

CRIMINAL LAW – REASONABLE SUSPICION: NOT JUST BASED ON TRAINING AND PROFESSIONAL EXPERIENCE

Kansas v. Glover, 140 S. Ct. 1183 (2020)

ABSTRACT

One of our most foundational freedoms is our right to live in peace without being accosted by the government. While the Fourth Amendment sets some high bars, law enforcement can perform simple investigatory stops under very low scrutiny. In *Kansas v. Glover*, the United States Supreme Court *held* that an officer may draw from their life experience and common sense to justify reasonable suspicion.

A Kansas deputy sheriff ran a license plate check on a pickup truck to discover that the registered owner, Charles Glover, Jr., had a revoked license. Assuming that Glover was driving, the officer initiated a traffic stop, discovering that Glover was indeed driving. Glover moved to suppress all evidence from the stop, claiming the deputy lacked reasonable suspicion for the stop. The Kansas District Court granted the motion to suppress, and the Court of Appeals reversed. The Kansas Supreme Court reversed the Court of Appeals, holding that the officer obtained the evidence only after violating Glover's Fourth Amendment rights. The Supreme Court of the United States granted certiorari and *held* that an officer who lacks information negating their commonsense inference that the owner is driving the vehicle has acted reasonably under the Fourth Amendment.

Reasonable suspicion is a low standard, yet many states across the country, including North Dakota, have begun to increase this standard from where it rightfully sits in Fourth Amendment jurisprudence. Recent cases, such as *State v. Morsette*,¹ and *State v. Wills*,² have interpretations of the Fourth Amendment that heighten reasonable suspicion to being closer to probable cause. While the two standards remain different, the reasonable suspicion standard has been inching upward, requiring officers provide more evidence or have more training to justify a simple investigatory traffic stop.³ The United States Supreme Court in *Glover* reiterated and anchored reasonable suspicion as a very low threshold.

1. 2019 ND 84, 924 N.W.2d 434.

2. 2019 ND 176, 930 N.W.2d 77.

3. *See, e.g.*, *State v. Miller*, 510 N.W.2d 638, 640-44 (N.D. 1994); *see also State v. Smith*, 2005 ND 21, ¶¶ 16-19, 691 N.W.2d 203.

I.	FACTS	64
II.	LEGAL BACKGROUND	66
	A. THE REASONABLE SUSPICION STANDARD.....	66
III.	COURT’S ANALYSIS	68
	A. THE MAJORITY OPINION	68
	1. <i>Reasonable Suspicion is Abstract and Flexible</i>	68
	2. <i>An Officer’s Use of Common Sense and Life Experience</i> ...	69
	3. <i>Reasonable Suspicion as Applied in Kansas v. Glover</i>	70
	4. <i>Limitations on the Court’s Holding</i>	71
	B. KAGAN’S CONCURRING OPINION	71
	C. SOTOMAYOR’S DISSENTING OPINION	73
IV.	IMPACT	74
	A. NORTH DAKOTA’S REASONABLE SUSPICION JURISPRUDENCE	75
	B. DOES NORTH DAKOTA OFFER DIFFERENT PROTECTIONS THAN THE U.S. CONSTITUTION?	77
	C. THE NEED TO REVISIT <i>STATE V. MORSETTE</i>	78
V.	CONCLUSION	79

I. FACTS

While on patrol in Douglas County, Kansas, Deputy Mark Mehrer observed a 1995 Chevrolet 1500 pickup with Kansas plate 295ATJ.⁴ After running the plate through the Kansas Department of Revenue’s file service, Deputy Mehrer learned that the plate belonged to a 1995 Chevrolet 1500 pickup truck registered to Charles Glover Jr., and that Glover had a revoked driver’s license.⁵ Deputy Mehrer initiated an investigatory traffic stop using only this information and discovered that Glover was indeed driving the vehicle under

4. *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020); Petition for Writ of Certiorari at app. 60-61, *Glover*, 140 S. Ct. 1183 (No. 18-556).

5. Petition for Writ of Certiorari at app. 60-61, *Glover*, 140 S. Ct. 1183 (No. 18-556).

a revoked license.⁶ Deputy Mehrer charged Glover with driving with a revoked license in violation of Kansas law.⁷ Glover filed a motion to suppress evidence from the stop, arguing Deputy Mehrer lacked reasonable suspicion to initiate the traffic stop.⁸ Neither Deputy Mehrer nor Glover testified at the suppression hearing and instead stipulated to the following facts:

1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff 's Office.
2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.
3. Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickup truck.
4. Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.
5. Deputy Mehrer assumed the registered owner of the truck was also the driver, Charles Glover Jr.
6. Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.
7. The driver of the truck was identified as the defendant, Charles Glover Jr.⁹

Based on these stipulated facts, the District Court granted Glover's motion to suppress, agreeing that the officer lacked reasonable suspicion.¹⁰ The Court of Appeals reversed, holding that "it was reasonable for [deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion."¹¹

The Kansas Supreme Court reversed the Court of Appeals, holding that the officer's inference that Glover was driving was "only a hunch" he was engaging in criminal activity.¹² Further, the court held that Deputy Mehrer's

6. *Id.*

7. *Id.*; see KAN. STAT. ANN. § 8-285(a)(3) (2020).

8. *State v. Glover*, 422 P.3d 64, 66 (Kan. 2018).

9. *Glover*, 140 S. Ct. at 1187; Petition for Writ of Certiorari at app. 60-61, *Glover*, 140 S. Ct. 1183 (No. 18-556).

