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# Criminal Procedure -- Search and Seizure -- The Permissible Scope of a Frisk

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obligor resides.<sup>58</sup> Such an election provides the wife with a forum-shopping opportunity. To combat this result, the Act was amended in 1952 to provide that the only applicable law is that of the state where the obligor was present during the period for which support is sought.<sup>59</sup> The amended version, while destroying the opportunity of the wife to forum shop, allows the husband to shop for a favorable state in which to reside.

The states operating under this amended version and at the same time affording a spouse no survival of support<sup>60</sup> face a dilemma. If they follow the Act and revert to the support law of their jurisdiction, the wife has no right to survival of support—their own laws terminate it. In such a situation, they may resort to the normal conflicts rule and find that the wife is afforded the right of survival under the law of her domicile. But what if the laws of her domicile likewise terminate her right to survival? The wife may then find herself without a remedy, and once again matrimonial law is found in its familiar state of frustration. In order to solve this problem, it would be beneficial if the National Conference of Commissioners on Uniform State Laws recommended legislation to insure uniform survival of support in the form of an amendment to the URESA.

Since the present language of the URESA affords the husband an opportunity to forum shop, the Commissioners would also do well to amend section seven to give the courts—not the obligee—the power of election in order that they may exercise discretion in applying either the law of the jurisdiction where the obligee resided when the failure of support commenced or the law of their own jurisdiction.<sup>61</sup>

JOSEPH E. ELROD III

### **Criminal Procedure—Search and Seizure—The Permissible Scope of a Frisk**

Antagonism between the police and the judiciary is perhaps an inevitable outcome . . . of the different interests residing in the police as a specialized agency and the judiciary as a representative of wider community interests. Constitutional guarantees of due process of law do make the working life and conditions of the police more diffi-

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<sup>58</sup> R.I. GEN. LAWS ANN. § 15-11-13 (1956). See note 54 *supra*.

<sup>59</sup> For a list of the states which adopted the 1952 amendment see 9C UNIFORM LAWS ANN. (Supp. 1967).

<sup>60</sup> See note 31 *supra*.

<sup>61</sup> This solution has been suggested previously. See Note, 44 TEXAS L. REV. 814, 818-19 (1966).

cult. But if such guarantees did not exist, the police would of course engage in activities promoting self-serving ends, as does any agency when offered such freedom in a situation of conflicting goals. Every administrative agency tends to support policies permitting it to present itself favorably. Regulative bodies restricting such policies are inevitably viewed with hostility by the regulated. Indeed, when some hostility does not exist, the regulators may be assumed to have been "captured" by the regulated. If the police could, in this sense, 'capture' the judiciary, the resulting system would truly be suggestive of a "police state."<sup>1</sup>

Thus does Jerome Skolnick view the importance of regulating police behavior. One police practice that in the eyes of some has "captured" the judiciary is the "stop and frisk" search of a suspect. The Supreme Court granted this practice limited legitimacy in *Terry v. Ohio*.<sup>2</sup> This note will explore the permissible bounds of a frisk, particularly in light of the evidentiary limitation announced recently by the Ninth Circuit Court of Appeals in *Tinney v. Wilson*.<sup>3</sup>

The fourth amendment to the Constitution was enacted in response to abusive and unrestrained official searches in colonial America<sup>4</sup> when officers acting under general warrants known as "writs of assistance" had unlimited power to search for smuggled goods.<sup>5</sup> The amendment<sup>6</sup> divides conveniently into two sections, one containing the basic safeguard against unreasonable searches and seizures, the other dealing with the requirements for issuance of a warrant. The difficulty concerns the proper relationship between the two sections.<sup>7</sup> If a search is conducted under authority of a warrant, can it be unreasonable? And, more importantly, can

<sup>1</sup> J. SKOLNICK, JUSTICE WITHOUT TRIAL 229 (1966).

<sup>2</sup> 392 U.S. 1 (1968).

