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Fourth Amendment--Officer Safety and the Protective Automobile Search: An Expansion of the Pat-Down Frisk

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FOURTH AMENDMENT—OFFICER SAFETY AND THE PROTECTIVE AUTOMOBILE SEARCH: AN EXPANSION OF THE PAT-DOWN FRISK

Michigan v. Long, 103 S. Ct. 3469 (1983).

I. INTRODUCTION

In *Michigan v. Long*,[1] the United States Supreme Court concluded that a police officer's protective search for weapons in the passenger compartment of a car does not violate the fourth amendment[2] when, absent probable cause, the officer possesses a reasonable belief that the suspect is dangerous and may gain immediate control of a weapon.[3] The Court justified this decision on the basis of *Terry v. Ohio*[4] which allowed a police officer to conduct a pat-down frisk for weapons without probable cause because the officer possessed a reasonable belief that the suspect was armed and dangerous.

The Court in *Long*, by permitting an area search of the passenger compartment of an automobile, extended *Terry* beyond the narrow confines of a limited body search. This extension is consistent with the rationale of *Terry*. The reasoning that permits a *Terry* pat-down frisk of an individual applies with equal force to a search of the passenger compartment of an automobile. The application of *Terry* to an automobile, how-

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1 103 S. Ct. 3469 (1983).

2 The fourth amendment states:

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

U.S. CONST. amend. IV.

3 103 S. Ct. at 3480-81.

4 392 U.S. 1 (1968). In *Terry*, a police officer observed three men surreptitiously "casing" a store and suspected they were planning a robbery. Although the officer did not have probable cause to arrest, he approached the men. Because the officer feared that the suspects were armed, he conducted a pat-down frisk of one of the suspect's outer clothing. Upon patting Terry, the officer felt a pistol. He then reached into Terry's pocket and removed a .38 caliber revolver. Terry was arrested, along with one of the other suspects, for carrying a concealed weapon. *Id.* at 6-7. The Court determined that the officer possessed a reasonable belief that Terry was armed and dangerous. *Id.* at 30.

ever, creates significant practical problems that the Court in *Long* did not address. While the Court recognized that a protective search can only comport with the fourth amendment's proscription against unreasonable searches when the scope of the search is justified by the circumstances which rendered its initiation permissible,[5] the Court failed to sufficiently explicate the circumstances and limitations of a protective automobile search. By failing to adequately establish these guidelines, the Court may have permitted police officers to conduct searches that cannot be justified under the fourth amendment.

II. *MICHIGAN V. LONG*

A. THE FACTS

In the early hours of August 25, 1977, two Barry County[6] Sheriff deputies observed David Long driving erratically and at an excessive speed.[7] Long's car swerved into a ditch, and the deputies stopped to investigate. Long, leaving the driver's door open, met the deputies near the back of the car. Long was slow in responding to the deputies' request for his driver's license. The deputies suspected that Long was " 'under the influence of something.' "[8] The deputies asked Long to produce his vehicle registration, but instead of answering, Long began to return to the open door of his vehicle. The deputies followed him but, upon spotting a large hunting knife on the floorboard of the driver's side of Long's vehicle, prevented Long from reentering his automobile. The deputies subjected Long to a *Terry* pat-down frisk,[9] but found no other weapons.[10]

One of the deputies then shone his flashlight into Long's car to search for additional weapons. The deputy spotted a small leather pouch protruding from under the driver's armrest.[11] The deputy examined the pouch and discovered that it contained marijuana. Long was arrested for possession of marijuana. The deputies then searched the trunk of Long's car and found 75 pounds of marijuana.[12]

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5 *Id.* at 18-19; *Long*, 103 S. Ct. at 3480-81.

6 Barry County is in the state of Michigan.

7 Michigan v. Long, 103 S. Ct. 3469-3473 (1983).

8 *Id.*

9 A pat-down frisk is a protective search to locate weapons that may be immediately used against the officer. A *Terry* search of an individual is generally restricted to a limited search of the outer clothing of the suspect. Only upon feeling an object that reasonably could be a weapon can the officer intrude under the clothing or into the pockets of the suspect. Terry v. Ohio, 392 U.S. 1, 27-30 (1968).

10 103 S. Ct. at 3473.

11 *Id.* The trial court determined that the pouch could have contained a weapon. *Id.* at 3481.

12 *Id.* at 3473.

The Barry County Circuit Court convicted Long for possession of marijuana.[13] The court denied Long's pre-trial motion to suppress the marijuana on the grounds that the deputies conducted an invalid search.[14] The Michigan Court of Appeals affirmed Long's conviction and held that the deputies search of Long's vehicle was a valid weapon search under *Terry*.[15] The Michigan Supreme Court reversed that decision. The court found that *Terry* allowed only a limited search of an individual's outer clothing, and did not extend to an area search of a car.[16]

B. THE SUPREME COURT OPINIONS

Before reaching the merits of *Long*, Justice O'Connor, writing for the majority,[17] addressed a jurisdictional issue. Long claimed that the Supreme Court was without jurisdiction to hear the case because the Michigan Supreme Court's decision rested on an adequate and independent state ground.[18] Long argued that the Michigan State constitution provided greater protection from searches and seizures than the fourth amendment of the United States Constitution. Justice O'Connor, however, held that when a state court's decision is interwoven with federal law, the Supreme Court will take jurisdiction over the case unless the lower court "make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."[19]

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[13] People v. Long, 94 Mich. App. 338, 388, 288 N.W.2d 629, 629 (1979), *rev'd*, 413 Mich. 461, 320 N.W.2d 866 (1982), *rev'd*, 103 S. Ct. 3469 (1983).

