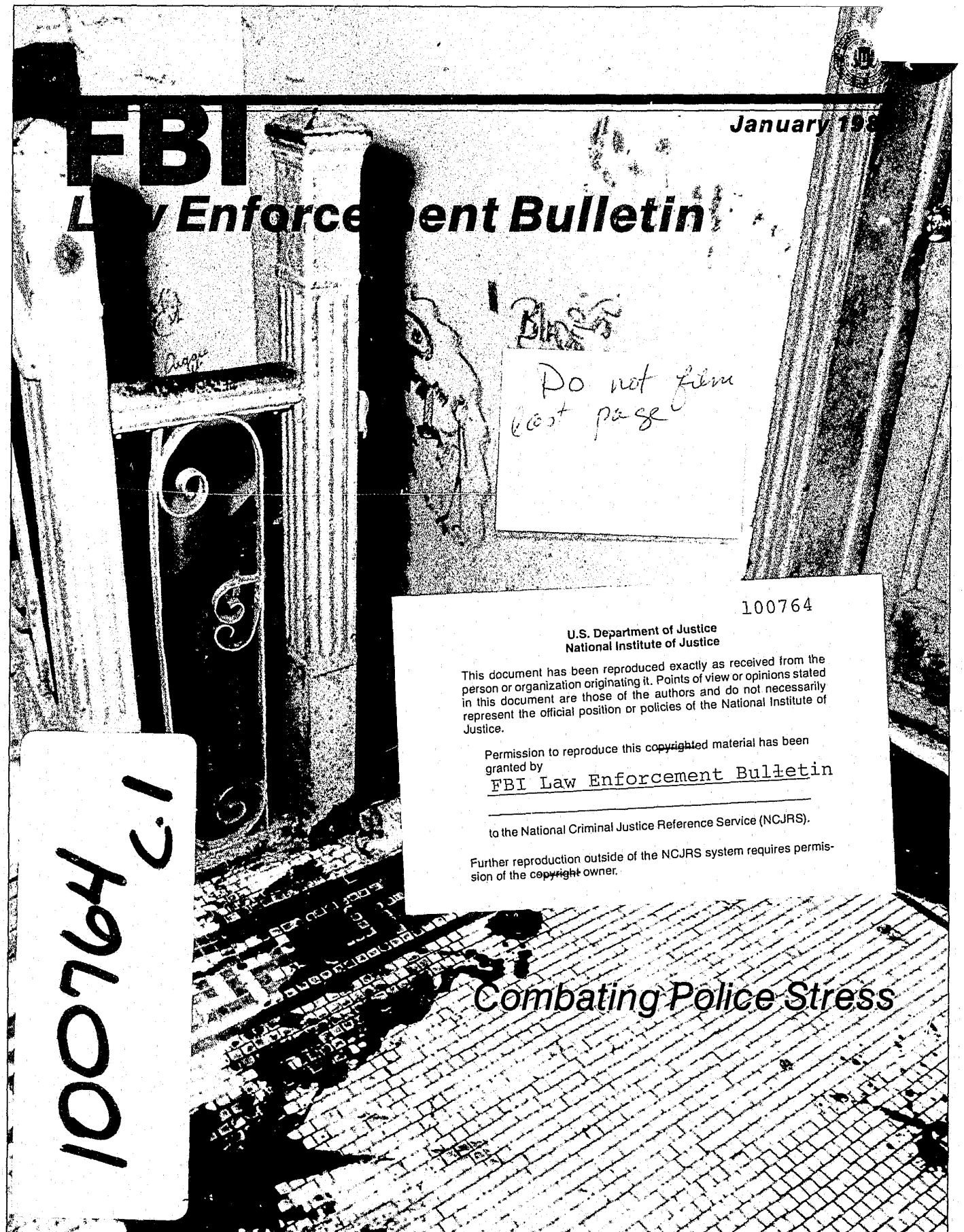

FBI Law Enforcement Bulletin

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Combating Police Stress

Contents

January 1986, Volume 55, Number 1

The Cover:
Police stress is a serious occupational malady which, if left unchecked, can be devastating to the officer and the department. See article p. 1.

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Investigative Detention

An Intermediate Response

(Conclusion)

"...the Court constitutionalized the investigative stop and the attendant frisk as an intermediate police response between inaction and overreaction."

