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# POLICE OFFICER'S SAFETY; AN EXCEPTION WITHIN AN EXCEPTION OF THE FOURTH AMENDMENT

*by Jeffrey T. Wennar, J.D.*

Much has been written regarding the Fourth Amendment to the United States Constitution and its requirement that a search warrant be issued by a neutral and detached magistrate before a search and seizure can be valid. Over the years, exceptions to this requirement have evolved and been recognized by the Supreme Court of the United States.<sup>1</sup>

1 *California v. Hodari*, 499 U.S. 621, 630 (1991) (the recovery of the crack cocaine was not the fruit of an illegal search because the defendant discarded it before being arrested); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (law enforcement officials may conduct a limited search of closets or closed areas where a suspect was arrested to ensure their safety from any possible threats); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (warrantless searches and seizures are not permissible if there were no exigent circumstances); *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (holding that individuals demonstrate a degree of privacy when they place a lock on a container and law enforcement must obtain a warrant to search its contents); *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (holding that law enforcement may inventory the items found in automobiles after being impounded); *Cady v. Dombrowski*, 413 U.S. 433, 446-47 (1973) (police officers will take certain precautions for the safety of the community); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (courts must look at the totality of the circumstances to determine whether consent was given for law enforcement to search a specific area); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (stating that objects can be seized if they are in 'plain view' and as long as nothing in the surrounding area is touched); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (determining that a search of a car without a warrant is constitutional so long as the officer has probable cause to believe that there is contraband inside the car); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (holding that during a search incident to arrest a law enforcement officer can search the area immediately within arm's reach of the detained individual); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (police officers may conduct a limited frisk of an individual if he or she has reasonable sus-

Within those exceptions lies a body of law examining and recognizing a concern to all – law enforcement officers' safety.<sup>2</sup> It does not re-examine the Fourth Amendment, but instead addresses those United States Supreme Court cases establishing the law effecting law enforcement safety.

The Supreme Court established the obligation of inferior courts regarding Fourth Amendment issues when the Court stated, "[It] is the duty of courts to be watchful for the constitutional rights of the citizen . . . ."<sup>3</sup> "The 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."<sup>4</sup> For the last half century, courts have followed the mandate that, ". . . the Fourth Amendment protects people . . . ."<sup>5</sup> Without specifically recognizing an exception for officer's safety, within specific recognized

picion that criminal activity is afoot, happened, or is about to happen); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (law enforcement officials can act without a warrant in the circumstance that their safety or the safety of innocent bystanders may be endangered).

2 Firearms related fatalities were the second leading cause of death among America's law enforcement officers in 2013. Handguns were the leading type of firearm used in fatal shootings of law enforcement officers in 2013. Law Enforcement Officers Memorial Fund, Law Enforcement Fatalities Dip to Lowest Level in Six Decades, [nleomf.org](http://www.nleomf.org), available at <http://www.nleomf.org/assets/pdfs/reports/2013-EOY-Fatality-Report.pdf>.

3 *Boyd v. United States*, 116 U.S. 616, 635 (1886).

4 *McDonald v. United States*, 335 U.S. 451, 455-456 (1948).

5 *Katz v. United States*, 389 U.S. 347, 351 (1967).



exceptions, the Supreme Court has addressed the paramount importance of protecting the men and women of law enforcement who daily put themselves at risk when encountering the public. Case law addresses officer safety in the context of on street encounters,<sup>6</sup> vehicle stops,<sup>7</sup> and protective sweeps.<sup>8</sup>

The Fourth Amendment becomes applicable when an individual has been seized and a reasonable person does not feel free to leave.<sup>9</sup>

## A PURPOSE OF THE FRISK IS NOT FOCUSED UPON THE CRIME AT ALL, BUT RATHER UPON THE PROTECTION OF THE STOPPING OFFICER.

The assertion of officer's safety does not establish an unfettered opportunity for law enforcement officers to frisk, pat down or search<sup>10</sup> an individual they have encountered. Reasonable articulable suspicion<sup>11</sup> is required for law enforcement officers to stop individuals. "Reasonable suspicion means something more than inchoate and unparticularized suspicion or hunch [but] less . . . than probable cause."<sup>12</sup> However, while this standard is sufficient to stop an individual, it does not automatically give the officer a right to frisk that individual.<sup>13</sup>

