a stop as valid.

In contrasting the *Jones* case with the line of drug courier cases decided by the Supreme Court, it is not readily apparent why the two courts reached different results. The analysis in the *Jones* case is sparse and does not address the drug courier cases considered by the Supreme Court. However, there are two possible hypotheses for the incongruous outcomes. One is the view that the two courts have of law enforcement personnel and their role. The Supreme Court has increasingly deferred to officers, viewing them as uniquely qualified to spot and stop criminals. The Supreme Court is also more solicitous of officer safety, viewing that as a substantial factor in rationalizing a stop.

The court in *Jones*, on the other hand, appears less deferential to officers in the field. The court of appeals retained the mandate of requiring evidence of criminal conduct, unlike the Supreme Court. Instead of deferring to officers, the *Jones* court appears more concerned with restraining the possible abuses of police power and ensuring the fight of the individual to be free from invading searches. The *Jones* court also appeared wary of officer's using a safety argument as a pretext to stop whomever they choose. When the issue of officer safety arose in *Jones*, the court dismissed the State's argument that officer safety could be a legitimate basis for a stop. Instead, the court found that in the absence of a "crisis situation" officers could not stop individuals based on the rationale of safety. Although the court acknowledged that officer safety was important, it found the right of a pedestrian to walk unmolested in greater need of protection.

The other, and more significant, difference between the two decisions may involve the nature of the groups that the courts evaluated. Drug couriers are, by definition, members of a group actually engaging in illegal activity. Individuals who transport drugs have chosen to engage in illegal activity. If an officer correctly identifies an individual as a drug courier, then he or she has identified an individual who is engaging in criminal activity at that very moment. In contrast, individuals who belong to gangs are not per se members of a group engaging in illegal activity at the moment of identification. Although there is a correlation between gang members and criminal activity, it is not necessarily true that individuals who choose to join a gang do so for the purpose of engaging in illegal activity or are doing so at any particular moment.[80]

---

80. Although the court of appeals in *Jones* did not address the question of whether officers could rely on a gang profile or "gang indicators" in order to form a basis for reasonable suspicion, this question may arise in a later case. If it does, the defendant gang member may be able to claim that the officer's reliance on a profile in deciding to stop and frisk violated his freedom of expression under the First Amendment. The "gang indicators" are largely based on the clothing that gang members wear. *See supra* note 2 and accompanying text. The Supreme Court has held that nonverbal communication can, in some instances, be protected by the First Amendment. United States v. O'Brien, 391 U.S. 367 (1968). In a situation involving a stop and frisk of a gang member by a police officer, the gang member can argue that his or her style of dress is just such "nonverbal communication" that warrants protection under the First Amendment. In order for the nonverbal

VI. CONCLUSION

The *Jones* decision held that an officer may not stop individuals based solely on "gang indicators" or profiles. Instead, the officer must have some independent, articulable fact that supports his decision to stop an individual. Although the court's decision in *Jones* would have been more helpful if the court had discussed and possibly distinguished the Supreme Court's line of drug courier cases, the law in New Mexico pertaining to an officer's ability to stop and frisk a gang member is now clear. Despite the fact that some criminal activity may go unpunished, officers in New Mexico may not stop individuals based on a department profile. Regardless of mode of dress, a gang member in New Mexico is as equally clothed with the protection of Fourth Amendment as every other citizen.

MONIQUE M. SALAZAR

---

communication to be protected under the First Amendment, the individual must meet a two part test: that there is an "intent to convey a particularized message" and that there is a high likelihood that the message will be understood by those who viewed it. Spence v. Washington, 418 U.S. 405, 410-11 (1974). The gang member could argue that his or her message in mode of dress is to convey what gang he or she belongs to—which would likely be considered a particularized message. To meet the second part of the test, the gang member could argue that there is a high likelihood that others viewing the message understood it. If police officers relied in part in deciding to stop and frisk in part on the fact that the individual's clothing indicates a gang affiliation, then there is a strong argument that the second prong has been met. Once the gang member establishes these two prongs, he or she is under the protection of the First Amendment, and the government must then articulate a compelling state interest that would allow them to stop gang members based on department profiles. *Id.* at 415. At least one Supreme Court justice, Justice Marshall, has suggested that choice of dress should be protected by the First Amendment. In his dissent in United States v. Sokolow, 490 U.S. 1 (1989), Justice Marshall stated, "to base . . . a search on a pop guess that persons dressed in a particular fashion are likely to commit crimes not only stretches the concept of reasonable suspicion beyond recognition, but also is inimical to the self-expression which the choice of wardrobe may provide." *Id.* at 16 (Marshall, J., dissenting). It may be possible, therefore, for gang members to challenge as unconstitutional stops based on two amendments: the First and the Fourth.