[14] *Id.* at 340-41, 288 N.W.2d at 630.

[15] *Id.* at 347, 288 N.W.2d at 632. The Court found that the search of Long's trunk was a valid inventory search under South Dakota v. Opperman, 428 U.S. 364 (1976). In *Opperman*, the police conducted a standard inventory of the entire contents of a car impounded for multiple parking violations. They discovered marijuana in the glove box and subsequently arrested Opperman, the car's owner. The Supreme Court held that this standard caretaking procedure was reasonable because of an owner's significantly diminished privacy expectations in a car, a need to protect owners from loss of property, protect police from claims over lost property, and protect police from physical danger. *Id.* at 367-69.

[16] People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982), *rev'd*, 103 S. Ct. 3469 (1983). The search of the trunk was held to be invalid because it was the result of an arrest following an invalid search of the car's interior. *Id.* at 473, 320 N.W.2d at 870; *see* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (prosecutors may not use evidence seized during an unlawful search against the victim of the search).

[17] Chief Justice Burger and Justices White, Powell, and Rehnquist joined in Justice O'Connor's majority opinion.

[18] 103 S. Ct. at 3474.

[19] *Id.* at 3476. Justice O'Connor recognized that the Court has not developed a consistent approach for determining whether the Supreme Court has jurisdiction to hear a case in which the adequacy and independence of state grounds is not clear. *Id.* at 3474-75. In the past, the Court had dismissed cases unless it was clear that the lower court had based its decision on

In its decision, the Michigan Supreme Court had relied exclusively upon federal law except for two references to the state constitution.[20] The United States Supreme Court found that this failed to constitute a plain statement that the Michigan Supreme Court's decision rested on adequate and independent state grounds.[21] Consequently, the Court determined that it had jurisdiction to hear the case.

Justice O'Connor then proceeded to the substance of the case. The majority in *Long* held that a *Terry* frisk was not limited to a pat-down search of a person.[22] Justice O'Connor used the principles articulated in *Terry* to establish the basis for a protective weapon search of an automobile passenger compartment.

A *Terry* stop permits a police officer, without probable cause to arrest, to make a reasonable investigatory stop and protective search of a person.[23] Because a *Terry* stop is not subject to the warrant clause of the fourth amendment,[24] the validity of a stop and frisk is tested by the

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federal grounds. *See, e.g.*, Lynch v. New York, 293 U.S. 52, 54 (1934). The Court had also vacated or continued such cases so that the state court could clarify the basis for its decision. *See, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551 (1940). In another case, the Court had refused a respondent's request to have the state court clarify the grounds for its decision even when that decision rested in part on state grounds, because of the state court's extensive reliance on federal grounds. Oregon v. Kennedy, 102 S. Ct. 2083 (1982). At other times, the Supreme Court had examined the state law in an attempt to resolve the issue. *See, e.g.*, Texas v. Brown, 103 S. Ct. 1535 (1983).

Justice O'Connor found that these prior alternatives for deciding to take jurisdiction were unsatisfactory for three reasons. First, outright dismissal of such cases is unsatisfactory because uniformity in federal law cannot be achieved when the Supreme Court fails to review an opinion that rests primarily upon federal grounds but where that basis is not clear from the four corners of the opinion. Second, vacation and continuance are unacceptable because of the delay, the decrease in administrative efficiency, and the significant burden placed upon the state court when called upon to demonstrate the presence or absence of the Court's jurisdiction. Third, it is unsatisfactory for the Supreme Court to examine state law because the Court is generally unfamiliar with the state laws, and the parties often have not fully argued those laws. 103 S. Ct. at 3475.

Justice Blackmun, in his concurring opinion, expressed his belief that the Court's new approach will increase the danger of advisory opinions without enhancing administrative efficiency. *Id.* at 3483 (Blackmun, J., concurring).

Justice Stevens, dissenting, stated that the Court's new approach to resolving the issue of jurisdiction defies the doctrine of *stare decisis*. According to Justice Stevens, cases in which a state court has "overprotected" the citizen are not of inherent interest to the Supreme Court. The Court should not stretch its jurisdiction to reverse a state court's decision to set a criminal free. *Id.* at 3491-92 (Stevens, J., dissenting). Justice Stevens claimed that an historic presumption exists against taking jurisdiction when it is unclear whether state grounds are dependent upon federal law. *Id.* at 3489 (Stevens, J., dissenting). Justice Steven's greatest concerns, however, were the conservation of the scarce federal resources of the Supreme Court, and the Court's burgeoning docket. *Id.* at 3491 (Stevens, J., dissenting).

20 People v. Long, 413 Mich. at 471 n.4, 472-73, 320 N.W.2d at 869 n.4, 870.

21 103 S. Ct. at 3477.

22 *Id.* at 3479.

23 *Terry*, 392 U.S. at 27, 30-31.