10. *Glover*, 140 S. Ct. at 1187.

11. *State v. Glover*, 400 P.3d 182, 188 (Kan. Ct. App. 2017).

12. *State v. Glover*, 422 P.3d 64, 66 (Kan. 2018).

inference involved “applying and stacking unstated assumptions that [were] unreasonable without further factual basis.”¹³ Most importantly to the Kansas Supreme Court, Deputy Mehrer lacked information that “the registered owner was likely the primary driver of the vehicle,” and that the owner would likely drive with a revoked license.¹⁴ The U.S. Supreme Court granted certiorari to answer the question of reasonable suspicion and reversed the Kansas Supreme Court.¹⁵

II. LEGAL BACKGROUND

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁶

Originally drafted and introduced by James Madison¹⁷ to protect against general warrants,¹⁸ the Fourth Amendment now requires law enforcement officers who seize an individual to either have a warrant or meet one of the specific exceptions to the warrant requirement.¹⁹ One well-known exception allows an officer to briefly detain an individual without a warrant if the officer has “an articulable and reasonable suspicion, based in fact, that the detained person is committing, has committed, or is about to commit a crime.”²⁰ The real question then is, what does the Fourth Amendment require to satisfy reasonable suspicion?

A. THE REASONABLE SUSPICION STANDARD

The Fourth Amendment allows an officer to initiate an investigatory traffic stop when they have “a particularized and objective basis for suspecting

13. *Id.*

14. *Id.* at 68-70. (“[W]e cannot accept the owner-is-the-driver presumption because it ultimately turns on the second assumption that the owner will likely disregard the suspension or revocation order and continue to drive.”).

15. *Glover*, 140 S. Ct. at 1187.

16. U.S. CONST. amend. IV.

17. 1 ANNALS OF CONG. 448, 452 (1789). James Madison drafted the Bill of Rights with heavy influence from the Virginia Declaration of Rights, written by George Mason. See *The Virginia Declaration of Rights*, NAT’L ARCHIVES (Sept. 29, 2016), <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>; see also Julia L. Ernst, *The Mayflower Compact: Celebrating Four Hundred Years of Influence on U.S. Democracy*, 95 N.D. L. REV. 1, 94 (2020).

18. Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1045 (2011).

19. *Riley v. California*, 573 U.S. 373, 382 (2014); *Terry v. Ohio*, 392 U.S. 1, 17-21 (1968).

20. *State v. Glover*, 422 P.3d 64, 67 (Kan. 2018) (citing *Terry*, 392 U.S. at 21).

the particular person stopped of criminal activity.”²¹ This very low standard is known as reasonable suspicion, and the test has been phrased differently by many courts.²² Although reasonable suspicion is more than a ‘hunch,’ it requires “considerably less proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.”²³ Even though officers frequently use their training and experience as grounds for reasonable suspicion, this is not a requirement of the Fourth Amendment.²⁴

Reasonable suspicion is such a low bar the Fourth Amendment permits officers to make reasonable mistakes of fact or law when determining if reasonable suspicion exists.²⁵ As the U.S. Supreme Court has explained, “to be reasonable is not to be perfect.”²⁶ Consequently, the reasonable suspicion inquiry “‘falls considerably short’ of 51 percent accuracy.²⁷ If an officer has reasonable suspicion, “‘justified at its inception,”²⁸ they may do no more than “‘briefly stop an individual and make reasonable inquiries aimed at confirming or dispelling the suspicion.”²⁹ Because of its brief and narrow scope, an officer does not need to rule out the possibility of innocent conduct to initiate an investigatory stop,³⁰ nor should courts demand perfection from officers.³¹ Officers may use personal experience to make “‘commonsense judgments and inferences about human behavior.”³² The reason officers may use personal

21. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *see also Terry*, 392 U.S. at 21-22.

22. *U.S. v. Williams*, 796 F.3d 951, 957 (8th Cir. 2015) (“Reasonable suspicion must be supported by more than a mere hunch, but the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying the preponderance of the evidence standard.”); *State v. Zachery*, 255 So. 3d 957, 960 (Fla. Dist. Ct. App. 2018) (“A reasonable suspicion is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer’s knowledge.”) (internal quotation marks omitted) (citation omitted)); *State v. Marr*, 499 S.W.3d 367, 374 (Mo. Ct. App. 2016) (“Reasonable suspicion, which is a less stringent standard than probable cause, is present when a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.”) (internal quotation marks omitted) (citations omitted)); *State v. Adan*, 2016 ND 215, ¶ 12, 886 N.W.2d 841 (“The question is whether a reasonable person in the officer’s position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity.”) (quoting *State v. Kenner*, 1997 ND 1, ¶ 8, 559 N.W.2d 538).

23. *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (quoting *Prado Navarette v. California*, 572 U.S. 393, 397 (2014)); *see also Williams*, 796 F.3d at 957.

24. *Glover*, 140 S. Ct. at 1189.

25. *Heien v. North Carolina*, 574 U.S. 54, 66 (2014).

26. *Glover*, 140 S. Ct. at 1188 (quoting *Heien*, 574 U.S. at 60).

27. *Id.* (citing *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

28. *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 185 (2004) (quoting *United States v. Sharpe*, 470 U.S. 675, 682 (1985)).

29. *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008).

30. *Navarette v. California*, 572 U.S. 393, 403 (2014).

31. *Glover*, 140 S. Ct. at 1188.