By
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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

THE FRISK

Apart from the justification for initiating an investigative stop, clearly the most litigated issue in the area of investigative detention is the conduct and scope of a frisk. Indeed, the landmark case of *Terry* v. *Ohio*[85] focused on the authority of an officer to conduct a frisk because it was the frisk of the suspects which discovered the guns and gave the officer probable cause to arrest. The Supreme Court held:

> "... where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot and that the person with whom he is dealing may be armed and presently dangerous ... 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."[86]

The authority of officers to conduct a frisk is generally challenged by defendants in criminal cases for the simple reason that the frisk—as in *Terry*—uncovers weapons or other evidence of crime which the defendants seek to suppress. There are two general arguments: (1) There was no justification to conduct the frisk, or (2) the frisk extended beyond the permissible scope.

Justification for the Frisk

The Supreme Court has characterized the frisk as a fourth amendment search, because "even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security...."[87] On the other hand, the Court has recognized that "there must be narrowly drawn authority to permit a reasonable search for weapons for the protection of the officer ... regardless of whether he has probable cause to arrest the individual for a crime."[88]

Just as an investigative stop must be supported by articulable facts which establish reasonable suspicion that criminal activity is afoot, a frisk must be supported by reasonable suspicion to believe that the individual who has been lawfully stopped is "armed and dangerous."[89] As with the reasonable suspicion to make an investigative stop, the reasonable suspicion to conduct a frisk may be based on facts derived from either firsthand knowledge or secondhand information and the logical inferences which an experi-

Special Agent Hall

enced officer is allowed to draw from those facts—i.e., the totality of the circumstances.

However, the justification for a stop is not necessarily justification for a frisk, and in each case, an officer conducting a frisk must be prepared to point to the specific and articulable facts which justified that particular intrusion.

For example, in *Ybarra* v. *Illinois*,[90] police officers had obtained a search warrant for a tavern based on reliable informant information that the bartender was selling tinfoil packets of heroin. When the officers arrived at the tavern to execute the warrant, there were several customers present, including Ybarra. The officers immediately conducted a pat-down search of the customers for weapons. The officer who frisked Ybarra felt what he described as "a cigarette pack with objects in it." After frisking the remaining customers, the officer returned to Ybarra and removed from his pants pocket what turned out to be a cigarette pack containing six tinfoil packets of heroin. The prosecution offered several arguments to support the discovery of the heroin, including the two-pronged argument that the officer was entitled to frisk Ybarra for weapons under the *Terry* doctrine and that the frisk yielded probable cause to believe that Ybarra possessed narcotics justifying the seizure and search of the cigarette pack. The Supreme Court did not address the second prong because the initial frisk of Ybarra "was simply not supported by a reasonable belief that he was armed and presently dangerous...."[91] The Court noted several factors which were significant:

(1) When the officers entered the tavern, there was sufficient lighting to observe those present;
(2) The police did not recognize Ybarra as a person with a criminal history or as one who might be inclined to assault them;
(3) Ybarra's hands were empty and he gave no indication of possessing a weapon; and
(4) Ybarra was not acting in a threatening manner.

Balanced against these factors, the Court ruled that "the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous."[92] The Court concluded:

> "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons. The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked...."[93]

Undoubtedly, the *Ybarra* decision reflects the fact that Ybarra was in a public place along with other customers at the time he was subjected to the frisk. The case does not preclude the possibility that police may be justified in frisking people located on the premises where a search warrant is being executed. Clearly, such action would be justified so long as the officers can point to specific factors which caused them to reasonably suspect that the person frisked was armed.

"...an officer conducting a frisk must be prepared to point to the specific and articulable facts which justified that particular intrusion."

The factors which suggest the presence of danger to an officer are immeasurable. But it can be instructive to consider some of those which have been approved by the courts.

