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Notwithstanding Court Officer's Declaration that Defendant Is "Under Arrest," Absence of Probable Cause Does Not Require Suppression of Evidence Seized During Pat-Down Search When Other Indicia of Arrest Are Not Present

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ability Law exception available to them, a significant restriction to suit is removed—as a prerequisite to the use of such law, notice must be served on an employer within 1 year of an accident.[105] In contrast, of course, personal injury causes of action may be commenced within 3 years of a tortious event.[106]

The impact of the *Lawrence* decision upon the administration of the Workers' Compensation statute also is significant. Since there is now greater potential for an injured employee not covered by Workers' Compensation to recover large judgments in a common-law cause of action, it appears that employers increasingly will elect Workers' Compensation coverage to protect themselves from large and unexpected adverse judgments.[107] Surely, this response, which will increase the number of employees covered by Workers' Compensation, is desirable.

Susan D. Koester

Notwithstanding court officer's declaration that defendant is "under arrest," absence of probable cause does not require suppression of evidence seized during pat-down search when other indicia of arrest are not present

A warrantless search is considered illegal under the fourth amendment[108] unless it falls within one of the narrow exceptions

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[105] N.Y. EMPL'RS LIAB. LAW § 3 (McKinney 1955 & Supp. 1980-1981); *see* note 91 *supra*.

[106] CPLR 214 (1972 & Supp. 1980-1981).

[107] *See, e.g.*, Lane v. Flack, 73 App. Div. 2d 65, 67, 425 N.Y.S.2d 648, 650 (3d Dep't 1980), *aff'd*, 52 N.Y.2d 856, 857, 418 N.E.2d 671, 671, 437 N.Y.S.2d 78, 78 (1981). In *Lane*, because the defendant county hospital had brought itself within the coverage of the New York Workers' Compensation Law, recovery under such statute was held to be the plaintiff's exclusive remedy. *Id.*; *see* Jamison v. Encarnacion, 281 U.S. 635, 640-41 (1930); N.Y. WORK. COMP. LAW § 11 (McKinney 1955 & Supp. 1980-1981) (recovery under the Workers' Compensation Law is exclusive); COMMISSION OF THE AMERICAN FEDERATION OF LABOR, THE NATIONAL CIVIC FEDERATION, WORKMEN'S COMPENSATION, S. DOC. No. 419, 63d Cong., 2d Sess. 17 (1914); *Workmen's Compensation: Hearings on H.R. 1 Before the Committee on the Judiciary*, 61st Cong., 138 (1910) (brief of H.V. Mercer). Significantly, Section 3, Group 19 of the New York Workers' Compensation Law provides that "[a]ny municipal corporation . . . may bring its employees . . . within the coverage of this chapter . . . notwithstanding the definitions of the terms 'employment', 'employer' or 'employee'" N.Y. WORK. COMP. LAW § 3(1), Group 19 (McKinney 1965 & Supp. 1980-1981); *see* 9 OP. N.Y. COMP. (1953); 1976 INF. OP. N.Y. ATT'Y GEN. 140; *cf.* 9 OP. N.Y. COMP. 297 (1953) (village has implied authority to elect workers' compensation coverage).

[108] The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects,

enunciated by the Supreme Court.[109] Under one of these exceptions, a police officer may briefly detain an individual for questioning and frisk him for weapons when he reasonably suspects that the individual is involved in the commission of a crime and presents a danger to the officer's safety.[110] When a detention rises

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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. The fourth amendment guarantee against unreasonable searches and seizures was extended to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961). New York has incorporated the language of the fourth amendment into its own constitution. *See* N.Y. CONST. art. 1, § 12. Thus, in New York, a court must determine whether probable cause for a search exists before issuing a warrant. People v. Hicks, 38 N.Y.2d 90, 92, 341 N.E.2d 227, 229, 378 N.Y.S.2d 660, 662 (1975); CPL § 690.40(2) (McKinney Supp. 1981). Property can be seized pursuant to a warrant if there is probable cause to believe that it is stolen, unlawfully possessed, being used to commit or conceal an offense, or constitutes evidence of an offense. CPL § 690.10 (1971).