32. *Id.*

experience along with professional experience is because the standard depends on the “factual considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”³³

III. COURT’S ANALYSIS

The opinion in *Kansas v. Glover*, as well as the discussion in the concurrence and dissent, are framed around the ideas of common sense and reasonableness. The U.S. Supreme Court asks whether an officer can use commonsense inferences to validate reasonable suspicion, or rather, must base their suspicion on specially acquired knowledge, such as training or law enforcement experience. In answering this question, the 8-1 majority says an officer may use common sense to meet the standard,³⁴ while the dissent believes an officer must rely on his training and experience as an officer alone.³⁵

A. THE MAJORITY OPINION

The United States Supreme Court held that an officer needs reasonable suspicion to initiate an investigatory traffic stop, and a commonsense inference may be sufficient to satisfy this Fourth Amendment requirement.³⁶ Because reasonable suspicion is such a low standard, the officer may use factual and logical reflections of everyday life the same as any reasonable and prudent person when making their determination.³⁷ Because officers may use their common sense and personal life experience to satisfy reasonable suspicion, they do not have to ground their suspicion in law enforcement training or experience.³⁸

1. Reasonable Suspicion is Abstract and Flexible

Throughout the opinion, the Court continually reminds us that the reasonable suspicion standard is “less demanding[.]”³⁹ The Court very tenderly laid out the standard while avoiding repeating the Fourth Amendment buzz phrases that tend to make reasonable suspicion seem much higher than it is.

33. *Id.* (citing *Navarette*, 572 U.S. at 402).

34. *Id.* at 1188; *Id.* at 1191 (Kagan, J., concurring) (“When you see a car coming down the street, your common sense tells you that the registered owner may well be behind the wheel.”).

35. *Id.* at 1196 (Sotomayor, J., dissenting) (“[W]hat may be ‘common sense’ to a layperson may not be relevant (or correct) in a law enforcement context.”).

36. *Id.* at 1187 (majority opinion).

37. *Id.* at 1187 (citing *Navarette*, 572 U.S. at 402).

38. *Id.* at 1189 (“The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.”).

39. *Id.* at 1188.

Phrases such as “more than a hunch,”⁴⁰ or “the State bears the burden of justifying a seizure,”⁴¹ or that the officer must articulate more than an “inchoate and unparticularized suspicion or hunch of criminal activity,”⁴² are all true and are important factors when deciding reasonable suspicion. However, the Court has repeatedly rejected efforts by courts to “impose a rigid structure on the concept of reasonableness[.]”⁴³ By prohibiting Deputy Mehrer from making the reasonable jump, that people drive their own cars, the Kansas Supreme Court held the bar of reasonable suspicion in Kansas far higher than it actually is, putting the standard closer to probable cause.⁴⁴

2. *An Officer’s Use of Common Sense and Life Experience*

Deputy Mehrer initiated an investigatory traffic stop based on the common sense inference that people drive their own car.⁴⁵ This commonsense inference required no reliance on the officer’s “experiences in law enforcement.”⁴⁶ While an officer’s training and experience can certainly help them attain reasonable suspicion,⁴⁷ the Court held “such experience is not *required* in every instance [by the Fourth Amendment].”⁴⁸

Bolstering its explanation, the majority pointed to examples in Kansas state law that reinforced the reasonableness of inferring an individual with a revoked license may continue to drive.⁴⁹ For example, Kansas state law provides that the Division of Vehicles of the Kansas Department of Revenue has discretion to revoke a license if a driver “has been convicted of a moving traffic violation, committed at a time when the person’s driving privileges

40. *Id.* at 1187.

41. *Id.* at 1194 (Sotomayor, J., dissenting) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

42. *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000)).

43. *Id.* at 1190 (majority opinion) (“[R]easonable suspicion is an ‘abstract’ concept that cannot be reduced to ‘a neat set of legal rules[.]’”) (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

44. *Id.* at 1188-90. The dissent argued that the majority’s rule would allow officers to seize individuals solely on probability rather than facts. The majority responded holding firm that reasonableness is a totality of the circumstances view. Because it is likely not reasonable for an officer to base a seizure solely on a probability, the Court made clear that the commonsense inference is only being used to fill a gap in objective and particularized facts. For example, in *Glover*, the officer objectively knew that Glover had a revoked license and that the ehicle belonged to Glover. Deputy Mehrer’s commonsense inference was hung between two posts of objective fact.

45. *Id.* at 1188 (“[Courts] must permit officers to make ‘commonsense judgments and inferences about human behavior.’”) (quoting *Wardlow*, 528 U.S. at 125).

46. *Id.* at 1189 (quoting *Glover*, 140 S. Ct. at 1196 (J. Sotomayor, dissenting)).

47. *Id.* at 1190 (“[W]e in no way minimize the significant role that specialized training and experience routinely play in law enforcement investigations.”) (citing *Arvizu*, 534 U.S. at 273-274).