24 A stop and frisk encounter requires "swift action predicated upon the on-the-spot obser-

fourth amendment's proscription against unreasonable searches and seizures.[25] The reasonableness of the search is determined by a test which balances the need to search[26] against the invasiveness of the search.[27] The Supreme Court in *Terry* concluded that an officer's safety outweighed the invasiveness of the protective search in an investigatory encounter.[28]

The Court in *Long* concluded that *Terry* did not restrict a protective search for weapons to the body of the suspect.[29] While *Terry* authorized only a protective pat-down search of a person, Justice O'Connor noted that the factual circumstances of the particular investigatory encounter in *Terry* constrained the Court's holding.[30] Thus, the Court in *Terry* did not "develop at length . . . the limitations which the Fourth Amendment places upon a protective seizure and search for weapons."[31]

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vations of the officer on the beat . . . [and] historically [this conduct] has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.* at 20.

[25] *Id.* Only unreasonable searches and seizures are forbidden by the fourth amendment. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974). The Supreme Court has stated that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable." Katz v. United States, 389 U.S. 347, 357 (1967). The Supreme Court, however, has "jealously and carefully drawn" exceptions to this rule. Jones v. United States, 357 U.S. 493, 499 (1958). These exceptions can be grouped into three categories: "consent searches, a very limited class of routine searches, and certain searches conducted under circumstances of haste that render the obtaining of a search warrant impracticable." Amsterdam, *supra*, at 358. Under the third category, a warrantless search can be made of a motor vehicle when an officer has probable cause to believe that the object of the search is in the car. *See* Carroll v. United States, 267 U.S. 132, 149 (1925) (search of automobile was valid when agents had probable cause to believe that the automobile contained contraband). Likewise, a warrantless search of an arrestee, and the area within the arrestee's immediate control, is permitted after a valid custodial arrest based on probable cause. *See* United States v. Robinson, 414 U.S. 218, 235 (1973). In *Robinson*, a police officer searched a crumpled cigarette package found in the arrestee's pocket. The Court held that incident to a lawful custodial arrest, an officer is allowed to fully search the arrestee. *Id.* at 236; *see also infra* note 33.

[26] The primary interest furthered by a protective search is the safety of the police officer. The Court in *Terry* concluded that it is clearly unreasonable to deny an officer the power to neutralize the threat of physical harm by checking a suspect for weapons when the officer reasonably believes the suspect may be armed and dangerous. 392 U.S. at 24.

[27] The Supreme Court has found that a protective weapon search of the exterior of a suspect's clothing is a "severe, though brief, intrusion upon cherished personal security" and "an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25.

[28] *Id.* at 27.

[29] 103 S. Ct. at 3479.

[30] The Supreme Court in *Long* noted that

> "[t]he opinion in *Terry* authorized the frisking of an overcoat worn by defendant because that was the issue presented by the facts. One could reasonably conclude that a different result would not have been constitutionally required if the overcoat had been carried, folded over the forearm, rather than worn. The constitutional principles stated in *Terry* would still control."

Id. at 3479 n.12 (quoting People v. Long, 413 Mich. at 475-76, 320 N.W.2d at 871 (Coleman, C.J., dissenting)).

[31] *Long*, 103 S. Ct. at 3479 (quoting *Terry*, 392 U.S. at 29).

The majority then elaborated on the justification for a protective search of a car's interior. Justice O'Connor emphasized the danger posed by investigatory stops of suspects in motor vehicles. She pointed out that a suspect's access to weapons, and not merely the presence of a weapon hidden in the suspect's clothing, may endanger a police officer.[32] Relying on *Chimel v. California*[33] and *New York v. Belton*,[34] the Court recognized that the passenger compartment of a car is under the control of a suspect, and is an area from which a suspect can acquire a weapon.[35]

Justice O'Connor disagreed with the Michigan Supreme Court's finding that a suspect under the control of an officer does not have immediate access to his vehicle, and thus, does not have control of weapons hidden in the car.[36] Justice O'Connor stated that a suspect can still gain access to his vehicle by breaking away from the officer, or by being permitted to reenter his vehicle to retrieve something from it.[37]

Consequently, the Court, after balancing the interests, concluded that when a police officer possesses a reasonable belief that a suspect is dangerous and may gain immediate control of a weapon, the officer may conduct a limited protective search of the passenger compartment of the suspect's vehicle.[38]

In order for an officer to reasonably believe that a suspect is armed and dangerous, the officer's belief must be based on "specific and articulate facts which, when taken together with rational inferences from those facts," reasonably lead the officer to conclude the search is warranted.[39] The majority in *Long* concluded that the sheriff deputies possessed a reasonable belief that Long was dangerous because Long had just driven his car into a ditch, he had appeared intoxicated, he was

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32 *Id.* at 3480.

33 395 U.S. 752 (1969). In *Chimel*, the Supreme Court recognized that a suspect has access not only to weapons hidden on his person, but also to weapons hidden in an area within the suspect's immediate control. Thus, the Court held that incident to an arrest, it is reasonable to search "the area 'within . . . [the arrestee's] immediate control' " so that the arrestee cannot gain possession of a weapon or destructible evidence. *Id.* at 763.

34 453 U.S. 454 (1981). In *Belton*, the Court stated that in a situation involving an individual with his car, the area within that person's immediate control includes the "relatively narrow compass of the passenger compartment of . . . [the] automobile. *Id.* at 460. In *Belton*, the occupants of an automobile were arrested for possession of marijuana. After the arrest, the officer searched the car and found cocaine in a zipped pocket of Belton's coat which was located on the back seat. *Id.* at 456. That search was held to be valid under the principles of *Chimel*. The Court in *Belton* defined the area within the suspect's immediate control as encompassing the passenger compartment of a car, and any containers found within. *Id.* at 460.

35 *Long*, 103 S. Ct. at 3480.

36 *Id.* at 3481.