[109] *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Katz v. United States, 389 U.S. 347, 357 (1967). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1, at 438-44 (1978). The Supreme Court has established various exceptions to the general rule that a search must be conducted pursuant to a warrant. One such exception is the search incident to a lawful arrest. *E.g.*, Chimel v. California, 395 U.S. 752, 763 (1969); Agnello v. United States, 269 U.S. 20, 30 (1925); People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 467 (1961). The right to search without a warrant upon a lawful arrest "grows out of the inherent necessities of the situation," Trupiano v. United States, 334 U.S. 699, 708 (1948), and is designed to prevent an arrestee from escaping or destroying evidence. Chimel v. California, 395 U.S. at 762-63; Agnello v. United States, 269 U.S. at 30.

A warrantless search also may be sustained when the individual being searched voluntarily consents. *See, e.g.*, Davis v. United States, 328 U.S. 582, 593-94 (1946); People v. Kuhn, 33 N.Y.2d 203, 208, 306 N.E.2d 777, 779, 351 N.Y.S.2d 649, 652 (1973); People v. Lane, 10 N.Y.2d 347, 353, 179 N.E.2d 339, 340, 223 N.Y.S.2d 197, 199 (1961); *cf.* United States v. Matlock, 415 U.S. 164, 169-72 (1974) (third-party consent). Voluntariness of consent is determined by looking to all the facts presented, Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973), and will be found only when the prosecution meets its "heavy burden." People v. Gonzalez, 39 N.Y.2d 122, 128, 347 N.E.2d 575, 580, 383 N.Y.S.2d 215, 219 (1976); *see* People v. Whitehurst, 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674-75 (1969). Exigency also may give rise to legal warrantless searches. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 509-10 (1978); Schmerber v. California, 384 U.S. 757, 770-71 (1966); People v. Mitchell, 39 N.Y.2d 173, 177-78, 347 N.E.2d 607, 609, 383 N.Y.S.2d 246, 248, *cert. denied*, 426 U.S. 953 (1976). For other exceptions to the general rule that searches must be predicated upon the issuance of a search warrant, see Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 199-201 (1977).

[110] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 26-27 (1968); Sibron v. New York, 392 U.S. 40, 63-64 (1968); People v. Cantor, 36 N.Y.2d 106, 112-13, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975). In *Terry*, the Supreme Court held that

there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has

to the level of an arrest or other severe interruption of a person's liberty, however, the officer's conduct must be supported by a showing of probable cause,[111] or any evidence seized as a result of the encounter will be suppressed pursuant to the exclusionary rule.[112] Recognizing that the severity of an intrusion is a question of degree, courts have noted that there is no simple formula for determining when a detention will require a predicate of probable cause.[113] Recently, in *People v. Alba*,[114] the Appellate Division,

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probable cause to arrest the individual for a crime.

392 U.S. at 27. The *Terry* doctrine is codified in CPL § 140.50. This section permits the detention of an individual for questioning when a police officer "reasonably suspects" that the person has committed or is about to commit a crime. *See* CPL § 140.50(1) (1981); *cf. id.* § 140.50(2) (court officers also may detain suspects). Moreover, if the officer "reasonably suspects that he is in danger of physical injury," he may frisk the individual for weapons. *Id.* § 140.50(3); *accord*, People v. Cantor, 36 N.Y.2d at 112-13, 324 N.E.2d at 877, 365 N.Y.S.2d at 516.

[111] *E.g.*, Dunaway v. New York, 442 U.S. 200, 211-12 (1979); People v. Chestnut, 51 N.Y.2d 14, 20, 409 N.E.2d 958, 961, 431 N.Y.S.2d 485, 489 (1980); *see* People v. Boodle, 47 N.Y.2d 398, 401, 391 N.E.2d 1329, 1331, 418 N.Y.S.2d 352, 354, *cert. denied*, 444 U.S. 969 (1979). The Supreme Court has noted that "[p]robable cause exists where 'the facts and circumstances . . . [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) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)); *accord*, People v. McRay, 51 N.Y.2d 594, 602, 416 N.E.2d 1015, 1019, 435 N.Y.S.2d 679, 683 (1980). Although " '[t]he substance of all definitions 'of probable cause' is a reasonable ground for belief of guilt,' " Brinegar v. United States, 338 U.S. at 175 (quoting Carroll v. United States, 267 U.S. 132, 161 (1925)), it has been recognized that probable cause to arrest differs from probable cause to search in that the former always focuses upon the guilt of a particular suspect while the latter merely requires a nexus between the items to be seized and the criminal activity. *See* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 4.1(a) (2d ed. 1981). *See generally* 1 W. LAFAVE, *supra* note 109, § 3.1(b), at 441-44. Thus, it does not automatically follow that when a search is supported by probable cause, the criteria necessary to justify an arrest will be satisfied. *Id.*; 1 W. RINGEL, *supra* § 4.1(a), at 4-5. In either context, however, a determination concerning the existence of probable cause must be reached by considering only the circumstances preceding the government's act and may not be bolstered by subsequent events. *See* Henry v. United States, 361 U.S. 98, 103 (1959); People v. Martin, 32 N.Y.2d 123, 124, 296 N.E.2d 245, 246, 343 N.Y.S.2d 343, 345 (1973); People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 467 (1961).