48. *Id.*

49. *Id.* at 1188 (citing KAN. STAT. ANN. §§ 8-254(a), 8-252 (2020)).

were restricted, suspended or revoked[.]”⁵⁰ The Fourth Amendment does not require a state to spell out common sense.⁵¹ Notwithstanding Kansas’s laws on suspended driving, Deputy Mehrer’s commonsense inference, that people drive their own cars, was reasonable. The Court pointed out the “license-revocation scheme” merely to demonstrate the cumulative evidence supporting Deputy Mehrer’s reasonable, commonsense inference.⁵²

3. *Reasonable Suspicion as Applied in Kansas v. Glover*

In *Kansas v. Glover*, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup.⁵³ Deputy Mehrer knew that Glover’s vehicle matched the vehicle that he observed.⁵⁴ Finally, Deputy Mehrer knew that Glover had a revoked license.⁵⁵ “From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided *more than reasonable suspicion* to initiate the stop.”⁵⁶ This “entirely reasonable inference,”⁵⁷ based on commonsense,⁵⁸ gave the officer “a particularized and objective basis for suspecting [Glover] of criminal activity.”⁵⁹ Importantly, the Court did not find that Deputy Mehrer initiated a traffic stop based solely on a commonsense inference. In order to make an inference, there must be at least two objective facts to hang the inference from.⁶⁰ Deputy Mehrer had only those facts and possessed no exculpatory information, “let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck.”⁶¹ The Court held reasonable suspicion existed and the stop was justified.⁶²

50. KAN. STAT. ANN. § 8-255(a)(4) (2020) (This law anticipates people will continue to drive while restricted, suspended, or revoked, and puts a punishment into code in preparation for these situations.).

51. *Glover*, 140 S. Ct. at 1188.

52. *Id.* (“Although common sense suffices to justify this inference, Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving.”).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* (emphasis added).

57. *Id.* at 1189 (“The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.”); *see also id.* at 1191.

58. *Id.* at 1189-90 (“[C]ommon sense, *i.e.*, information that is accessible to people generally, not just some specialized subset of society.”).

59. *Id.* at 1187 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

60. *Inference*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A conclusion reached by considering other facts deducing a logical consequence from them.”). In *Glover*, the two objective facts were that Glover had a suspended license and the vehicle observed belonged to Glover. The inference Deputy Mehrer made was that Glover was driving his vehicle.

61. *Glover*, 140 S. Ct. at 1191.

62. *Id.*

4. *Limitations on the Court’s Holding*

After drawing what the dissent saw as an erroneous and broad holding,⁶³ the majority “emphasize[d] the narrow scope of [the Court’s] holding.”⁶⁴ While the Fourth Amendment allows an officer to draw from personal experience in establishing reasonable suspicion, the Court’s holding does not erase the Fourth Amendment’s requirement that the officer have “an individualized suspicion that a particular citizen was engaged in a particular crime.”⁶⁵ In addition, allowing an officer to use their common sense “in no way minimize[s] the significant role that specialized training and experience routinely play in law enforcement investigations. [The Court] simply [held] that such experience is not required in *every* instance.”⁶⁶ “The standard takes into account the totality of the circumstances—the whole picture.”⁶⁷

An officer saying they made a commonsense inference will not alone satisfy reasonable suspicion.⁶⁸ “Like all seizures, ‘the officer’s action must be “justified at its inception.”’”⁶⁹ In concluding its holding, the majority sustained that “the ultimate touchstone of the Fourth Amendment is ‘*reasonableness*’[,]”⁷⁰ not any particular test or specific phrase that must be uttered by officers in a courtroom.⁷¹

B. KAGAN’S CONCURRING OPINION

Justice Kagan, in a concurrence joined by Justice Ginsburg, wrote separately to point out that Deputy Mehrer had reasonable suspicion because of his knowledge that: (1) Glover’s license was revoked,⁷² and (2) revocation of a license in Kansas is done “for serious or repeated driving offenses.”⁷³ Therefore, Deputy Mehrer had specialized knowledge that Glover might be

63. *Id.* at 1194 (Sotomayor, J., dissenting) (“This analysis breaks from settled doctrine and dramatically alters both the quantum and nature of evidence a State may rely on to prove suspicion.”).

64. *Id.* at 1191 (majority opinion).

65. *Id.* at 1190 n.1.

66. *Id.* at 1190 (emphasis added).

67. *Id.* at 1191 (quoting *Prado Navarette v. California*, 572 U.S. 393, 397 (2014)).

68. *Id.* at 1183.

69. *Id.* at 1191 (quoting *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 185 (2004)).

70. *Id.* (emphasis added) (quoting *Heien v. North Carolina*, 574 U.S. 54, 60 (2014)).

71. Transcript of Oral Argument at 37, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (No. 18-556) (Gorsuch, J.) (“[I]f that’s all that is at issue here, is that Kansas . . . neglected to put an officer on the stand to say in my experience the driver is usually the owner of the car . . . what are we fighting about here? . . . It seems to me that it’s almost a formalism you’re asking for this Court to endorse.”).

72. *Glover*, 140 S. Ct. at 1192 (Kagan, J., concurring).

73. *Id.*

engaging in criminal activity.⁷⁴ There were two “wrinkles” that the concurrence pointed out: first, cars are not *always* driven by their owners, and second, having a suspended or revoked license does not *always* mean an individual will continue to drive.⁷⁵

The first point, and the one on which the concurrence did not push too firmly, was that an owner might not be the only one to drive their car.⁷⁶ “Families share cars; friends borrow them.”⁷⁷ Additionally, other factors could muddy the otherwise clear commonsense inference that people drive their own cars. For example, consider if a vehicle has two registered owners, one with a revoked license.⁷⁸ Justice Kagan also pointed out that the vehicle attributes might change this inference.⁷⁹ “Compare the likelihoods that someone other than the registered owner is driving (1) a family minivan and (2) a Ferrari.”⁸⁰

As to the second point, Justice Kagan disagreed that knowing a license is revoked automatically satisfies reasonable suspicion in every case.⁸¹ For example, although Kansas may revoke a license for serious offenses⁸² and repeated driving offenses,⁸³ other states suspend licenses for offenses unrelated to moving violations, such as failure to pay child support.⁸⁴ While common sense might allow a reasonable person to make an inference jump that someone who has driven illegally might do so again, that same jump is not as graceful when inferring that someone who failed to pay court fees⁸⁵ is also willing to drive under a suspended license.⁸⁶ For situations that require an officer to make a maladroit leap, “I doubt whether our collective common sense could do the necessary work[.]”⁸⁷ to find more than a “mere hunch[.]”⁸⁸

74. *Id.*

75. *Id.* at 1191.