<sup>3</sup> 408 F.2d 912 (9th Cir. 1969).

<sup>4</sup> *Chimel v. California*, 395 U.S. 752, 761 (1969).

<sup>5</sup> D. REISIG, SEARCHES AND SEIZURES HANDBOOK 58 (1968). For a complete history of conditions leading up to the adoption of the fourth amendment, see J. LANDYSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19-49 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-105 (1937); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 396-98 (1963) [hereinafter cited as Leagre].

<sup>6</sup> 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.

U.S. CONST. amend. IV.

<sup>7</sup> For five possible interpretations of how the two sections are related, see Leagre 398-99.

a search conducted without a warrant *and* without probable cause ever be reasonable?

The Supreme Court has held that the Constitution does not forbid all searches, but only unreasonable ones.<sup>8</sup> Originally, the Court defined a reasonable search as one occurring under authority of a search warrant.<sup>9</sup> This requirement has been waived in those exceptional situations where it is impossible to get a warrant and still make the search, as when dealing with moving vehicles,<sup>10</sup> when the police are in hot pursuit,<sup>11</sup> or when objects are in plain view of an officer making an arrest.<sup>12</sup>

The Court later developed the principle that when a police officer makes a valid arrest, a search of the accused and the area under his immediate control is reasonable.<sup>13</sup> The search "incident to an arrest" has come to be one of the most prevalent forms of search.<sup>14</sup> Throughout the development of the incident-search doctrine remained the requirement that there be probable cause.<sup>15</sup> Furthermore, the Court continued to stress the importance of the search warrant by requiring its use whenever possible.<sup>16</sup>

Then, in *Camara v. Municipal Court*,<sup>17</sup> the Court announced that an

<sup>8</sup> *Elkins v. United States*, 364 U.S. 206, 222 (1960). See also *Boyd v. United States*, 116 U.S. 616 (1886), which held that the fourth and fifth amendments must be considered together in determining the reasonableness of a search:

For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned by the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment.

*Id.* at 633.

<sup>9</sup> See *Jones v. United States*, 357 U.S. 493 (1958).

<sup>10</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>11</sup> *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

<sup>12</sup> *Harris v. United States*, 390 U.S. 234 (1968).

<sup>13</sup> *Harris v. United States*, 331 U.S. 145 (1947). For the historical development of the doctrine of searches incident to arrest and its present limitations, see *Chimel v. California*, 395 U.S. 752 (1969).

<sup>14</sup> Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433, 435 (1969).

<sup>15</sup> See *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307, 314 (1959). A representative definition of probable cause is:

Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

*Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

<sup>16</sup> *Katz v. United States*, 389 U.S. 347, 351, 353 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

<sup>17</sup> 387 U.S. 523 (1967).

investigatory search in a criminal prosecution requires more justification to be reasonable than a "search" that is merely an administrative inspection. No longer would the reasonableness of a search be determined solely by the presence of probable cause. Instead, the process was inverted: The Court first looked to see whether the search had been a reasonable one; then, having deemed it such, it declared that there was probable cause for a warrant to be issued. This concept, which some commentators have denominated the "variable probable cause" standard,<sup>18</sup> means that the quantum of evidence a police officer needs for probable cause will vary indirectly with the reasonableness of the search that he intends to make. The reasonableness of the search is determined by balancing the government's need for the particular search against the individual's interest in his privacy. As the degree of police intrusion increases, more probable cause must be shown in justification; stated otherwise, the greater the intrusion, the less reasonable the search.<sup>19</sup>

The Supreme Court balanced interests recently in *Terry v. Ohio*<sup>20</sup> and held that a police officer with a "reasonable suspicion"<sup>21</sup> that an individual is engaging in criminal activity can stop him for questioning and, if the policeman reasonably believes that the individual is armed and presently dangerous, may lawfully "make a carefully limited search of the suspect's outer clothing for weapons and any weapons found will be admissible in evidence."<sup>22</sup> However, the search must be reasonable not only at its inception, but throughout.<sup>23</sup>

*Terry* dealt with the on-the-street detention of the suspect and a companion, who had been observed pacing back and forth in front of a store. The observing police officer believed they were "casing" the store for a

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<sup>18</sup> La Fave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 55 (1968); Note, 78 YALE L.J., *supra* note 14, at 438.