As the officer encounters the individual, the officer's interaction with that individual may become progressively more intrusive based on the officer's successive observations to a set of escalating responses: (1) articulable suspicion that a crime has occurred, is occurring, or is about to occur – this will justify the stop; (2) articulable suspicion that the stopped person may be armed – this will justify the frisk; (3) an arrest; then, (4) search incident to

arrest.<sup>14</sup> The purpose of the stop is detecting evidence of the crime, past crime, stopping crime then in progress, or preventing the possibility of imminent crime.<sup>15</sup> Each is a distinct intrusion, each is designed to serve a distinct purpose, each requires a distinct justification, and each is subject to distinct scope limitations.<sup>16</sup> A purpose of the frisk is not focused upon the crime at all, but rather upon the protection of the stopping officer.<sup>17</sup>

"In the case of the self-protective search for weapons [the officer] must be able to point to particular facts from which [the officer] reasonably inferred that the individual was armed and dangerous."<sup>18</sup> Once the officer has been satisfied that there is suspicious behavior that warrants investigation, ". . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."<sup>19</sup>

The Court has been adamant, noting in *Terry*, "[w]e need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective search and seizure for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases."<sup>20</sup> On the same day the Court issued its opinion in *Terry*, the Court issued an opinion consolidating two cases also addressing searches of individuals who were stopped and searched by

6 *Terry*, 392 U.S. at 27-28.

7 *Michigan v. Long*, 463 U.S. 1032 (1983).

8 *Buie*, 494 U.S. at 334.

9 *Michigan v. Chestnut*, 486 U.S. 567, 573 (1988).

10 *Sibron v. New York*, 392 U.S. 40, 64 (1968).

11 *Brown v. Texas*, 443 U.S. 47, 53 (1979).

12 *Illinois v. Wardlow*, 528 U.S. 119, 123-124 (2000).

13 *Sibron*, 392 U.S. at 74.

14 *Terry*, 392 U.S. at 10.

15 *Id.* at 26.

16 *Id.* at 25-26.

17 *Id.* at 29, 31.

18 *Sibron*, 392 U.S. at 64 (citing *Terry*, 392 U.S. at 24).

19 *Terry*, 392 U.S. at 24.

20 *Id.* at 29.



police officers.<sup>21</sup> In *dicta*, the Court explained that a search may be permitted, even when probable cause for an arrest is lacking, if the officer “. . . had reasonable grounds to believe [the suspect] was armed and dangerous.”<sup>22</sup> “The search for weapons approved in *Terry* consists solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault.”<sup>23</sup> The case law is clear, “. . . a search incident to a lawful arrest may not precede the arrest and serve as part of its justification.”<sup>24</sup>

vehicle.”<sup>28</sup>

A decade before *Michigan v. Long*, the Court had the opportunity to review an officer's actions when the officer approached the occupant of a vehicle, reached into the window, and removed a gun from the occupant's waistband.<sup>29</sup> All of the actions taken by the officer were based upon information supplied by a citizen. The Court refused to adopt a holding that a stop and frisk can only occur based upon an officer's observation.<sup>30</sup> In rational-

## LAW ENFORCEMENT OFFICER MAY ORDER OCCUPANTS TO STEP OUT OF A VEHICLE DURING A TRAFFIC STOP, AND MAY FRISK THOSE PERSONS FOR A WEAPON WHEN THERE IS A REASONABLE BELIEF THAT THEY ARE ARMED AND DANGEROUS

With the authority to arrest comes the authority to search, incident to arrest,<sup>25</sup> in order to seize any weapon that can be used against the arresting officer.<sup>26</sup>

*Terry* was applicable to individuals only. In *Terry*, the encounter between the individual and law enforcement occurred when both were pedestrians on a public street and involved only the protective search of the individual for weapons. The question then became, could protective searches extend beyond the individual in the absence of probable cause? The Supreme Court addressed this question in *Michigan v. Long*.<sup>27</sup> The Court phrased its inquiry 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

izing its affirmation of the seizure, the Court examined the holding in *Terry*. The Court enunciated a principle from *Terry* that permits the limited pat down for weapons where the officer has justification in the belief the person being investigated is armed and dangerous. The Court stated, “[the] purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue [the] investigation without fear of violence . . . .”<sup>31</sup> The fact that this search occurred in an automobile rather than through a street encounter was not addressed by the Court. The Court recognized, based on the information provided to the officer, the officer “. . . had ample reason to fear for his safety.”<sup>32</sup>

A law enforcement officer may order occupants to step out of a vehicle during a traffic stop, and may frisk those persons for a weapon when there is a reasonable belief that they are armed and dangerous.<sup>33</sup> The

21 *Sibron*, 392 U.S. at 47.