76. *Id.*

77. *Id.*

78. *Id.* at 1193.

79. *Id.*

80. *Id.* (“The officer himself may have a wealth of accumulated information about such matters, and the defendant may probe what that knowledge suggests about the stop at issue.”).

81. *Id.* at 1191-92.

82. *See, e.g.*, KAN. STAT. ANN. § 8-252 (2020); *id.* § 8-254(a) (Involuntary manslaughter, vehicular homicide, battery, failure to stop and render aid as required in the event of a motor vehicle accident resulting in the death or personal injury of another, reckless driving, and fleeing or attempting to elude a police officer as provided in Kansas law demand license revocation).

83. *Glover*, 140 S. Ct. at 1189; *see, e.g.*, KAN. STAT. ANN. § 8-255(a)(4) (2020).

84. *See, e.g.*, ARK. CODE ANN. § 9-14-239 (2020).

85. *See, e.g.*, N.J. STAT. ANN. § 39:4-139.10 (West 2020).

86. *Glover*, 140 S. Ct. at 1192 (Kagan, J., concurring).

87. *Id.*

88. *Id.* (quoting *Navarette v. California*, 572 U.S. 393, 397 (2014)).

In agreeing with the majority’s commonsense inference articulation,⁸⁹ Justice Kagan made clear not all suspended or revoked licenses will afford the same inference.⁹⁰ The record only indicated that the “officer learned from a state database that a car on the road belonged to a person with a revoked license.”⁹¹ Because license revocations in Kansas almost always “stem from serious or repeated driving violations,” Justices Kagan and Ginsburg agreed that Deputy Mehrer also knew this and had established reasonable suspicion.⁹² However, they remained firm in their skepticism that a revoked license will *always* give an officer reasonable suspicion.

C. SOTOMAYOR’S DISSENTING OPINION

Justice Sotomayor begins her lone dissent by agreeing with the Fourth Amendment framework laid out by the Court.⁹³ Even though she disagreed with the majority, Justice Sotomayor seemed to hint that it was the constitutionally correct holding.⁹⁴ However, unlike the concurrence, which afforded the fact that Deputy Mehrer knew Kansas revoked licenses for serious or repeated driving offenses,⁹⁵ Justice Sotomayor saw that as a break from the Court’s jurisprudence.⁹⁶

In discussing the Fourth Amendment, the dissent indomitably highlights that it is the State’s burden to justify a seizure.⁹⁷ Not only does the State bear this burden, but the State must “articulate factors supporting its reasonable suspicion, usually through a trained agent.”⁹⁸ The articulation should include both particularized facts, and “an officer’s ‘rational inferences from those facts.’”⁹⁹ While “[a] logical ‘gap as to any one matter’ in this analysis may be overcome by ‘a strong showing’” of reliability,¹⁰⁰ no gap may go unfilled.¹⁰¹ While the entire Court agreed that inferences are permitted to fill

89. *Id.* at 1194.

90. *Id.* at 1192.

91. *Id.* at 1194.

92. *Id.*

93. *Id.* at 1194 (Sotomayor, J., dissenting).

94. *Id.* at 1196 (“I ‘doubt’ that our collective judicial common sense could answer that question, even if our Fourth Amendment jurisprudence allowed us to do so.”) (citing *Glover*, 140 S. Ct. at 1187-88).

95. *Id.* at 1194 (citing *Glover*, 140 S. Ct. at 1188-89).

96. *Id.* at 1198.

97. *Id.* at 1194 (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

98. *Id.* (citing *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

99. *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

100. *Id.* at 1195 (quoting *Florida v. Harris*, 568 U.S. 237, 245 (2013)).

101. *Id.*

knowledge gaps,¹⁰² Justice Sotomayor thought the Court had filled a gap left by the State by calling it a commonsense inference.¹⁰³

Even if Deputy Mehrer knew Kansas only revokes licenses for serious or repeated driving offenses, a fact the concurrence was willing to afford the officer,¹⁰⁴ the dissent believes it was not the judiciary's job to place that fact into the record.¹⁰⁵ In response to this strict reading of the Fourth Amendment case law, the majority points out that Justice Sotomayor's reading would require every officer to base reasonable suspicion strictly on their law enforcement training or experience.¹⁰⁶ However, "[n]othing in our Fourth Amendment precedent supports [that] notion[.]" and in fact, the Court has "repeatedly recognized the opposite."¹⁰⁷

In response to the majority's framing of commonsense inferences, the dissent agrees that they are allowed, but stipulates "the reasonable-suspicion inquiry does not accommodate the average person's intuition. Rather, it permits reliance on a particular type of common sense – that of the reasonable officer, developed through her experiences in law enforcement."¹⁰⁸ This seems to be an attempt to conflate a reasonable officer's "common sense" with general common sense. As the majority candidly points out, the dissent's proposed standard "defies the 'common sense' understanding of common sense, *i.e.*, information that is accessible to people generally, not just some specialized subset of society."¹⁰⁹

IV. IMPACT

Glover could have a remarkable impact for defendants who have relied on North Dakota's expanded reading of the Fourth Amendment. Officers face what has become "heightened 'reasonable suspicion,'"¹¹⁰ and *Glover* is making courts across the country rethink and rephrase their standard.¹¹¹ Reasonable suspicion is a low standard for a reason, and courts need to give officers

102. *Id.* at 1188 (majority opinion); *id.* at 1194 (Kagan, J., concurring); *id.* at 1195 (Sotomayor, J., dissenting).