37 *Id.*

38 *Id.*

39 *Terry*, 392 U.S. at 21.

slow in answering questions, the incident had taken place in a rural area early in the morning, and Long was about to reenter a car in which the officers had spotted a large hunting knife.[40] The officers had appropriately limited their search to those areas of the car over which Long had immediate control and that could have contained a weapon.[41] Therefore, "[t]he officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons in the car."[42]

Justice Brennan, dissenting,[43] stated that a *Terry* stop authorizes no more than a limited search of the outer clothing of a person for weapons, not a search of a person's car based on mere reasonable suspicion.[44] According to Justice Brennan, the majority in *Long* improperly relied upon *Chimel* and *Belton* because both cases involved a search incident to a lawful custodial arrest based on probable cause instead of a *Terry*-type protective search.[45]

Furthermore, Justice Brennan claimed that the majority in *Long* failed to distinguish between the scope and purpose of a *Terry* search. The scope of the search is determined not only by the purpose, but also by the intrusiveness of the search.[46] Justice Brennan argued that because the search of a suspect's unoccupied car is more intrusive than a pat-down search of the suspect, the Court improperly applied *Terry* to an

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[40] 103 S. Ct. at 3481.

[41] *Id.* The Court in *Terry* stated that the scope of a protective search is limited to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29. In *Long*, the deputy shone his flashlight only into the car's passenger compartment. The officers found a leather pouch which could have contained a weapon, and thus, the officer justifiably examined the contents of the pouch. 103 S. Ct. at 3473, 3481; *cf.* Commonwealth v. Silva, 366 Mass. 402, 409-10, 318 N.E.2d 895, 900-01 (1974) (search of small opaque leather pouch found during *Terry* search of an automobile was invalid because the pouch was so small that it could not conceivably have contained a weapon).

[42] 103 S. Ct. at 3481.

[43] Justice Marshall joined Justice Brennan in his dissent.

[44] Justice Brennan relied on United States v. Place, 103 S. Ct. 2637 (1983), which described the search authorized by *Terry* as a "limited search for weapons" or "frisk." *Long*, 103 S. Ct. at 3484 (Brennan, J., dissenting) (quoting *Place*, 103 S. Ct. at 2642). Justice Brennan characterized the search in *Long* as a "far cry from a 'frisk' and certainly not . . . 'limited.' " *Long*, 103 S. Ct. at 3484 (Brennan, J., dissenting).

In *Place*, the police detained an airline passenger's luggage based on a reasonable belief that his luggage contained narcotics. While the seizure of Place's luggage was unreasonable because it extended over a period of two days, the Court determined that the principles of *Terry* permitted an officer to briefly detain luggage and investigate the circumstances that aroused the officer's suspicion. *Place*, 103 S. Ct. at 2644-45.

[45] *Long*, 103 S. Ct. at 3484 (Brennan, J., dissenting). The sole purpose of a protective search is to discover hidden weapons that may be used against the officer or others nearby. *Terry*, 392 U.S. at 26. A search incident to arrest, while justified in part by the necessity to protect the officer, is also justified by the need to preserve evidentiary matter. *See Robinson*, 414 U.S. at 234; Preston v. United States, 376 U.S. 364, 367 (1964).

[46] 103 S. Ct. at 3486 (Brennan, J., dissenting).

area search which exceeds the requisite limited scope.[47]

Justice Brennan then concluded that the majority's reliance on a balancing test was inappropriate.[48] He noted that the Court in *Dunaway v. New York* had stated that a balancing test is used only when an intrusion falls far short of the kind of intrusion associated with an arrest.[49] Probable cause must be present when the severity of the intrusion approaches that of an arrest.[50] According to Justice Brennan, an area search is "precisely 'the kind of intrusion associated with an arrest' ";[51] balancing the relevant interests is unjustified because an area search cannot be sustained in the absence of probable cause.[52]

III. ANALYSIS

The principles developed in *Terry* justified the protective area search of the passenger compartment of Long's automobile. The interest of protecting police officers in investigatory encounters by permitting a limited search of the passenger compartment of the suspect's motor vehicle outweighs the intrusiveness of the protective search. The scope of an automobile search, however, like the scope of a pat-down frisk, must be properly limited by the justifications of officer safety.

A. THE APPLICATION OF *TERRY* TO AN AUTOMOBILE SEARCH

1. The Limitations of a Terry *Search: Exceeding the Pat-Down Frisk*

The Supreme Court has never limited the scope of a *Terry* search to the body of a person. In *Terry*, the Court held that an officer who reasonably believes a suspect to be armed and dangerous may conduct a limited pat-down search of the outer clothing of the suspect for the sole purpose of discovering concealed weapons.[53] The Court examined the method of the search in light of the standard that justified the search.[54] Thus, in *Terry*, the policeman's method of searching was appropriate

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47 *Id.* at 3486-87 (Brennan, J., dissenting).

48 *Id.* at 3487 (Brennan, J., dissenting).

49 442 U.S. 200, 210 (1979). In *Dunaway*, the police had picked up the suspect, brought him to police headquarters for questioning, and placed him in an interrogation room where he would have been physically restrained if he had tried to leave. The police neither formally arrested the suspect, nor did they have probable cause to arrest him. *Id.* at 203. The Court determined that this seizure was unlawful because it was indistinguishable from a traditional arrest and thus required probable cause. *Id.* at 212.

50 *Id.* at 212-13.