<sup>19</sup> See *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967); *United States v. Clark*, 289 F. Supp. 610 (E.D. Pa. 1968).

<sup>20</sup> 392 U.S. 1 (1968). The Court there said, "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" *Id.* at 21, quoting from *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

<sup>21</sup> Reasonable suspicion is a quantum of evidence less than probable cause. The difference between probable cause and reasonable grounds to stop a person, according to Justice Harlan, is that "reasonable grounds to stop do not depend on any degree of likelihood that a crime has been committed." *Sibron v. New York*, 392 U.S. 40, 78 (1968) (concurring opinion).

<sup>22</sup> Note, *Constitutional Law—Search and Seizure—Police may Conduct Limited Search for Weapons in Course of Field Investigation Without Probable Cause for Arrest*, 21 VAND. L. REV. 1109, 1110 (1968).

<sup>23</sup> *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

robbery and tried to question them. When he received no response, he frisked them for weapons and found a revolver in Terry's overcoat pocket. Terry was arrested and convicted of carrying a concealed weapon. The conviction was affirmed by the Supreme Court for the reasons given above.

Handed down the same day as *Terry* were *Sibron v. New York*<sup>24</sup> and *Peters v. New York*,<sup>25</sup> two cases in which the Court attempted to clarify its position. *Sibron*, while loitering outside a restaurant, was observed by a police officer to have met and talked with several known drug addicts. After *Sibron* entered the restaurant and ate a meal, the police officer told him to come outside; once there, he said to *Sibron*, "You know what I am after." When *Sibron* mumbled and reached for his pocket, the officer thrust his hand into the same pocket and discovered several packets of heroin, which he seized. The Supreme Court ruled that this evidence must be excluded from trial since the police officer had neither probable cause for an arrest (thus there could be no incident search) nor a reasonable suspicion that *Sibron* was committing a crime or was armed and dangerous (thus under the principles laid down in *Terry* there could be no frisk). The Court made clear in *Sibron* that a frisk must be used only for the protection of the officer and not as a method for gathering evidence when the police have less than probable cause.

In *Peters*, police officer Lasky heard a noise at his apartment door but was unable to investigate because he received a telephone call. After the call, he looked through a peephole in his door and saw *Peters* and a companion tiptoeing out of the alcove toward the stairway. Believing that the two were attempting a burglary, he dressed, got his revolver, and gave chase. He caught *Peters* on the stairs below but was unable to catch the other man. *Peters* said that he was visiting a girl friend but refused to name her. At this point officer Lasky patted *Peters* down for weapons and discovered a hard object, which he thought might be a knife. He removed the object from *Peters*' pocket and found that it was a plastic envelope containing burglar tools. The Supreme Court found that officer Lasky had probable cause to arrest *Peters* by the time he caught him on the stairs, and it did not need to apply the *Terry* frisk rule. The

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<sup>24</sup> 392 U.S. 40 (1968).

<sup>25</sup> *Id.* *Peters* is reported within the *Sibron* opinion. Hereinafter when *Peters* is referred to it will be designated: *Sibron v. New York*, 392 U.S. 40 (1968) (*Peters*).

burglar tools were properly admitted into evidence since they were seized lawfully in a search incident to an arrest.