Specific Information

It is difficult to imagine a stronger indication of danger to an officer than specific information derived from witnesses or other reliable sources that a person is armed. In *Adams* v. *Williams*,[94] the Supreme Court upheld the frisk of a person by an officer who had just received information from a reliable informant that the suspect possessed narcotics and had a gun in his waistband. Following a review of the factors justifying the officer's reliance on the hearsay information received from the informant, the Court reasoned:

> "Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable."[95]

Suspicious Bulges

A second factor which may justify a protective frisk is the observation of a suspicious bulge in the suspect's clothing. In *Pennsylvania* v. *Mimms*,[96] officers stopped an automobile with an expired license plate and ordered the operator to exit the vehicle. When Mimms got out of the car, one of the officers observed a "large bulge" under his sports jacket. The officer frisked Mimms and discovered a loaded revolver in his waistband.

After considering and upholding the authority of the officers to order Mimms out of the car, the Supreme Court considered the validity of the frisk, which was triggered by the officer's observation of the suspicious bulge:

> "The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat-down.'"[97]

It is interesting to note that in the *Mimms* case, the facts which justified the initial stop did not suggest the presence of weapons or any threat to the officers. The observation of the suspicious bulge in Mimms' clothing was sufficient by itself to justify the frisk.

Nature of Suspected Criminal Activity

Although the reasonable suspicion which justifies a stop does not automatically justify a frisk, in some instances the very nature of the suspected criminal activity may suggest the presence of weapons. A good example is *Terry* v. *Ohio*,[98] where the Supreme Court upheld the frisk of three men suspected of planning to commit a store robbery. The Court held that the actions of the three men were consistent with the officer's hypothesis that they were contemplating a robbery, "which, it is reasonable to assume, would be likely to involve the use of weapons."[99] Thus, the reasonable suspicion supported not only the belief that criminal activity was afoot but also that those engaged in that activity were armed and dangerous. Clearly, officers would be justified in conducting a frisk of a person suspected of involvement in criminal activity which ordinarily involves the use or threatened use of weapons. The presence of weapons may be reasonably inferred from the nature of the criminal activity.

More difficult issues arise when the suspected criminal activity does not—standing alone—support a reasonable presumption that weapons are present. It is not sufficient for the officers to simply point to the seriousness of the criminal activity. For example, the courts have declined to adopt as a general premise that those who deal in narcotics are armed and dangerous, notwithstanding the conceded seriousness of the crime and the fact that narcotics offenders are in fact often armed and violent.[100] In those instances, officers must be capable of factually supporting their suspicions that a suspect is armed. The reasonableness of those suspicions may be supported by the officer's prior experiences in investigating similar types of activity,[101] as well as the officer's personal observations of the suspect and his demeanor, but will not be presumed simply because of the seriousness of the suspected criminal activity.

Discovery of Weapons

When officers observe a weapon in the vicinity of one who has been lawfully stopped, they may reasonably suspect that other weapons are present which pose a threat.

In the recent case of *Michigan* v. *Long*,[102] police officers conducted a frisk after observing a large hunting knife on the floorboard of an automobile, the operator of which appeared to

"...officers would be justified in conducting a frisk of a person suspected of involvement in criminal activity which ordinarily involves the use or threatened use of weapons."

be under the influence of some intoxicant. In evaluating the officers' actions, the Supreme Court noted:

(1) The hour was late;
(2) The area was rural and isolated;
(3) The individual being investigated appeared to be under the influence of some intoxicant; and
(4) The officers conducted the frisk only after they observed a large hunting knife in the interior of the car.

The Court reasoned that it was not unreasonable for the officers to take "preventive measures to ensure that there were *no other weapons* within Long's grasp before permitting him to reenter his automobile."[103]

In such cases, it is irrelevant that the weapons observed may be lawfully possessed by the suspect. As the Court has explained:

> "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon, violated any applicable state law."[104]

Various other factors have been considered by the courts as significant in justifying a frisk, including the officer's prior expertise with a suspect,[105] extreme nervousness of the suspect,[106] or furtive gestures or movements.[107] An officer must be able to recognize and articulate in a given case the reasons for suspecting that weapons are present, and then, he may conduct a weapons search *limited in scope* to this protective purpose.[108]

Scope of the Frisk

The frisk of a person, though lawful at its inception, may nevertheless offend the fourth amendment if the police action exceeds the boundaries necessary to accomplish its purposes. The sole object of a frisk is to determine whether a weapon is present and to neutralize the threat of physical harm to the officer and others. Two issues are significant: The *breadth* of the frisk, i.e, now *extensive* an area may be searched, and how *intensive* may the search be within that area.