51 103 S. Ct. at 3487 (Brennan, J., dissenting) (quoting *Dunaway*, 442 U.S. at 212). Incident to arrest, an officer is permitted to conduct an area search of the passenger compartment of the arrestee's automobile. New York v. Belton, 453 U.S. 454 (1981); *see supra* note 34.

52 103 S. Ct. at 3487 (Brennan, J., dissenting).

53 Terry v. Ohio, 392 U.S. 1, 30 (1968).

54 *Id.* at 29.

because the scope of the search only encompassed what was necessary to discover whether the suspect was armed.[55] Because the Court limited its holding to the factual circumstances of the particular case, it did not examine the spectrum of degrees of intrusiveness associated with searches other than a pat-down frisk.[56] Furthermore, the Court explicitly stated that it did not develop the fourth amendment limitations on protective searches.[57]

Moreover, the Supreme Court expanded *Terry* in a subsequent case to permit a protective search not commenced with a pat-down frisk. In *Adams v. Williams*,[58] an informant tipped off a police officer about a man alleged to be dealing narcotics and carrying a gun in his waistband.[59] The suspect was seated in a car and the police officer asked him to get out. When the man refused to do so, the officer reached through the open window and immediately removed a concealed revolver from the man's waistband. The Court in *Adams*, relying on *Terry*, found that "[u]nder 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 . . . was [therefore] reasonable."[60]

The Court in *Adams* permitted a protective search without an initial pat-down frisk because the circumstances prevented the officer from neutralizing danger through less instrusive means.[61] Likewise, the prin-

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55 The officer in *Terry* "confined his search strictly to what was minimally necessary to learn whether the men were armed." *Id.* at 30.

56 *Id.*

57 *Id.* at 29. The Court stated that this is not an "occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without possible cause to arrest him." *Id.* at 16.

58 407 U.S. 143 (1972).

59 *Id.* at 144-45.

60 *Id.* at 148. The officer justifiably searched the suspect even though his information was not based on personal observation but on the observations of an informant. Because the suspect failed to step out of the car at the officer's request, "the revolver allegedly at . . . [the suspect's] waist became an even greater threat." *Id.* at 148. Professor LaFave has suggested that "the suspect's failure to respond to the officer's order to alight from the vehicle made it impossible for the officer to carry out an effective pat-down or to conduct even a partial pat-down without putting himself into a much more dangerous position vis-a-vis the suspect." 3 W. LAFAVE, SEARCH AND SEIZURE § 9.4, at 125 (1978).

61 *Adams*, 407 U.S. at 148. In Sibron v. New York, 392 U.S. 40 (1968), a case decided prior to *Adams*, the Supreme Court had found that a search conducted by an officer who thrust his hand into the suspect's pocket without an initial exploration was invalid not only because the search was motivated by the officer's improper purpose in looking for drugs, but because its scope was too extensive. *Id.* at 64-65. The search in *Sibron*, however, failed not because of its increased intrusiveness *per se*, but because it was unnecessarily intrusive in that a less intrusive manner of searching would have secured the officer's safety. The Court noted that the manner of "[t]he search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer." *Id.* at 65.

ciples of *Terry* do not preclude further inquiry into the reasonableness of a protective search of the passenger compartment of a suspect's automobile if the scope of the search is minimally necessary to insure the officer's safety.[62]

2. *The Balancing Test: Reasonableness and the Automobile Search*

In *Long*, the Court relied upon *Terry* and applied a balancing test to determine the reasonableness of a protective search of an automobile passenger compartment without probable cause.[63] The majority properly applied the balancing test to this automobile search.

In *Dunaway v. New York*,[64] the Court stated that "[t]he narrow intrusions involved in [*Terry*] . . . were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long prevailing standards' of probable cause . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest."[65] Thus, a seizure that approaches a level of intrusiveness generally associated with an arrest activates the traditional safeguard of an arrest—probable cause.[66]

In *Long*, Justice Brennan stated that a search of the passenger compartment of an automobile is "precisely" the type of intrusion associated with an arrest.[67] Thus, he reasoned, one cannot balance the interests[68] because probable cause is required in all automobile searches.[69] A search incident to an arrest, however, is more intrusive than a *Terry* automobile search. A search incident to a lawful custodial arrest has not only a different purpose, but a different permissible scope than a *Terry* protective search of an automobile.[70]

In a search incident to custodial arrest, a police officer may conduct

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62 *See infra* text accompanying notes 79-85.

63 Michigan v. Long, 103 S. Ct. 3469, 3481 (1983).

64 442 U.S. 200 (1979); *see supra* note 49.

65 *Id.* at 212.

66 *Id.* at 213-14.

67 103 S. Ct. at 3487 (Brennan, J., dissenting).

68 Essentially, no need exists to "balance" the interests in a search incident to a lawful custodial arrest because a balancing test has already taken place. In an arrest, "the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principles that [these types of] seizures are 'reasonable' only if supported by probable cause." *Dunaway*, 442 U.S. at 214. Thus, it is patently unreasonable for police officers to arrest suspects without probable cause.

69 103 S. Ct. at 3487 (Brennan, J., dissenting).