Left unresolved in the *Terry* trilogy was the scope of intrusion constitutionally permissible in a frisk. The Ninth Circuit Court of Appeals attempted to provide the answer in *Tinney v. Wilson*.<sup>26</sup> On the night of April 17, 1965, police officer McGill was approached by a prostitute. She arranged to engage in an act of prostitution with him at a nearby location if a second girl could follow in another car as a lookout. The second girl got her car and followed them to a parking lot, where, unknown to the girls, McGill's partner waited. There officer McGill arrested the first girl for prostitution. The two officers then proceeded to the second car where they observed Tinney lying on the back seat. The officers asked Tinney to get out and frisked him for weapons. Officer McGill testified that he thought that Tinney was in a position to rob him had he driven into the alley where he and the girl had agreed to go. During the frisk, officer McGill felt what he thought were pills in Tinney's pocket. He asked the defendant what they were, and Tinney replied that they were "nerve pills." Officer McGill advised the defendant of his right to remain silent and then asked if he had a prescription for the pills. Tinney answered that he did not. McGill removed the seconal pills from the defendant's pocket, placed him under arrest, handcuffed him, and then made a more complete search, during which he found a marijuana cigarette.

The trial court admitted the cigarette in evidence, and Tinney was convicted for possession of marijuana. The California Supreme Court affirmed the conviction on the theory that his evidence was the result of a search incident to a lawful arrest. It held that there was probable cause for the arrest when the police officer felt the pills in Tinney's pocket and Tinney said that he had no prescription for them.

The Ninth Circuit Court of Appeals refused to adopt the reasoning of the California courts; and, relying on *Terry*, ruled the evidence inadmissible.<sup>27</sup> It reasoned that the original frisk of Tinney must be seen as a limited search based on "reasonable suspicion of the possibility" of criminal conduct as in *Terry*, rather than as a search incident to a lawful arrest, as in *Peters*. Prior to the removal of the pills from Tinney's pocket, the police knew only that he had some "nerve pills" without a prescription. As there are many such pills that can be purchased without a

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<sup>26</sup> 408 F.2d 912 (9th Cir. 1969).

<sup>27</sup> After exhausting his post-conviction remedies in the state courts, Tinney filed a petition for a writ of habeas corpus in the federal district court. That court in an unreported opinion denied his petition and Tinney appealed.

prescription, the police did not have sufficient knowledge reasonably to believe that Tinney had committed an offense. Since there was no probable cause to arrest, there could be no search incident thereto. Under the *Terry* doctrine, there is no doubt that the police had the right to frisk Tinney for weapons, because the officer could reasonably believe that the defendant had planned to assault him. But a search conducted without probable cause to arrest must be strictly confined to an intrusion reasonably designed to discover weapons that could be used for an assault on the police officer. Although the frisk was initially valid, when the officer felt the pills and pursued his quest of what he knew was not a weapon, he transgressed the limits of the search permitted by *Terry*.<sup>28</sup> The search was thus an unconstitutional extension of the frisk, and any evidence seized thereby could not be admitted at Tinney's trial.<sup>29</sup>

The court in *Tinney* could have reached a different conclusion and decided that all evidence seized during a frisk is admissible at trial.<sup>30</sup> Such a holding would have meant the pills in the defendant's pocket were lawfully seized. The argument then would be that the pills (seconal), being lawfully seized, provided officer McGill with the probable cause necessary to arrest Tinney for possession of dangerous drugs; the arrest, in turn, sanctioned the incident search during which the marijuana cigarette was discovered. Thus the legality of the search that turned up the marijuana would depend on the legality of the seizure of the "nerve pills."

It can be argued that the exclusionary rule forbids only the admission

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<sup>28</sup> *Tinney v. Wilson*, 408 F.2d 912, 916 (9th Cir. 1969).

<sup>29</sup> "Since Officer McGill's discovery of the pills or capsules in Tinney's pocket did not follow lawful arrest and resulted from an unconstitutional extension of his 'frisk' for possible weapons, it follows that any 'fruit' of this search should have been excluded from Tinney's trial." *Id.* at 917.