103. *Id.* at 1196 (Sotomayor, J., dissenting).

104. *Id.* at 1192 (Kagan, J., concurring).

105. *Id.* at 1196 (Sotomayor, J., dissenting).

106. *Id.* at 1189 (majority opinion).

107. *Id.*; *see, e.g.*, *Navarette v. California*, 572 U.S. 393, 402 (2014).

108. *Glover*, 140 S. Ct. at 1196 (Sotomayor, J., dissenting) (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

109. *Id.* at 1189-90 (majority opinion).

110. Brief of Nat'l Fraternal Order of Police as Amici Curiae Supporting Petitioner at 16, *Kansas v. Glover*, 140 S. Ct. 1180 (2020) (No. 18-556).

111. *See, e.g.*, *United States v. Villavicencio*, 825 F. App'x 88 (4th Cir. 2020); *United States v. Williams*, No. 2:18-cr-00013-JDL, 2020 U.S. Dist. LEXIS 91549 (D. Me. 2020); *People v. Silveria*, 471 P.3d 412 (Cal. 2020).

a greater leniency so they can do their jobs.¹¹² Jurisdictions that require heightened reasonable suspicion, such as Kansas and North Dakota, not only allow criminals to escape prosecution, but also put officers at increased risk.¹¹³

Under the standard Kansas had, “law enforcement [were] forced to divert their attention from safe driving in order to obtain the heightened reasonable suspicion [] required for a traffic stop.”¹¹⁴ *Kansas v. Glover* is a very instructive case that clarifies the legal standard for a permissible investigative stop.¹¹⁵ As the Eighth Circuit and North Dakota continue to see more cases involving investigatory stops, *Glover* will likely be a driving factor in reducing the amount of evidence an officer needs in order to initiate a lawful traffic stop.¹¹⁶

A. NORTH DAKOTA’S REASONABLE SUSPICION JURISPRUDENCE

In North Dakota, the “reasonable and articulable suspicion standard requires more than a ‘mere hunch,’ but less than probable cause.”¹¹⁷ “Whether an officer had a reasonable and articulable suspicion is a fact-specific inquiry that is evaluated under an objective standard considering the totality of the circumstances.”¹¹⁸ While North Dakota “does not require officers to see a motorist violating a traffic law or to rule out potential innocent conduct,”¹¹⁹ officers are expected to base their inferences and deductions on their experience and training.¹²⁰ “When assessing reasonableness, [the court] considers

112. Brief of Nat’l Fraternal Order of Police as Amici Curiae Supporting Petitioner, *supra* note 110, at 6 (“Public safety is the number one goal for law enforcement, and the public is safer when police officers are permitted to briefly investigate potentially dangerous situations without fear of violating the Constitution.”).

113. *Id.* at 16.

114. *Id.* at 6.

115. *Kansas v. Glover*, 140 S. Ct. 1180, 1187-88 (2020).

116. The rule as described in *U.S. v. Williams*, 796 F.3d 951, 957 (8th Cir. 2015), seems to align fairly closely with *Kansas v. Glover*, 140 S. Ct. 1183 (2020).

117. *Gabel v. N.D. Dep’t of Transp.*, 2006 ND 178, ¶ 20, 720 N.W.2d 433 (Sandstrom, J., dissenting) (quoting *Lapp v. N.D. Dep’t of Transp.*, 2001 ND 140, ¶ 11, 632 N.W.2d 419). This standard sets boundaries very far apart on both ends of the spectrum for what is required by law enforcement. Having the standard phrased this way adds a lot of play for what an officer needs in order to be able to initiate a traffic stop without violating the U.S. Constitution. Other courts, such as the Eighth Circuit, have added the additional phrase that reasonable suspicion “falls considerably short of satisfying the preponderance of the evidence standard,” *Williams*, 796 F.3d at 957. This closes the gap between two extremes and gives a more precise rule that comports with *Glover*.

118. *State v. Rahier*, 2014 ND 153, ¶ 13, 849 N.W.2d 212.

119. *Gabel*, 2006 ND 178, ¶ 20.

120. *See State v. \$127,930 United States Currency*, 2017 ND 282, ¶ 9, 904 N.W.2d 307 (allowing an officer to use his experience and training to justify stopping a vehicle for excessive tint); *State v. Franzen*, 2010 ND 244, ¶ 12, 792 N.W.2d 533; *City of Fargo v. Ovind*, 1998 ND 69, ¶ 8, 575 N.W.2d 901.

inferences and deductions an investigating officer would make which may elude a layperson.”¹²¹

North Dakota’s standard is very similar to Kansas’ standard,¹²² which was reversed by *Glover* as being too strict.¹²³ Reasonable suspicion in North Dakota echoes the rule described by Justice Sotomayor in the dissents of *Glover* and *Heien*.¹²⁴ When reviewing future reasonable suspicion cases in North Dakota, courts “cannot reasonably demand scientific certainty ... where none exists.”¹²⁵ After all, the Fourth Amendment’s keystone is the requirement of reasonableness,¹²⁶ and “[t]o be reasonable is not to be perfect.”¹²⁷ So long as “the officer lacks information negating an inference,”¹²⁸ and draws on their experiences as a civilian or as an officer, the Fourth Amendment permits a brief investigatory traffic stop.¹²⁹ While North Dakota correctly states the significant role that “specialized training and experience routinely play in law enforcement investigations[.]”¹³⁰ the standard has been clarified by the U.S. Supreme Court that officers are allowed to draw on

121. *Ovind*, 1998 ND 69, ¶ 9; see *State v. Cook*, 2020 ND 69, ¶ 16, 940 N.W.2d 605; see also *State v. Hendrickson*, 2019 ND 183, ¶¶ 7-8, 931 N.W.2d 236.