Breadth of the Frisk

The decision in *Terry* v. *Ohio* made it clear that a person suspected of possession of a weapon may be subjected to a frisk. The facts in *Terry* did not require the Court to go beyond the issue of frisking the person, and in fact, the Court specifically noted that limitations with respect to the scope of the frisk would best be developed "in the concrete factual circumstances of individual cases."[109]

In two cases after *Terry,* the Court approved what may be described as limited extensions of the protective frisk where the safety of police officers was at stake. In *Pennsylvania* v. *Mimms,*[110] the Court held that police may order persons out of lawfully stopped automobiles and may frisk them if there is reasonable suspicion to believe they are armed. Although the *Mimms* decision did not reduce the standard of justification for a frisk, it approved an incremental increase in the control the officer could exercise over the detainee. The Court reached its decision by balancing the fourth amendment interests of the person who is already lawfully detained against the legitimate need for protecting police officers engaged in automobile stops. Recognizing the "inordinate risk confronting an officer as he approaches a person seated in an automobile..."[111] the Court concluded that any additional intrusion occasioned by the action of ordering that person out of the vehicle is *de minimus.* In *Adams* v. *Williams,*[112] the Court approved the action of an officer who, acting on an informant's tip that the suspect possessed narcotics and had a gun in his waistband, reached into an automobile and removed the offending weapon without so much as a preliminary pat-down. Although neither of the two cases specifically broadened the scope of a frisk, each demonstrated a sensitivity on the part of the Court to the risks which confront law enforcement officers engaged in investigative detentions.

The Court squarely confronted the issue in the recent case of *Michigan* v. *Long.*[113] Police officers on patrol at night in a rural area observed a car speeding and driving erratically. When the car turned onto a side road and swerved into a ditch, the officers approached it to investigate. By the time the officers reached the car the only occupant, Long, had exited the vehicle, leaving the driver's door open. Long did not respond initially to a request for his operator's license, but complied when the request was repeated. When one of the officers asked for the vehicle registration, Long again did not respond until the request was repeated, and then he turned from the officers and walked back toward the open door of the vehicle. (One of the officers later testified that Long appeared to be under the influence of some intoxicant.) Through the open door of the car the officers observed a large hunting knife on the floorboard of

the driver's side. Long was immediately subjected to a frisk which revealed no weapons, and one of the officers shined his flashlight into the interior of the car where he observed something protruding from beneath the armrest of the front seat. Closer examination disclosed that the object was an open pouch containing what appeared to be marijuana. Long was then arrested, and a further search of the car revealed 75 pounds of marijuana in the trunk. The Michigan Supreme Court reversed Long's conviction for possession of marijuana on the grounds that the search of the interior of the car could not be justified as a protective search for weapons, and the remaining evidence was discovered as a result of the initial fourth amendment violation.

In reversing the decision of the Michigan court, the Supreme Court defined the issue as "the authority of a police officer to protect himself by conducting a Terry-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle."[114]

Referring to earlier decisions which had given deference to the needs of law enforcement officers to protect themselves while engaged in investigative detentions,[115] as well as full blown arrests,[116] the Court ruled that the case law supports the principle that threats to the police may arise from the possible presence of weapons in the "*area surrounding* a suspect,"[117] as well as on the person.

Accordingly, the Court concluded:

> "...the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief ... that the suspect is dangerous and the suspect may gain immediate control of weapons."[118]

In reaching its conclusion, the Court rejected the apparent assumption of the State court that Long was effectively under control of the officers, and therefore, could not gain access to any weapon that might be in the car. The Court gave three reasons for its view that the need for the weapons search continues:

(1) The suspect, even though detained, may nevertheless break away from police control and retrieve a weapon;
(2) If the suspect is not under arrest, he will eventually be permitted to reenter his automobile where he will then have access to any weapons inside; and
(3) Even during the course of the detention, the suspect may be allowed to reenter the vehicle before the investigative detention has been concluded.

In either case, the officer remains vulnerable to the threat posed by the possible presence of weapons, and the fact that the suspect is not under a full custodial arrest heightens that risk.