<sup>30</sup> See, e.g., The Memorandum of the Institute of Government at the University of North Carolina at Chapel Hill on *Terry*, which was sent to all police departments in North Carolina:

Again, it must be stressed that the only *purpose* of a frisk can be for protection against dangerous weapons. The Court did not answer the question, however, of whether the seizure of evidence would be legal if it were accidentally uncovered while seeking to disarm a suspect whom a frisk had revealed to be carrying a weapon or if what was thought to be a weapon turned out instead to be other evidence. The Court probably will permit the use of such accidentally discovered evidence, although it might not if it suspects that in many cases the discoveries are not truly "accidental." Institute of Government, University of North Carolina, Memorandum—Stop and Frisk Cases, June 14, 1968 (Permanent Institute of Government Library File No. 68.74), at 3.

of evidence seized in an unreasonable search;<sup>31</sup> if the conditions set forth by the Supreme Court in *Terry* are met, then the frisk is reasonable and any evidence seized should be admissible.<sup>32</sup> Justice Harlan advanced this view in his concurring opinion in *Peters v. New York*.<sup>33</sup> He argued that the evidence seized during the frisk of Peters should be admitted as the fruit of a lawful frisk rather than as the fruit of a lawful search incident to an arrest: "[A]lthough the frisk is constitutionally permitted only in order to protect the officer, if it is lawful the State is of course entitled to the use of any other contraband that appears."<sup>34</sup> Dissenting in *Sibron v. New York*,<sup>35</sup> Justice Black agreed. Unlike the majority, he concluded that the police officer there had reasonable cause to believe Sibron armed and that the frisk was lawful: "Since, therefore, this was a reasonable and justified search, the use of the heroin discovered by it was admissible in evidence."<sup>36</sup> Justice White's somewhat more limited view of the permissible scope of a frisk is that if a police officer, in a "pat down," feels an object that he believes to be a weapon, he can seize it for admission at trial even though the object in fact turns out not to be one.<sup>37</sup>

Another possible indication of the permissible scope of a frisk is found in the majority opinion in *Sibron*. The majority there held the search illegal only after deciding that there could have been no reasonable belief that the suspect was engaged in criminal activity or was armed. Under *Terry*, absent grounds for such a belief, no frisk of Sibron was permissible. Arguably, it would have been immaterial for the majority to have considered whether there were reasonable grounds to believe the petitioner was armed unless it was prepared to hold admissible all evidence seized as a result of a legal frisk.<sup>38</sup>

The Ninth Circuit did not adopt any of the foregoing arguments in deciding *Timney*. The court acknowledged that a frisk is justified solely for the protection of the police officer and must be limited to an intrusion reasonably designed to discover only those objects that might be used in assaulting him. All other objects discovered during a frisk must, there-

<sup>31</sup> See *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule in *Weeks* was applied to state action in *Mapp v. Ohio*, 367 U.S. 647 (1960).

<sup>32</sup> Note, *The Limits of Stop and Frisk—Questions Unanswered by Terry*, 10 ARIZ. L. REV. 419, 430 (1968); Note, *Constitutional Law—Search and Seizure—"Stop and Frisk,"* 57 ILL. B.J. 404, 410 (1969).

<sup>33</sup> *Sibron v. New York*, 392 U.S. 40, 74-79 (1968) (Peters).

<sup>34</sup> *Id.* at 79 (Peters).

<sup>35</sup> *Id.* at 79-82 (dissenting opinion).

<sup>36</sup> *Id.* at 82.

<sup>37</sup> *Id.* at 69-70 (Peters) (concurring opinion).