70 A *Terry* protective search also has a different permissible scope than other car searches for which probable cause is necessary. A search of a car based on probable cause allows an officer to search any container which could conceal the sought-after item. Moreover, the search may extend to the trunk of the automobile. *See* United States v. Ross, 102 S. Ct. 2157, 2172 (1982) (allowing an officer with probable cause to believe that contraband is hidden in a car to search any container in which the object could reasonably be found).

a very thorough search of a suspect[71] and the passenger compartment of the suspect's car.[72] The purposes of a search incident to arrest include not only the discovery of weapons, but also the discovery and protection of evidence.[73] Therefore, when searching an individual, the officer is not restricted to a protective pat-down of the arrestee's clothes,[74] but may conduct a thorough search of the passenger compartment of the arrestee's vehicle and examine the contents of any containers found therein regardless of whether they may conceal a weapon.[75]

A protective weapon search, on the other hand, is less intrusive than a search incident to an arrest because the search must be restricted to those areas in which a weapon could be hidden.[76] The principles of *Terry* do not permit an officer to search a container found after a pat-down when that container could not hold a weapon.[77] The Court in *Long* restricted the protective automobile search to the passenger compartment of a car, and further limited the search to those areas in which a weapon may have been placed or hidden.[78] Thus, because a *Terry* search of an automobile is less intrusive than a search incident to arrest, the Court properly applied the *Terry* balancing test to a protective automobile search.

3. The Interests Involved: The Primacy of Officer Safety

When using a balancing test to determine the reasonableness of a search, the Court weighs the need to search against the invasion which the search entails. The officer's safety and the safety of others nearby is the immediate justification for a protective search of an automobile.[79] The Court in *Terry* recognized the need for law enforcement officials to protect themselves and prospective victims by conducting a protective

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71 United States v. Robinson, 414 U.S. 218, 235 (1973).

72 New York v. Belton, 453 U.S. 454, 461 (1981).

73 *Robinson*, 414 U.S. at 234.

74 In a search incident to an arrest, "the officer must feel with sensitive fingers every position of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1954).

75 The authority to search incident to custodial arrest will permit a search of "containers [that] will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Belton*, 453 U.S. at 461.

76 *Long*, 103 S. Ct. at 3480.

77 Professor LaFave has noted that a "container [withdrawn from the suspect's pocket] should not be opened unless it might contain a weapon, a judgment which the officer should be expected to make on the basis of its size, weight and feel." 3 W. LAFAVE, *supra* note 60, § 9.4, at 132.

78 103 S. Ct. at 3480; *see supra* note 41 and accompanying text.

79 *Long*, 103 S. Ct. at 3479.

search of a suspect who may be armed and dangerous.[80] The resultant intrusion on the suspect's personal sanctity did not outweigh the interest of police officer safety; thus, a limited intrusion designed to protect a police officer can be a reasonable search under the fourth amendment.

The Supreme Court in *Chimel* recognized that protecting a police officer could involve more than just removing weapons from the clothing of a suspect. The officer could be physically harmed as a result of a suspect's access to weapons in an area within the suspect's immediate control.[81] In addition, the Court in *Belton* recognized that the passenger compartment of an automobile and any containers therein are in an area into which the suspect could reach for a weapon.[82]

The Court in *Long* appropriately used these two cases of search incident to arrest to analyze a *Terry* stop of an automobile. The majority in *Long* relied upon *Chimel* merely to indicate that the Court has previously recognized that weapons hidden within a suspect's reach pose a danger to police officers. Likewise, the majority in *Long* used *Belton* only to point out that the passenger compartment of an automobile and any containers therein are within the reach of the suspect. Thus, although *Long* did not involve a search incident to arrest, the Court used *Chimel* and *Belton* only to identify a potential source of police danger, and to note that in the absence of a protective search of an automobile, the interest of officer safety is not secured.[83] While the Court in *Long* noted the gravity of an intrusion into a suspect's automobile,[84] the Court, consistent with the principles of *Terry*, determined that a proper balance of the interests favored officer safety.[85] This conclusion is a logical extension of *Terry* and its progeny.

B. THE DIFFICULTIES OF APPLYING A PROTECTIVE SEARCH TO THE AUTOMOBILE

1. Determining the Amount of Evidence for Reasonable Suspicion

Under *Terry*, an officer may conduct a protective search only when he reasonably concludes that a suspect is armed and dangerous.[86] Not all stops call for a *Terry* search.[87] When an officer reasonably believes

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

81 *See supra* note 33.

82 *See supra* note 34.

83 103 S. Ct. at 3480 n.14.

84 *Id.* at 3481. The search in *Terry* was also severely intrusive. *Terry*, 392 U.S. at 24-25; *see supra* note 27.

85 103 S. Ct. at 3479-80.

86 Terry v. Ohio, 392 U.S. 1, 30 (1968).

87 The question of "whether it is proper to make a protective search incident to a stopping for investigation is a question separate from the issue of whether it is permissible to stop the suspect." 3 W. LAFAVE, *supra* note 60, § 9.4, at 115.

that the suspect has committed a violent crime, however, the right to search is concomitant with the right to stop the suspect.[88] In other types of crimes "such as trafficking in small quantities of narcotics, possession of marijuana, illegal possession of liquor, prostitution, bookmaking, or vagrancy," other circumstances must be present to justify a *Terry* search.[89] Typical circumstances include "a characteristic bulge in the suspect's clothing; observation of an object . . . which might be a weapon; an otherwise inexplicable sudden movement toward a . . . place where a weapon could be concealed; . . . and awareness that the suspect had previously been armed."[90]

Justice Brennan stated in his dissent in *Long* that "the Court's requirement that an officer have a reasonable suspicion that a suspect is armed and dangerous does little to check the initiation of an area search."[91] In *Long*, a large hunting knife, an apparently intoxicated driver, a dark night, and a rural area combined to prompt a weapon search of Long's car.[92] Aside from possessing a large hunting knife, David Long was not readily distinguishable from numerous other intoxicated late night drivers. The Court did not explicitly state whether, in the absence of Long's hunting knife, the officer could have conducted the protective search. If the officer could have searched anyway, the Court in *Long* would have authorized car searches based on little more than inebriation and the hour of the night.