[112] *E.g.*, People v. Boodle, 47 N.Y.2d 398, 401-02, 391 N.E.2d 1329, 1331, 418 N.Y.S.2d 352, 354, *cert. denied*, 444 U.S. 969 (1979); People v. Cantor, 36 N.Y.2d 106, 114, 324 N.E.2d 872, 878, 365 N.Y.S.2d 509, 517 (1975); *see* Wong Sun v. United States, 371 U.S. 471, 485, 488 (1963); J. HIRSCHEL, FOURTH AMENDMENT RIGHTS 7 (1979). The rationale behind the exclusionary rule is to deter the police from violating an individual's fourth amendment rights, People v. Adams, 53 N.Y.2d 1, 9, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981), and to prevent courts from using illegally obtained evidence. J. HIRSCHEL, *supra*, at 13-14. *See generally* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 575-82 (1971).

[113] *See, e.g.*, People v. Chestnut, 51 N.Y.2d 14, 20, 409 N.E.2d 958, 961, 431 N.Y.S.2d

First Department, held that a law enforcement officer's declaration to an individual that he is "under arrest" does not require a showing of probable cause when there is no accompanying physical restraint or other indicia of arrest.[115]

In March 1978, the defendant, a reputed member of a terrorist organization,[116] attended a Sunday evening session of Bronx County Criminal Court.[117] Due to previous bomb threats, courthouse officials had posted signs at the entrance to the courthouse, warning individuals that they were subject to search.[118] Because the entrance was not monitored on weekends, the defendant entered the building without interruption, sat in the rear of the courtroom and placed his attaché case on his lap.[119] Two court officers and an Assistant District Attorney recognized the defendant and, believing that he might be carrying a bomb, decided to search his briefcase.[120] When the defendant adamantly refused to allow the case to be searched, one of the officers informed him that he was "under arrest" in order to move him to a more secluded place.[121] The defendant was brought into the court clerk's office and was told to put his hands on the counter.[122] Instead of complying with this order, the defendant moved his hands toward his

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485, 489 (1980).

[114] 81 App. Div. 2d 345, 440 N.Y.S.2d 230 (1st Dep't 1981), *appeal dismissed,* N.Y.L.J., Apr. 9, 1982, at 6, col. 2 (Apr. 7, 1982).

[115] 81 App. Div. 2d at 348, 440 N.Y.S.2d at 232.

[116] *Id.* at 346, 440 N.Y.S.2d at 230-31. The court officers and the Assistant District Attorney believed the defendant was a member of the FALN, a notorious terrorist organization seeking Puerto Rican independence. *Id.*

[117] *Id.*, 440 N.Y.S.2d at 230.

[118] *Id.* Since the courthouse entrance was not monitored on weekends, courtroom officers were responsible for conducting searches within the courthouse. *Id.*

[119] *Id.* On most occasions when the defendant attended court sessions, he sat in a front row seat. *Id.* at 355, 440 N.Y.S.2d at 236 (Sullivan, J., dissenting).

[120] *Id.* at 346, 440 N.Y.S.2d at 230-31. The officers knew that the defendant had once participated in a demonstration outside the courthouse, that he had been arrested previously for possession of weapons and that he had threatened an Assistant District Attorney. People v. Alba, 104 Misc. 2d 1095, 1099-100, 430 N.Y.S.2d 923, 929 (Sup. Ct. Bronx County 1980), *rev'd,* 81 App. Div. 2d 345, 440 N.Y.2d 230 (1st Dep't 1981), *appeal dismissed,* N.Y.L.J., Apr. 9, 1982, at 6, col. 2 (Apr. 7, 1982). Suspicions were aroused when the defendant placed the attaché case on his lap rather than on the floor beside him. 104 Misc. 2d at 1100, 430 N.Y.S.2d at 929.