<sup>38</sup> Note, 57 ILL. B.J., *supra* note 32, at 410-11.

fore, be seen as the fruits of a search that, though lawful at its inception, became unreasonably broad in its scope. Since the search becomes unreasonably broad at the point where something other than a weapon is seized, it is unconstitutional; and the evidence must be excluded.<sup>39</sup> Thus in *Tinney* the "nerve pills" could not be used to show probable cause for the arrest, and, absent this probable cause, there could be no arrest or search incident thereto. The marijuana seized from Tinney was therefore excluded as the result of an unconstitutional search. Much of the language in *Terry* supports this reasoning:

The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." Thus, evidence may not be introduced if it was discovered by means of a seizure and search which are not reasonably related in scope to the justification for their initiation.<sup>40</sup>

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A search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.<sup>41</sup>

The Court also stated:

The former [a search incident to an arrest], although justified in part by acknowledged necessity to protect the arresting officer from assault with a concealed weapon is also justified on other grounds and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may be characterized as something less than a "full" search, even though it remains a serious intrusion.<sup>42</sup>

But the Supreme Court in *Terry* postponed determination of the exact limits of a frisk: "We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons."<sup>43</sup>

A hint as to what the Court may ultimately decide these limits to be

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<sup>39</sup> *Tinney v. Wilson*, 408 F.2d 912 (9th Cir. 1969).

<sup>40</sup> *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

<sup>41</sup> *Id.* at 18.

<sup>42</sup> *Id.* at 25-26 (footnotes omitted).

<sup>43</sup> *Id.* at 29.

can be found in *Peters*. There the majority seemed to strain to find probable cause for the arrest. Once this standard was met, the search was incident to a valid arrest and therefore reasonable. The Court thus avoided deciding whether evidence other than weapons seized during a frisk will be admissible as the fruit of a lawful frisk. But if the Court viewed as admissible evidence other than weapons obtained during a frisk, surely it would have avoided weakening the probable cause standard for incident searches<sup>44</sup> and would have declared the evidence admissible as the lawful fruit of a valid frisk.

The Supreme Court's recent decision limiting the physical scope of searches incident to an arrest also gives strength to the conclusion in *Tinney*. In *Chimel v. California*,<sup>45</sup> defendant was arrested in his home for burglary; the police, although they did not have a search warrant, then searched his entire house, including the attic, the garage, a small workshop, and various drawers. They found evidence that was used to convict him. The Supreme Court reversed,<sup>46</sup> holding that since the search of the defendant's home went far beyond his person and the area from within which he might have obtained either a weapon or potentially adverse evidence, and that since there was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area, the breadth of the search was unreasonable under the fourth and fourteenth amendments.

The scope of an incident search was thus made clear by *Chimel*. There must be probable cause for the search, and its purpose is not only to protect the arresting officer but also to seize evidence within the accused's control. While a frisk may be made upon less than probable cause, its only justification is to protect the arresting officer; therefore, its scope should be even more restricted than that of the full-scale search incident to an arrest. The "variable probable cause" standard requires this result;<sup>47</sup> since there is less probable cause required for a frisk, the permissible intrusion must be more restrained. As Justice Stewart has said, "The standard of reasonableness embodied in the Fourth Amendment

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<sup>44</sup> Justice Harlan, concurring in *Peters*, warned of the possible weakening of the standard for probable cause. *Sibron v. New York*, 392 U.S. 40, 74-75 (1968) (*Peters*).

<sup>45</sup> 395 U.S. 572 (1969).

<sup>46</sup> In reversing *Chimel's* conviction the Supreme Court overruled *Rabinowitz v. United States*, 339 U.S. 56 (1950), and *Harris v. United States*, 331 U.S. 145 (1947).

<sup>47</sup> See p. 113 *supra*.

demands that the showing of justification match the degree of intrusion."<sup>48</sup>

Just as the Court in *Chimel* confined incident searches to their original purpose and justification, so it is proper that frisks be confined in accordance with their purpose to prevent them from becoming "fishing expeditions" for evidence in circumstances where the police have less than probable cause for the search. That the police would abuse their privilege to frisk cannot be doubted. Justice Douglas, speaking on the importance of a search warrant, stressed this fact: "This right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted."<sup>49</sup> Other commentators have voiced similar misgivings about police use of the frisk: "[I]t is hard to ignore the fact that here, at least, any power at all will be abused. . . . Police will use this power not really to protect themselves but to seize and confiscate weapons and other contraband."<sup>50</sup> The President's Commission on Law Enforcement and Administration of Justice has found that