The *Long* decision is an interesting case for at least three reasons. First, it represents an effort by the Court to establish a bright-line rule to govern situations where an officer has to make a "quick decision as to how to protect himself and others from possible danger."[119] Second, it significantly—and logically—expands the scope of the frisk for weapons as originally enunciated in the *Terry* case and recognizes that "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed."[120] Accordingly, the frisk for weapons may extend into the area surrounding the suspect. And third, the decision recognizes the authority of the police to seize evidence or contraband other than weapons lawfully discovered during a valid frisk. The Court held:

> "If while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances."[121]

Implicit in the *Long* decision is the authority to examine the contents of any containers within the area of the suspect, or within the passenger compartment of his vehicle, capable of containing weapons. Presumably that authority would not extend to locked containers where immediate access to weapons would not exist, but the issue remains unresolved.

Although the permissible breadth of the frisk has now been defined by the Supreme Court, there remains the issue of the permissible *intensity* of the frisk within that area.

Intensity of the Frisk

Because the sole object of a frisk is to locate weapons, the intrusion must be strictly limited to accomplish that object, and no more. A lawfully initiated frisk is unlikely to generate a challenge to the intensity of the frisk if a weapon was in fact located. The issue is more likely to arise when an officer conducts a frisk for weapons and discovers other items of evidence or contraband. As noted in the *Long* deci-

"...law enforcement officers [should] limit the intensity of a frisk for weapons to the level necessary to accomplish the purpose for which it is intended."

sion, the evidence or contraband thus discovered will be admissible if the frisk did not exceed permissible bounds; however, the defense may contend that the officer went further than reasonably necessary to assure that no weapons were present.

In *United States* v. *Vaughan*,[122] narcotics task force agents stopped several suspects during the course of a narcotics investigation. One of the suspects, Vaughan, was carrying a vinyl briefcase which was seized by one of the agents and opened, disclosing some documentary evidence of a drug smuggling operation. One of the issues raised by the defendant was the opening of the briefcase by the agent. The Federal appellate court sustained the trial court's suppression of the evidence. In response to the Government's assertion that the search was justified as a protective frisk, the court stated that "the agents could have felt the briefcase without opening it to see if any weapons were in it and that the opening of the case to search further was not justified."[123] In the court's view, the briefcase was sufficiently soft and thin that any weapons could have been felt through the cover. In simple terms, the frisk was justified at its inception, but the agent went further than necessary to accomplish his purpose.

A similar issue arises when a law enforcement officer pats down a suspect for weapons and removes other evidence or contraband instead. There are two possible justifications for the seizure of the items.

First, the officer may be able to satisfy a reviewing court that he reasonably believed that the object he felt during the pat-down could have been a weapon of some type. In considering this argument, it should be remembered that the Supreme Court has held that the validity of the frisk is not dependent upon whether a weapon is possessed legally under State law. Therefore, the officer is not limited to checking only those objects ordinarily covered by concealed weapons statutes (e.g., firearms). An unidentified object which could reasonably be used as a weapon against the officer can and should be removed from the suspect. If the object turns out to be evidence or contraband—rather than a weapon—the admissibility of that evidence in any subsequent prosecution will depend on the ability of the officer to articulate his reasons for believing the object he felt could have been a weapon of some type warranting closer examination.[124]

The alternative justification for the seizure is a probable cause argument: Assuming the officer was justified in conducting a frisk for weapons, what he perceived through the sense of touch established probable cause to believe the suspect possessed evidence or contraband. The Supreme Court has never addressed this issue, but the concept is consistent with the general principle that probable cause may be based on the sensory perception of an officer as interpreted in light of his knowledge and experience.

In *Ybarra* v. *Illinois*,[125] an officer engaged in executing a search warrant for heroin at a tavern removed a cigarette pack containing heroin from a customer who was being frisked for weapons. The State did not seek to justify the seizure by contending that the officer thought the object he felt was a weapon. Rather, the State contended that given the officer's knowledge of the nature of the evidence described in the warrant, the pat-down yielded probable cause to believe Ybarra was carrying narcotics. The Supreme Court did not reach that issue because it considered that frisk unjustified at its inception because there was no reasonable suspicion to believe Ybarra was armed. However, there is no logical basis for believing that the Court would not accept the concept that objects *felt*, or otherwise perceived, during the course of a valid frisk can establish the probable cause necessary to extend the intrusion.