[121] 81 App. Div. 2d at 346, 440 N.Y.S.2d at 231. A recess had been called so that the officers could approach the defendant in the corridor rather than in the courtroom. *Id.* One of the officers testified that he told the defendant that he was under arrest only to move the scene from the corridor to the clerk's office. *Id.*

[122] *Id.* at 347, 440 N.Y.S.2d at 231.

midsection.[123] Fearing that the defendant was reaching for a gun, a court officer frisked him, discovered a loaded handgun and arrested him for possession of a weapon.[124] The Supreme Court, Bronx County, granted the defendant's motion to suppress the gun, holding that because the defendant was arrested without probable cause, the evidence seized during the pat-down search was inadmissible.[125]

On appeal, the Appellate Division, First Department, reversed the order of suppression, holding that the defendant was not arrested prior to the discovery of the handgun, and therefore, the search could be sustained on the basis of implied consent and exigent circumstances.[126] Writing for a divided court,[127] Justice Markewich reasoned that no arrest occurred prior to the discovery of the handgun because the defendant had not been physically restrained and "[n]one of the [other] indicia of an actual arrest was present."[128] The court stated that the officers had "probable cause for an inquiry" and that the "arrest" was merely "an expedient effort to terminate the corridor scene."[129] Thus, the detention of the defendant, the court observed, was a permissible inquiry based upon a reasonable belief that exigent circumstances required an immediate search.[130] In addition, Justice Markewich noted that the defendant's entry into the courtroom, with knowledge of signs warning of the right of court officers to search individuals, constituted an implied consent to such a search.[131]

Authoring a vigorous dissent, Justice Sullivan maintained that none of the theories relied upon by the majority justified the

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[123] *Id.*

[124] *Id.* at 356, 440 N.Y.S.2d at 236-37 (Sullivan, J., dissenting). The attaché case did not contain any explosive material. *Id.* (Sullivan, J., dissenting).

[125] 104 Misc. 2d at 1100, 430 N.Y.S.2d at 929-30.

[126] 81 App. Div. 2d at 348, 354, 440 N.Y.S.2d at 231-32, 235.

[127] Presiding Justice Kupferman and Justice Lupiano joined in the opinion by Justice Markewich. Justice Sullivan authored a dissenting opinion in which Justice Sandler concurred.

[128] 81 App. Div. 2d at 348, 440 N.Y.S.2d at 231-32. The court examined the officer's use of the term "arrest" in relation to his conduct when he initially approached the defendant. Since no physical restraint was directed at the defendant at that point, the majority concluded that an arrest had not taken place. *Id.*

[129] *Id.*, 440 N.Y.S.2d at 232.

[130] *Id.* The majority concluded its opinion by balancing the existence of danger against the degree of the intrusion and determining that the officers' actions were justified. *Id.* at 352-54, 440 N.Y.S.2d at 234-35.

[131] *Id.* at 349-51, 440 N.Y.S.2d at 232-33.

search of the defendant.[132] Initially, the dissent noted that consent could not be implied from the mere posting of signs.[133] Moreover, the dissent stated, there were no exigent circumstances present that would justify a search without probable cause.[134] Focusing on the arrest issue, Justice Sullivan emphasized that the detention of the defendant constituted an arrest regardless of whether the officers believed an arrest had taken place.[135] Since the arrest lacked probable cause, the dissent concluded, it was illegal, requiring suppression of the evidence discovered as "fruit of the poisonous tree."[136]

It is submitted that the *Alba* court incorrectly relied upon the absence of the physical "indicia" of arrest in determining that probable cause was not necessary to justify the detention of the defendant. It is clear that one can be "seized" within the meaning of the fourth amendment without physical manifestations of governmental authority.[137] Moreover, the Supreme Court has stated

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[132] *Id.* at 356, 360, 440 N.Y.S.2d at 237, 239 (Sullivan, J., dissenting).