The Court, however, emphasized that the officers did not frisk Long until after they had observed the hunting knife.[93] Thus, one could reasonably conclude that Long's apparent intoxication and the late hour of the night were not decisive factors, and that without the observation of the knife, the officers could not have properly searched the car. A *Terry* stop of a taciturn, confused, and somewhat inebriated individual is more closely grouped with nonviolent crimes like bookmaking, vagrancy, and trafficking in small quantities of narcotics for which the right to search is founded upon additional circumstances, than with dangerous crimes from which the right to search automatically flows from the right to stop. Therefore, the Court in *Long* most likely concluded that a large hunting knife on the floorboard of the suspect's car

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88 *See id.* at 116; *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring).

89 3 W. LAFAVE, *supra* note 60, § 9.4, at 117 (footnotes omitted); *see* Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977)(an officer who ordered a lawfully stopped traffic violator out of the car was permitted to search him when the officer observed a bulge that could have been a weapon).

90 3 W. LAFAVE, *supra* note 60, § 9.4, at 117, 118 (footnotes omitted).

91 Michigan v. Long, 103 S. Ct. 3469, 3486 (1983) (Brennan, J., dissenting).

92 *Id.* at 3481.

93 *Id.* The Court also stated the the search of Long's person could be justified after the discovery of the knife. *Id.* at 3481 n.15.

established the requisite "other circumstances" permitting a *Terry* search.

Terry requires not only that a police officer have a reasonable suspicion that the suspect is armed, but also that the suspect is dangerous.[94] In most *Terry* stops, if the officer reasonably believes that the suspect is armed, "then it will follow that there is the requisite suspicion that he is dangerous because [the suspect] is confronting an officer who is investigating the possibility that he is engaged in criminal conduct."[95] In a *Terry* encounter with a suspect and an automobile, it is unclear when an officer may reasonbly conclude that a suspect is armed and dangerous.

A police officer may presume that typical weapons such as guns or knives within the passenger compartment of the suspect's car are always dangerous. Automobiles, however, will often contain items that could conceivably make effective weapons but which are not in any way intended for that purpose *(e.g.*, a baseball bat, a hammer, a tire iron, or a steel tow chain). An officer who reasonably believes that a suspect has a concealed tire iron strapped to his body would, following *Terry*, be permitted to frisk that individual because the officer may reasonably assume that the suspect intends to use the tire iron as a weapon.[96] But an officer cannot so readily conclude that the presence of a tire iron on the floor of a car can similarly be the impetus for a protective search of the entire passenger compartment. Because the presence of a tire iron in a car may be ordinary and generally benign, it is not necessarily an accurate indicia of the dangerousness of the suspect.[97]

An officer's safety is not jeopardized by a suspect who is not dangerous. A protective search that is not justified by the need to protect the officer or others nearby is unreasonable.[98] Thus, protective searches of the passenger compartment of a car based solely upon the presence of a tire iron or a baseball bat may result in frequent violations of the fourth amendment because of the low correlation between the presence of these objects and the dangerousness of the suspect.

2. Determining the Suspect's Area of Immediate Control

Terry principles permit an extension of a protective search from the body of a suspect to the passenger compartment of a car and the con-

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94 *Terry*, 392 U.S. at 30.

95 3 W. LAFAVE, *supra* note 60, § 9.4, at 114 n.17.

96 *See, e.g.*, People v. Harris, 48 N.Y.2d 208, 216, 397 N.E.2d 733, 736, 422 N.Y.S.2d 43, 46 (1979) (police officer was justified in taking two long sticks from defendant because the sticks could pose a danger to the officer if the suspect became violent).

97 A tire iron in a car could pose a danger to a police officer. A tire iron within the reach of an ostensibly irrational suspect could reasonably lead an officer to conclude that the suspect is dangerous because of his access to this potential weapon.

98 *Terry*, 392 U.S. at 20-21, 29.

tainers therein only when an officer reasonably believes that a suspect is dangerous and may gain immediate control of weapons.[99] Because a suspect can only gain immediate control of weapons from his automobile when he is in control of his automobile, it is necessary to determine when the passenger compartment of a vehicle is within the suspect's immediate control.

Incident to a custodial arrest, an officer may search the passenger compartment of the arrestee's car. The justification for this search, in part, is that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon.' "[100] The Court in *Long* recognized that a suspect who is not arrested may similarly gain access to weapons.[101] A number of circumstances exist, however, in which the subject of a *Terry* stop would not have immediate access to his vehicle.[102] For example, a suspect who has walked back to a patrol car some distance from his own automobile may not have immediate access to his automobile.[103]

The exigencies of an investigatory stop involving an automobile may make it difficult to determine precisely when the suspect has immediate control of items in his car. Consequently, courts may draw a bright line and conclude that suspects have immediate control of the interior of their cars regardless of their position in or outside the car.[104] Officer safety can be secured, however, without establishing a general rule that an officer can always search a suspect's automobile because of the possibility of the suspect's future access to the interior of his car.