122. *State v. Glover*, 422 P.3d 64, 67-68 (Kan. 2018) (“To have reasonable suspicion . . . ‘a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’ The suspicion must have a ‘particularized and objective basis’ and be something more than ‘an unparticularized suspicion or hunch.’ Although . . . the concept of reasonable suspicion is somewhat abstract, [the Supreme Court] has ‘deliberately avoided reducing it to a neat set of legal rules.’”) (citations omitted).

123. See *supra* Sections II.A., III.A.3.

124. Compare *Kansas v. Glover*, 140 S. Ct. 1183, 1194 (2020) (Sotomayor, J., dissenting) (“The State bears the burden of justifying a seizure. This requires the government to articulate factors supporting its reasonable suspicion, usually through a trained agent.”) (citations omitted), and *Heien v. North Carolina*, 574 U.S. 54, 73 (2014) (Sotomayor, dissenting) (“[O]ur enunciation of the reasonableness inquiry and our justification for it . . . have always turned on an officer’s factual conclusions and an officer’s expertise with respect to those factual conclusions”), with *State v. Morsette*, 2019 ND 84, ¶ 16, 924 N.W.2d 434 (“No testimony was elicited about [the officer’s] past success rate at identifying violations of the cell phone-us-while-driving law or any unique training he received enabling him to conclude the facts he observed amounted to violations of the law”), and *State v. Wills*, 2019 ND 176, ¶ 18, 930 N.W.2d 77 (“[T]he officer must articulate his or her training or experience and connect that . . . to activity in the case. Absent such articulation and connection . . . ‘training and experience’ fails to meet the legal standard because reasonable suspicion requires more than a ‘mere hunch.’”), but see *Glover*, 140 S. Ct. at 1189 (majority opinion) (“Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite”), and *Morsette*, 2019 ND 84, ¶ 21 (VandeWalle, C.J., dissenting) (“[R]easonable suspicion is more than a hunch but is surely a much lesser standard than proof beyond a reasonable doubt required for conviction and a lesser standard than probable cause required for arrest for an offense.”), and *Wills*, 2019 ND 176, ¶¶ 25-27 (McEvers, J., dissenting) (stating that reasonable suspicion should be viewed in totality of the circumstances, not in individual facts separately analyzed).

125. *Glover*, 140 S. Ct. at 1188 (citing *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

126. *Id.* at 1191; *Heien*, 574 U.S. at 60; *Riley v. California*, 573 U.S. 373, 381 (2014).

127. *Heien*, 574 U.S. at 60.

128. *Glover*, 140 S. Ct. at 1186.

129. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

130. *Glover*, 140 S. Ct. at 1190; see *State v. Wills*, 2019 ND 176, ¶ 18, 930 N.W.2d 77.

“commonsense judgments and inferences about human behavior.”¹³¹ These permissible judgments and inferences are outside of an officer’s training and experience.¹³²

B. DOES NORTH DAKOTA OFFER DIFFERENT PROTECTIONS THAN THE U.S. CONSTITUTION?

The United States is a system of dual sovereignty, which gives citizens the benefit of dual protections against overreaching state and local laws.¹³³ *Kansas v. Glover* gives the federal protections of the Fourth Amendment as they relate to reasonable suspicion.¹³⁴ However, the Fourth Amendment protections should be seen as the floor and not the ceiling of individual rights.¹³⁵ Because the North Dakota Constitution has its own protection against search and seizure,¹³⁶ there is the possibility that the state constitution gives more protection than the Fourth Amendment.¹³⁷ If that were the case, a higher bar for reasonable suspicion could exist under the North Dakota Constitution, and the reasonable suspicion analysis of the North Dakota Supreme Court could be current when viewed through the lens of article 1, section 8.¹³⁸ The North Dakota Constitution states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.¹³⁹

This section of the North Dakota Constitution has identical language to the Fourth Amendment with minor adjustments to punctuation.¹⁴⁰ Even though

131. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

132. *See Glover*, 140 S. Ct. at 1189.

133. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2 (2018).

134. *Glover*, 140 S. Ct. at 1187-88.

135. Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, 9 FEDERALIST SOC’Y REV. 51, 54 (2008) (“There is good reason for the Supreme Court to establish a floor for remedies for federal constitutional rights violations. On the other hand, there is no comparable justification for it to also establish a ceiling that state courts are not allowed to exceed.”).

136. N.D. CONST. art. I, § 8.

137. Transcript of Nomination Hearing for the Honorable Amy Coney Barrett (Day 3) Before the Senate Committee on the Judiciary, 2:46:14 (2020); *see also* Jerod Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95 N.D. L. REV. 417, 419-20 (2020) (stating that advocates often assume North Dakota’s Constitution offers the same protections as the U.S. Constitution).