22 *Id.* at 63.

23 *Id.* at 65.

24 *Id.* at 67.

25 *Chimel*, 395 U.S. at 763-63.

26 *Preston v. United States* 376 U.S. 364, 367 (1964).

27 *Michigan v. Long*, 463 U.S. 1032 (1983).

28 *Id.* at 1037.

29 *Adams v. Williams*, 407 U.S. 143, 145 (1972).

30 *Id.* at 147.

31 *Id.* at 146.

32 *Id.* at 148.

33 *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977);



Court stated, “. . . we recognize that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers.”<sup>34</sup>

. . . protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger; that roadside encounters between police and suspects are especially hazardous, and the danger may arise from the possible presence of weapons in the area surrounding a suspect. . . . 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 based on ‘specific and articulable facts, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is armed and dangerous and the suspect may gain immediate control of weapons.<sup>35</sup>

The Court, in a footnote to this holding, stressed that their decision “. . . does not mean that police may conduct automobile searches *whenever* they conduct an investigative stop.”<sup>36</sup> That footnote became the holding in *Arizona v. Gant*,<sup>37</sup> where the Supreme Court held an investigative stop does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been removed from the vehicle and secured, thus overruling *New York v. Belton*.<sup>38</sup> However, *Gant* added an indepen-

dent exception for a warrantless search of a vehicle’s compartment “when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.”<sup>39</sup> A unanimous Supreme Court ruled that a traffic stop is a seizure of both the driver and the passenger, thus either individual “may challenge the constitutionality of the stop.”<sup>40</sup>

The street and roadside encounters were the basis for the Court’s eventual decision permitting police to conduct a protective sweep of an in-home arrest, only when the officer has a “reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>41</sup> The Supreme Court previously ruled that officers had “. . . the limited authority to detain the occupants of the premises while a proper search is conducted.”<sup>42</sup> Justice Holmes wrote, “. . . the character of every act depends upon the circumstances in which it is done.”<sup>43</sup> An officer encountering an individ-

ual has a finite amount of time within which to assess the situation. Unlike most individuals, a police officer has certain experiences and specialized training to draw upon<sup>44</sup> when making inferences and deductions regarding said situations. The question in every situation is whether “the circumstances are of such a nature as to create a clear and present danger.”<sup>45</sup> “The reasonableness of the officer’s

## COURTS ARE DIRECTED TO ANALYZE BOTH DEADLY AND NON-DEADLY FORCE PURSUANT TO THE REASONABLENESS STANDARD OF THE FOURTH AMENDMENT.

Maryland v. Wilson, 519 U.S. 408 (1997).

34 Long, 463 U.S. at 1047.

35 Id. at 1049.

36 Id. at n.14.

37 Arizona v. Gant, 556 U.S. 332, 351 (2009).

38 New York v. Belton, 453 U.S. 454 (1981).

39 Gant, 556 U.S. at 335.

40 Brendlin v. California, 551 U.S. 249, 259 (2007) (citing 6 W. LaFare, Search and Seizure, §11.3(e) (4th ed. 2004 and Supp. 2007)).

41 Maryland v. Buie, 494 U.S. 325, 325 (1990).

42 Michigan v. Summers, 452 U.S. 692, 705 (1981).

43 Schenck v. United States, 249 U.S. 47, 52 (1919) (citing Aikens v. Wisconsin, 195 U.S. 194, 205, 206 (1904)).

44 United States v. Aryizu, 534 U.S. 266, 273 (2002).

45 Schenck, 249 U.S. at 52.



decision to stop a suspect does not turn on the availability of less intrusive investigating techniques.”<sup>46</sup>

In order to avoid suppression of any evidence recovered during one of these encounters, the officer has to be able to articulate what was being observed and how those observations were processed at the time the observations were made. That articulation must address “the totality of the circumstances”<sup>47</sup> encountered by the officer and related to experience and training. Each situation encountered by an officer is somewhat different. The officer must have a “particularized and objective basis’ for suspecting legal wrongdoing.”<sup>48</sup> “Reasonable suspicion depends on ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’”<sup>49</sup> This “commonsense approach”<sup>50</sup> is met through the articulation of reasonable suspicion.