A suspect who is in the control of police officers may gain immediate control of his automobile by either breaking away from the officers, or by being permitted to reenter the vehicle. A suspect capable of breaking away from an investigating officer and reaching his car is in

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99 *See id.* at 27, 30.

100 New York v. Belton, 453 U.S. at 454, 460 (1981) (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

101 103 S. Ct. at 3480.

102 Professor LaFave has noted that there are "a number of commonplace events which would put the passenger compartment beyond the arrestee's [or the suspect's] control—immediate removal of him . . . to some other place away from his vehicle, . . . [and] closure of the vehicle, . . . among others." 3 W. LAFAVE, *supra* 60, § 7.1, at 158 (Supp. 1983).

103 *See* State v. Greenwald, 369 So.2d 1317, 1319 (La. 1979)(tied bag inside suspect's automobile is not within area of immediate control when suspect is outside the vehicle with his hands on its roof); People v. Pagliarulo, 41 A.D.2d 563, 564, 340 N.Y.S.2d 134, 136-37 (1973) (mem.) (revolver in automobile passenger compartment out of reach when suspects were standing on the sidewalk and the door of the car was closed). *Contra* Hill v. State, 275 Ark. 71, 82, 628 S.W.2d 284, 289, *cert. denied*, 103 S. Ct. 180 (1982) (inside of suspect's automobile was within area of control even when suspect was standing behind car with his hands on the trunk).

104 *See Belton*, 453 U.S. at 460.

immediate control of his vehicle. Consequently, *Terry* principles do not proscribe a protective search of the passenger compartment of the cars of suspects capable of breaking away from the investigating officers. Courts need not presume, however, that every suspect is capable of breaking away from the investigating officer because certain circumstances may effectively preclude a suspect from entering the passenger compartment of his car. For example, in many situations the police officers may be between the suspect and his locked car door. Therefore, the Court should require the police officer to determine whether a suspect may gain control of his automobile from the particular factual circumstances of the individual encounter.[105] The validity of the protective search, then, would turn on whether the police officer reasonably believed that even though the suspect was under the control of the officers, he was still capable of breaking away and acquiring access to a weapon.

Police officers also may expressly permit a suspect to gain access to his automobile either during or after the *Terry* investigation.[106] If the need arises for the suspect to retrieve something from his car during the investigation, then at that time, if the officer reasonably believes that the suspect is dangerous and will gain access to weapons upon entering the vehicle, the officer can conduct a *Terry* search of the suspect's automobile.

Likewise, at the conclusion of the *Terry* investigation, if the suspect has not been arrested, the suspect will be allowed to reenter the automobile.[107] At that time, the suspect will have access to any weapons hidden in the vehicle. If, at the conclusion of the investigation, the officer reasonably believes that the suspect may harm the officer, then the principles of *Terry* allow the officer to search the suspect's vehicle for weapons. Because a suspect by this time has successfully concluded the encounter with the police officer and is now safely ensconced in the automobile, however, it is unlikely that the suspect will wish to reestablish contact with the law by trying to harm the officer.[108] Thus, although situations may arise in which an officer reasonably believes that a suspect may harm the officer even though the officer has finished the *Terry* investiga-

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[105] *Terry* principles already require an officer to use a reasonably prudent man standard to determine whether the suspect is armed and dangerous. *Terry*, 392 U.S. at 24, 27-28.

[106] *Long*, 103 S. Ct. at 3481-82. A suspect may be required to obtain information from within the automobile during the *Terry* investigation *(e.g.*, driver's license, automobile registration, or insurance card).

[107] *Id.* at 3481.

[108] Professor LaFave has stated that "[if] a person is stopped for running a stop sign, it hardly seems plausible to suggest that after he is ticketed and returns to his car he will then seize a gun and try to overtake the police car and shoot the officers." 3 W. LAFAVE, *supra* note 60, § 9.4, at 137 (footnote omitted).

tion, it seems improbable that this will occur very often.[109]

IV. CONCLUSION

The Court in *Michigan v. Long* extended *Terry* to permit a protective area search of the passenger compartment of a car. This decision is doctrinally consistent with the principles developed in *Terry*. The Court correctly identified the passenger compartment of a suspect's automobile as a place in which a suspect can conceal weapons and appropriately permitted a police officer to search that area when the officer reasonably believed that the suspect was dangerous and had immediate access to weapons.

The Court, however, did not explicate the circumstances and limitations of the protective automobile search. An officer should not commence a protective search unless he reasonably believes that the suspect intends to gain control of weapons hidden in the passenger compartment of the automobile within the immediate control of the suspect. If the police officer has control over the suspect, then the passenger compartment of the suspect's automobile is within the immediate control of the suspect only when the officer reasonably determines that the suspect is capable of breaking away from the investigating officers or when the officer allows the suspect to reenter the car. Following these guidelines, a protective automobile search should successfully comply with the principles of *Terry*.

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[109] Although the Court in *Long* pointed out that *Terry* does not require officers to adopt alternate measures of ensuring their safety to avoid the intrusion involved in a *Terry*-type search, 103 S. Ct. at 3482 n.16, an officer's decision to search the passenger compartment of an automobile based on the possibility that a suspect may break away from the officer or will be permitted to reenter the vehicle is not a choice among less intrusive means of neutralizing a threat to officer safety. Rather, it is a determination as to whether an officer is actually in danger as a result of a suspect's access to weapons. Thus, this decision is similar to decisions officers already make under *Terry*. *See supra* note 105 and accompanying text.