138. N.D. CONST. art. 1, § 8.

139. *Id.*

140. U.S. CONST. amend. IV; *supra* Part II.

a court may look to the meaning conveyed by the punctuation of a provision,¹⁴¹ the North Dakota Supreme Court has historically treated article I, section 8 as offering the same protections as the Fourth Amendment.¹⁴² Although the Court has declined to “chart an independent course under Article 1, § 8 of the North Dakota Constitution for assessing probable cause to issue a search warrant[,]” it has not spoken specifically to the issues of reasonable suspicion as addressed in *Glover*.¹⁴³

C. THE NEED TO REVISIT *STATE V. MORSETTE*

Because the North Dakota Constitution gives the same protection as the Fourth Amendment,¹⁴⁴ and because North Dakota’s reasonable suspicion standard is similar to Kansas’ standard,¹⁴⁵ cases such as *State v. Morsette*, decided in 2019, have been called into question by *Glover*. While fairly decided at the time, the North Dakota Supreme Court should revisit reasonable suspicion post-*Glover* for reasons discussed in the dissents of *Morsette*¹⁴⁶ and *Wills*.¹⁴⁷ For example, the heightened reasonable suspicion standard used in *Morsette* made North Dakota’s hands-free cell phone law effectively impotent,¹⁴⁸ by removing law enforcement’s ability to enforce the law without first ruling out innocent conduct.¹⁴⁹ Under *Glover*, an officer who sees a person tapping their cell phone while driving might make a commonsense inference, based on their “judgments and inferences about human behavior” that the driver is texting and satisfy reasonable suspicion.¹⁵⁰ Reasonable suspicion would be an even more likely result if the officer knew that upwards of 35-45 percent of drivers admit to texting while driving.¹⁵¹

141. See, e.g., *Nw. Bell Tel. Co. v. Wentz*, 103 N.W.2d 245, 253-54 (N.D. 1960).

142. See e.g., *State v. West*, 2020 ND 74, ¶ 11, 941 N.W.2d 533 (“We interpret the North Dakota constitution as providing . . . the same protections from unreasonable searches as the United States Constitution provides.”); see also, *Beckler v. N.D. Workers Comp. Bureau*, 418 N.W.2d 770, 772-74 (N.D. 1988).

143. See *State v. Ringquist*, 433 N.W.2d 207, 212 (N.D. 1988) (declining to find different protections in the North Dakota constitution than the United States Constitution).

144. *West*, 2020 ND 74, ¶ 11.

145. See *supra* note 122.

146. *State v. Morsette*, 2019 ND 84, ¶ 21, 924 N.W.2d 434 (VandeWalle, C.J., dissenting).

147. *State v. Wills*, 2019 ND 176, ¶¶ 25-27, 930 N.W.2d 77 (McEvers, J., dissenting).

148. *Morsette*, 2019 ND 84, ¶ 16; see also Joseph Hackman, *Search and Seizure: Determining Probable Cause Relating to “Hands-Free” Laws*, 95 N.D. L. REV. 193, 202 (2020) (“The immediate impact on North Dakota drivers is the apparent unenforceability of section 39-08-23.”) (citing N.D. CENT. CODE § 39-08-23 (2019)).

149. *Morsette*, 2019 ND 84, ¶¶ 16, 18.

150. See *Kansas v. Glover*, 140 S. Ct. 1183, 1187-88 (2020).

151. *Surprising Facts About Distracted Driving*, AAALIVING <https://aaaliving.acg.aaa.com/auto/top-driving-distractions> (last visited Sept. 20, 2020).

V. CONCLUSION

Reasonable suspicion is a *very* low standard.¹⁵² While an officer must “articulate more than an ‘inchoate and unparticularized suspicion or “hunch” of criminal activity[.]’”¹⁵³ the level of suspicion needed is “*considerably less* than . . . preponderance of the evidence[.]”¹⁵⁴ Not only does *State v. Morsette* seem to be inconsistent with the majority opinion in *Glover*, but North Dakota courts might be unnecessarily suppressing evidence in other cases, as well.¹⁵⁵

When determining reasonable suspicion, an officer is allowed to not only draw on their experience and training, but also their life experiences.¹⁵⁶ An officer in North Dakota should not have to ignore commonsense inferences drawn from every day experiences simply because they are wearing a uniform.¹⁵⁷ North Dakota, much like Kansas, must reevaluate its reasonable suspicion standard in light of *Glover*.

*W. Logan Caldwell**

152. *See Glover*, 140 S. Ct. at 1187-88.

153. *Id.* at 1194 (Sotomayor, J., dissenting) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000)).

154. *Id.* at 1187 (majority opinion) (emphasis added); *Gabel v. N.D. Dep’t of Transp.*, 2006 ND 178, ¶ 20, 720 N.W.2d 433 (stating the standard is less than probable cause).

155. *See, e.g., State v. Cook*, 2020 ND 69, ¶ 17, 940 N.W.2d 605; *see also State v. Wills*, 2019 ND 176, ¶¶ 18-19, 930 N.W.2d 77.

156. *Glover*, 140 S. Ct. at 1189.

157. *Id.*; *see State v. Wills*, 2019 ND 176, ¶ 18, 930 N.W.2d 77.

* 2021 J.D. Candidate at the University of North Dakota School of Law. I would like to thank my wife, Annika Caldwell, for her unwavering support and patience. She is the true embodiment of a Proverbs 31 woman. Also, thank you my undergraduate advisor, Dr. Michelle Solensky, PhD, who sparked a curiosity in me that serves me well to this day. I also would like to thank Dean Michael McGinniss for his advice and mentorship throughout my three years at the University of North Dakota School of Law. Finally, I want to thank my friends and colleagues on the North Dakota Law Review for their advice and assistance in the editing process.