[i]n some cities, searches are made in a high proportion of instances not for the purpose of protecting the officer but to obtain drugs or other incriminating evidence. In New York, for example, where searches are permitted only when the officer reasonably believes he is in bodily danger, searches were made in 81.6 percent of stops reported. However, a Commission survey of police practices in several large cities, found that [only] one out of every five persons frisked was carrying a dangerous weapon. . . .<sup>51</sup>

In *Tinney* an officer, upon finding the suspect unarmed, nevertheless continued the frisk to discover evidence. A more difficult situation occurs when a frisking officer detects what he believes to be a weapon but what turns out to be other incriminating evidence. The officer has met all the conditions set down in *Terry*, but happens to turn up burglar tools in-

<sup>48</sup> *Berger v. New York*, 388 U.S. 41, 68-69 (1967). This interpretation is also that of the court in *United States v. Clark*, 289 F. Supp. 610 (E.D. Pa. 1968): "As demonstrated in *Terry* itself, however, there is a hierarchy of these forms of interference and the Constitutional standard with which police must comply varies in relation to the type of arrest they are making." *Id.* at 618.

<sup>49</sup> *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

<sup>50</sup> Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433, 461 (1967).

<sup>51</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 185 (1967).

stead of a weapon. Here it is difficult to insist that the exclusionary rule be applied.<sup>52</sup> Nevertheless, it is important that evidence other than weapons be excluded when discovered in this situation because "there may be strong incentive for [the police officer] to fabricate grounds for a frisk since evidence leading to a conviction may be obtained thereby. As a result, the reliability of the officer's testimony in these cases should be subject to considerable doubt."<sup>53</sup>

Police misuse of searches incident to arrests—after *Rabinowitz v. United States*<sup>54</sup> allowed the police great latitude in making such searches—became so great that it overshadowed the valid reasons for allowing warrantless incident searches and led to the limitations enunciated in *Chimel*.<sup>55</sup> It seems clear that unless the scope of the frisk is limited then the police will also misuse the frisk procedure. Restricting potential misuse by requiring the exclusion of all evidence, other than weapons, discovered during a frisk should have the salutary effect of maximizing individual freedom from official intrusion without sacrificing the effectiveness of the frisk as a protective device.

J. DAVID JAMES

### Criminal Procedure—The Potential Defendant's Right to a Speedy Trial

In recent years the long quiescent sixth amendment right to a speedy trial has undergone re-analysis by various federal and state courts.<sup>1</sup> The Supreme Court of North Carolina in a recent decision, *State v. Johnson*,<sup>2</sup>

<sup>52</sup> The police find the exclusionary rule particularly repulsive in these circumstances. As Professor Skolnick has pointed out, "the impact of the exclusionary rule, as the police view it, has not been to guarantee greater protection of the freedom of 'decent citizens' from unreasonable police zeal, but rather to complicate unnecessarily the task of detecting and apprehending criminals." J. Skolnick, *JUSTICE WITHOUT TRIAL* 227 (1966). Rather than alter his actions in response to the rule, the policeman often attempts "to infuse the character of legality—perhaps after the fact—into his actions." *Id.* 227.

<sup>53</sup> Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 170 (1966). "While there are serious objections to barring evidence of crime discovered in a lawful search, the admissibility of evidence such as betting slips or narcotics found during a stop may encourage the misuse of the search power." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 50, at 186.

<sup>54</sup> 339 U.S. 56 (1950).

<sup>55</sup> Note, 78 YALE L.J., *supra* note 14, at 435-36.

<sup>1</sup> See generally U.S. CONST. amend. VI; Note, *Justice Overdue—Speedy Trial for the Potential Defendant*, 5 STAN. L. REV. 95 (1952); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968).

<sup>2</sup> 275 N.C. 264, 167 S.E.2d 274, *rev'g* 3 N.C. App. 420, 165 S.E.2d 27 (1969).