[133] *Id.* at 356, 440 N.Y.S.2d at 237 (Sullivan, J., dissenting) (citing Chenkin v. Bellevue Hosp. Center, 479 F. Supp. 207, 213 (S.D.N.Y. 1979); Gaioni v. Folmar, 460 F. Supp. 10, 14 (M.D. Ala. 1978)). The dissent stated that the circumstances presented were distinguishable from prior cases which upheld consensual courthouse searches. 81 App. Div. 2d at 357-58, 440 N.Y.S.2d at 237-38 (Sullivan, J., dissenting) (citing McMorris v. Alioto, 567 F.2d 897, 899, 901 (9th Cir. 1978); Downing v. Kunzig, 454 F.2d 1230, 1231, 1233 (6th Cir. 1972); Barrett v. Kunzig, 331 F. Supp. 266, 270, 274 (M.D. Tenn. 1971), *cert. denied*, 409 U.S. 914 (1972)). The dissent noted that the procedures employed in *McMorris*, *Downing*, and *Barrett* were uniformly applied, and unlike the method used by the officers in *Alba*, gave the individuals a choice to avoid the search. 81 App. Div. 2d at 358, 440 N.Y.S.2d at 237-38 (Sullivan, J., dissenting). Justice Sullivan also questioned why the defendant should be denied his constitutional rights merely because he was present on a weekend when the courthouse entrance was not monitored. *Id.*, 440 N.Y.S.2d at 237 (Sullivan, J., dissenting). Moreover, the dissent observed that the defendant was the only person searched although other spectators were carrying bags. *Id.* at 358, 440 N.Y.S.2d at 237-38 (Sullivan, J., dissenting).

[134] *See* 81 App. Div. 2d at 360, 440 N.Y.S.2d at 239 (Sullivan, J., dissenting). In concluding that the officers' actions were not justified, the dissent examined the defendant's conduct and the officers' knowledge of his reputation. *Id.* (Sullivan, J., dissenting). The dissent noted that the defendant "had a constitutional right to refuse to be searched." *Id.* (Sullivan, J., dissenting) (citing People v. Howard, 50 N.Y.2d 583, 590, 408 N.E.2d 908, 913, 430 N.Y.S.2d 578, 584, *cert. denied*, 449 U.S. 1023 (1980)).

[135] 81 App. Div. 2d at 361, 440 N.Y.S.2d at 239 (Sullivan, J., dissenting).

[136] *Id.*, 440 N.Y.S.2d at 239-40 (Sullivan, J., dissenting).

[137] It has been recognized that an arrest can be effected without physical restraint. *See* Henry v. United States, 361 U.S. 98, 103 (1959); People v. Smith, 62 Misc. 2d 473, 477, 308 N.Y.S.2d 909, 914 (Sup. Ct. Queens County 1970); People v. Graf, 59 Misc. 2d 61, 66-67, 298 N.Y.S.2d 224, 231 (N.Y.C. Crim. Ct. N.Y. County 1969). It has been held, for example, that an arrest may occur when a police officer orders an individual to enter a police car. *See* People v. Graf, 59 Misc. 2d at 66, 298 N.Y.S.2d at 231. Similarly, an arrest may take place when a person is ordered out of his car and told to place his hands on the automobile.

that any seizure must be justified by a showing of probable cause unless it falls "far short of the kind of intrusion associated with an arrest" so as to permit scrutiny under the less stringent standard of reasonable suspicion.[138] When the court officer in *Alba* told the defendant that he was "under arrest," he did so in order to secure the defendant's submission to authority, and therefore acted consistently with traditional notions of arrest.[139] Thus, it is suggested that the situation in *Alba* went beyond "the brief and narrowly circumscribed intrusions"[140] permitted in reasonable suspicion cases, and regardless of whether the seizure of the *Alba* defendant can be technically characterized as an "arrest," the court should have required a showing of probable cause.

It seems that the *Alba* court's analysis of the arrest issue, coupled with its justification for the search through the use of consent and exigency principles, represented an attempt to respond to the

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People v. Dellorfano, 77 Misc. 2d 602, 607, 352 N.Y.S.2d 963, 969 (Suffolk County Ct. 1974). *See generally* E. FISHER, LAW OF ARREST 42-98 (1967).

[138] *See* Dunaway v. New York, 442 U.S. 200, 212-13 (1979). In *Dunaway*, the Supreme Court emphasized that most seizures must be supported by probable cause, and that any exception to this fourth amendment requirement must remain narrow in scope. *Id.* at 210. The Court explained that the *Terry* doctrine was a creature of necessity, designed to permit minimal intrusions which "did not fit comfortably within the traditional concept of an 'arrest.'" *Id.* at 209. Thus, the Court observed, if a seizure extends beyond the "narrowly defined intrusions involved in *Terry*," a showing of probable cause is required. *Id.* at 212-13. Applying this rule to the facts involved in *Dunaway*, the Court stated:

> Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. . . . The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation proved fruitless . . . obviously do not make petitioner's seizure even roughly analogous to the [seizure in *Terry*].