In two civil use of force<sup>51</sup> cases, the Supreme Court<sup>52</sup> recognized that, “police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation.”<sup>53</sup> The court clearly limited the use of deadly force to those situations “. . . necessary to prevent escape and the officer has probable cause to believe that the suspect

poses a significant threat of death or serious physical injury to the officer or others.”<sup>54</sup>

“[An] officer [has] the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an immediate threat to his safety.”<sup>55</sup> Courts are directed to analyze both deadly and non-deadly force pursuant to the reasonableness standard of the Fourth Amendment.<sup>56</sup> “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>57</sup>

The practitioner, either defense or prosecution, faced with the issue of officer’s safety may find two recognized exceptions to the Fourth Amendment requirement persuasive. The first recognized exception, exigent circumstances<sup>58</sup> applies when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reason-



able. . . .”<sup>59</sup> Those exigent circumstances are not unqualified. The “. . . exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.”<sup>60</sup> Courts will permit the warrantless search pursuant to this exception where “. . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment . . . .”<sup>61</sup> The second recognized

46 United States v. Sokolow, 490 U.S. 1, 11 (1989).

47 United States v. Cortez, 449 U.S. 411, 417 (1981).

48 *Aryizu*, 534 U.S. at 273.

49 *Navarette v. California*, 134 S. Ct. 1683, 1690 (2014).

50 *Id.*

51 42 U.S.C. §1983 (2014).

52 *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

53 *Graham*, 490 U.S. at 397.

54 *Garner*, 471 U.S. at 3.

55 *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014) (*internal quotes omitted*).

56 *Graham*, 490 U.S. at 395.

57 *Id.* at 396.

58 *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

59 *Id.*

60 *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011).

61 *Id.*



exception is consent.<sup>62</sup> When challenged, the court must make a determination based upon a “totality of the circumstances” whether the consent was knowingly and voluntarily given.<sup>63</sup>

The prosecutor applying these two analogous exceptions, must, by a preponderance of the evidence persuade the court that the officer acted appropriately given the situation the officer was confronted with at the time of the incident. The prosecutor is well advised to make certain that the officer can objectively articulate all facts that the officer was presented with which led to the use of force for the officer’s safety. Likewise, applying these two exceptions the defense must be prepared to refute the officer’s testimony. This preparation should include, but is not limited to: reviewing discovery, speaking to witnesses, going to the scene, attempting to locate witnesses not previously interviewed by police, and otherwise conducting a thorough independent investigation.

Courts have bestowed upon law enforcement officers the authority to use deadly and non-deadly force when confronted with an imminent threat. The officer will have to justify this force when called upon to do so. It stands to reason then that the same officer has the implied authority to conduct a search without the benefit of a search warrant when the officer perceives and can articulate with as much detail as possible why that action was taken.

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<sup>62</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

<sup>63</sup> *United States v. Mendenhall*, 446 U.S. 544, 557 (1980).



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## About the AUTHOR

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Jeffrey T. Wennar has been practicing law since 1979. He began his legal career as an Assistant State's Attorney in Prince George's County, Maryland. Mr. Wennar has been a Senior Assistant State's Attorney in Montgomery County, Maryland since August 2001.

Mr. Wennar has lectured to many legal, civic and educational groups. He has also lectured throughout the United States on Community/Gang Prosecution. Mr. Wennar writes and is a published author. He has participated in writing the national legal considerations curriculum on behalf of the Bureau of Justice Assistance for both Basic and Advanced Training for Street Gang Investigators.

In 1995 he was recognized by Federal Bureau of Investigation Director, Louis Freeh, for his successful prosecution of the Hester drug gang. In 2003 and 2004 Mr. Wennar received the prestigious Frederic Milton Thrasher Award, from the National Gang Crime Research Center, for superior community service. In 2005, the Maryland General Assembly, House of Delegates recognized Mr. Wennar's contribution to Montgomery County and the State of Maryland by passing a Resolution congratulating him on his services to the County and State. Mr. Wennar is a member of the Executive Board of the Mid Atlantic Gang Investigators Network, and is the Legislative Chair for the National Alliance of Gang Investigators Associations.

Mr. Wennar is currently an Adjunct Professor at American University. While at American University Mr. Wennar developed and taught the course Gangs and Gang Violence in America. Mr. Wennar is also an Adjunct Professor at Washington College of Law where he developed and teaches an advanced trial advocacy class focusing on prosecuting gang homicide, and, developed and teaches a course regarding the challenges and obligations of the prosecutor.