The important lesson for law enforcement officers is to limit the intensity of a frisk for weapons to the level necessary to accomplish the purpose for which it is intended. As the Supreme Court stated in *Terry* v. *Ohio:*

> "... a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope."[126]

CONCLUSION

Terry v. *Ohio* and its progeny do not create a new category of searches and seizures. Undoubtedly, from the earliest days of our country, law enforcement officers have conducted brief stops of individuals to investigate suspicious activities, not because there was some specific statutory or constitutional language authorizing it, but because common sense suggested that it was a normal part of their duties to detect and prevent crime. The *Terry* case did two things: (1) It recognized that even apart from an arrest, police action which deprives a person of his freedom of movement—however temporary—is governed by the fourth amendment's pro-

scription against unreasonable searches and seizures; and (2) it recognized that in appropriate circumstances, such activities can be reasonable, even in the absence of probable cause to arrest. In short, the Court constitutionalized the investigative stop and the attendant frisk as an intermediate police response between inaction and overreaction.

The reasonableness standard which governs every aspect of an investigative detention reflects the need for flexibility in graduating police responses to the demands of any particular situation; but responsibility is the ever-present companion to authority, and that same flexibility imposes a heavy burden on law enforcement officers to tailor their actions to the circumstances of each case.

The Constitution does not require a police officer confronted with possible criminal activity to choose between the two alternatives of making an arrest (when probable cause may be absent) or walking away (allowing a crime to occur or a criminal to escape). The investigative detention doctrine provides an *intermediate response* which, in the appropriate circumstances, constitutes the "essence of good police work."[127] FBI

Footnotes

[85]392 U.S. 1 (1968).
[86]*Id.* at 30–31.
[87]*Id.* at 24–25.
[88]*Id.* at 27.
[89]*Id.* at 24. *See also, Sibron* v. *New York*, 392 U.S. 40 (1968).
[90]444 U.S. 85 (1979).
[91]*Id.* at 92–93.
[92]*Id.* at 93.
[93]*Id.* at 93–94.
[94]407 U.S. 143 (1972).
[95]*Id.* at 148.
[96]*Supra* note 72.
[97]*Id.* at 338.
[98]392 U.S. 1 (1968).
[99]*Id.* at 28.
[100]*See, e.g., United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977); *United States* v. *Ceballos*, 654 F.2d 177 (2d Cir. 1981).
[101]*See, e.g., United States* v. *DelToro*, 464 F.2d 520 (2d Cir. 1972).
[102]77 L.Ed.2d 1201 (1983).
[103]*Id.* at 1221.
[104]*Supra* note 94, at 146.
[105]*See, e.g., United States* v. *Romero*, 692 F.2d 699 (10th Cir. 1983).
[106]*See, e.g., United States* v. *Pajari*, 715 F.2d 1378 (8th Cir. 1984).
[107]*Id.*
[108]*Supra* note 94, at 146.
[109]*Supra* note 85, at 29.
[110]434 U.S. 106 (1977).
[111]*Id.* at 110.
[112]*Supra* note 94.
[113]77 L.Ed.2d 1201 (1983).
[114]*Id.* at 1212.
[115]*Michigan* v. *Summers*, 452 U.S. 692 (1981); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *Adams* v. *Williams*, 407 U.S. 143 (1972).
[116]Chimel v. California, 395 U.S. 752 (1969); *New York* v. *Belton*, 453 U.S. 454 (1981).
[117]*Supra* note 113, at 1220.
[118]*Id.*
[119]*Id.* at 1222.
[120]*Id.* at 1219.
[121]*Supra* note 113, at 1220.
[122]718 F.2d 332 (9th Cir. 1983).
[123]*Id.* at 335.
[124]*See United States* v. *DelToro*, 464 F.2d 520 (2d Cir. 1972), (the court declined to credit the officer's explanation that he removed a folded $10 bill containing cocaine from a suspect because he thought it was a razor blade).
[125]444 U.S. 85 (1979).
[126]*Supra* note 85, at 18.
[127]*Adams* v. *Williams*, 407 U.S. 143, at 145 (1972).

Cross Keys

Officials at a Pennsylvania correctional institution discovered a handmade cross hanging around the neck of an inmate. The cross was fashioned using two handcuff keys and a leg iron key, as shown.

(Submitted by the Pennsylvania Department of Corrections)