Id. at 212-13 (citation omitted). It is submitted that the defendant in *Alba* was subjected to a seizure at least as intrusive as that involved in *Dunaway*. Indeed, although the *Alba* defendant was not transported to a police station, he was forced to accompany the court officers to another room and was specifically told that he had been arrested. *See* People v. Alba, 81 App. Div. 2d at 346-47, 440 N.Y.S.2d at 231.

[139] Although it has been stated that "mere words . . . cannot constitute an arrest," E. FISHER, *supra* note 137, at 48; *see, e.g.*, State v. Powers, 386 A.2d 721, 728 (Me. 1978), it has been recognized that the additional element of submission to police authority will support a finding that an arrest has occurred, *see, e.g.*, 386 A.2d at 728; State v. White, 209 Neb. 218, 306 N.W.2d 906, 912 (1981). Indeed, one court has recognized that the words "you are under arrest—are sufficient to effect an arrest of the person, if the person to be arrested is in the presence and power of the officer and in consequence of the communication submits to the officer's restraint." 386 A.2d at 728.

[140] Dunaway v. New York, 442 U.S. at 212; *see* note 138 and accompanying text *supra*.

critical problem of bombings in public facilities.[141] Nevertheless, it is submitted that the court has taken a dangerous step toward curtailment of an individual's rights in addressing this concern. Rather than risk sacrificing these rights,[142] it is suggested that the court should encourage a uniform, minimally intrusive search at the courthouse entrance whenever court is in session as an alternative to the type of search sustained in *Alba*.[143]

Caren L. Samplin

Pending Seider *attachments survive* Rush *decision when defendant had not raised jurisdictional defect with sufficient particularity to apprise plaintiff of quasi-in-rem nature of objection*

After the *Seider* doctrine[144] was declared unconstitutional in

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[141] *See* 81 App. Div. 2d at 352-53, 440 N.Y.S.2d at 234-35.

[142] *See* Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); People v. Rivera, 14 N.Y.2d 441, 452, 201 N.E.2d 32, 39, 252 N.Y.S.2d 458, 468 (1964) (Fuld, J., dissenting), *cert. denied*, 379 U.S. 978 (1965). *See generally* Terry v. Ohio, 392 U.S. 1, 11-12 (1968). In *Brinegar*, Justice Jackson recognized the difficulty of protecting fourth amendment rights. 338 U.S. at 181 (Jackson, J., dissenting). He noted that many unlawful searches are never scrutinized by courts because of the absence of incriminating evidence. *Id.* (Jackson, J., dissenting). Therefore, Justice Jackson concluded that courts must often exclude evidence seized from guilty defendants in order to protect the innocent against future unconstitutional invasions. *Id.* (Jackson, J., dissenting).

[143] It has been noted that despite the threat posed by public dangers, modifications in constitutional principles should be approached with caution. *See* Jesmore, *The Courthouse Search*, 21 U.C.L.A. L. REV. 797, 799 (1974). The increased threat of violence in courthouses and other federal buildings has resulted in the implementation of limited searches at the entrances to many federal facilities. *See id.* at 799, 809. The constitutionality of regulations requiring searches of all packages carried by individuals into such buildings has been upheld. *See, e.g.*, Downing v. Kunzig, 454 F.2d 1230, 1232-33 (6th Cir. 1972). The immediate danger to property and persons is said to justify these minimally intrusive searches. *Id.*; *see* McMorris v. Alioto, 567 F.2d 897, 900 (9th Cir. 1978). It is suggested that if such a procedure had been employed at the Bronx courthouse whenever court was in session, the issues involved in *Alba* never would have arisen. Indeed, it seems that the danger would have been averted, and the defendant's constitutional rights would not have been affected.

[144] Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The *Seider* doctrine provided that when a defendant had procured liability insurance with a New York insurer doing business within the state, the insurer's obligation to indemnify would be viewed as an attachable debt upon which jurisdiction could be predicated. *Id.* at 114-15, 216 N.E.2d at 314-15, 269 N.Y.S.2d at 101-02. *See generally* Carpenter, *New York's Expanding Empire in Tort Jurisdiction? Quo vadis?*, 22 HASTINGS L.J. 1173, 1180-83 (1971); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U. L. REV. 1075, 1105, 1116-17, 1135-36 (1968). CPLR 5201(a) defines an attachable debt as one "which is past due or which is yet to become due, certainly or upon demand of the judgment debtor." CPLR 5201(a)