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Louisiana and the Justification for a Protective Frisk for Weapons

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Criminality and weaponry are neither synonymous nor mutually inclusive.[1]

I. INTRODUCTION

The United States Supreme Court, in *Terry v. Ohio*,[2] expressly recognized that in certain situations, law enforcement personnel might search citizens because of suspicions not amounting to probable cause. These situations are street encounters between police and persons suspected of criminal activity, particularly those encounters causing police to reasonably believe the citizen is armed and dangerous. The practice of "stop and frisk" was not the brainchild of the Supreme Court; indeed, police had been frisking suspects for weapons for years prior to 1968.[3] But the Court directly confronted the practice for the first time in *Terry*, and the limited approval *Terry* stamped on the practice constituted official acknowledgment that frisks are not prohibited by the Fourth Amendment.

Close on the heels of *Terry*, the Louisiana legislature took advantage of the opening created by the Supreme Court and passed Louisiana Code of Criminal Procedure article 215.1.[4] That article grants to Louisiana law enforcement personnel the right to stop persons reasonably suspected of criminal activity. More significantly, the article grants to law enforcement personnel the right to frisk those persons previously stopped and reasonably suspected of carrying a weapon.

Critics of the reasonable suspicion standard argue that drawing ambiguous distinctions between probable cause and reasonable suspicion may ultimately turn every police-citizen encounter into grounds for a search of the person.[5] This

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1. State v. Rodriguez, 476 So. 2d 994, 997 (La. App. 1st Cir. 1985).

2. 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968).

3. Wayne R. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 Mich. L. Rev. 39, 42 (1968).

4. 1968 La. Acts No. 305, § 1. For the full text of Louisiana Code of Criminal Procedure Article 215.1, see *infra* note 31 and accompanying text.

5. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests [of private rights and law enforcement]. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311 (1949).

The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion."

. . . .

. . . Only [the probable cause standard] draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is

comment examines whether those criticisms have been realized in Louisiana. Do the courts of this state consistently require independent justification for a frisk for weapons, or does the right to frisk stem automatically from a lawful investigatory stop? Assuming Louisiana courts require independent justification, is more than lip service given to the requirement? This comment attempts to answer these questions by selecting those Louisiana cases in which the frisk, separate and apart from the initial investigatory stop, was an issue on appeal. The cases are grouped into four recurring fact patterns. Each group and the treatment accorded it by the courts is then analyzed.

Secondarily, this comment suggests courts should more rigorously differentiate the analysis of the stop and the analysis of the frisk. Too often, courts treat the inquiries into the justification for the stop and the justification for the frisk as a single question. Of course, the same circumstances may give rise to both the stop and the frisk, but courts should always be careful to distinguish the inquiries.

II. THE FEDERAL CASES

Analysis of the Louisiana cases necessarily begins with a brief review of the federal cases, particularly *Terry*. In *Terry*, Cleveland Police Detective Martin McFadden stopped and frisked three men he suspected of planning to rob a nearby store. McFadden's suspicions were aroused solely by his observation of the men's conduct. The frisk uncovered handguns on two of the men, including John Terry. Terry was convicted of carrying a concealed weapon.[6]

Probable cause had previously always been required for any type of search, even a limited frisk for weapons. Before the United States Supreme Court, Terry therefore argued the frisk was only justifiable if based on probable cause.[7] The prosecution conceded that Officer McFadden's suspicions did not amount to probable cause.[8] Thus, the issue was whether a frisk-type search of the kind conducted by McFadden violated the Fourth Amendment when based on something less than probable cause. The Court ultimately concluded:

> where a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity is afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies

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committing, or is about to commit a particular crime.

Terry, 392 U.S. at 37-38, 88 S. Ct. at 1888 (Douglas, J., dissenting).

6. *Terry*, 392 U.S. at 5-7, 88 S. Ct. at 1871-72. McFadden's suspicions were aroused because two of the men took turns walking down the street and stopping to peer into the same store front window. After looking in the window, they would continue walking in the same direction, then turn around and return to the street corner, stopping on the way to peer into the same window. They repeated this ritual several times.

7. Brief for Petitioner at 20-25, Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) (No. 67).

8. Brief for Respondent at 27-29, Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) (No. 67).

> himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[9]

This "reasonable belief" test[10] requires that the officer "point to specific and articulable facts which, taken together with rational inferences from those facts," warrant him in believing the suspect is armed and dangerous.[11]

Applying its newly-formulated test, the Supreme Court held that Officer McFadden could reasonably have believed Terry was planning a daylight robbery. Such a crime would likely involve the use of weapons; therefore, the frisk was justified. *Terry's* holding suggests that when the initial stop is based on suspicion of a crime likely to involve the use of weapons, the justification for any resulting frisk is automatic, without inquiry into what the officer might reasonably have believed.[12]

Since *Terry*, the Supreme Court has decided five cases that help clarify when a suspect may be frisked. *Sibron v. New York*[13] was decided the same day as

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9. *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884-85. If a frisk is justified in a particular situation, the scope of the frisk must be reasonable. "The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover . . . hidden instruments for the assault of the police officer." *Id.* at 29, 88 S. Ct. at 1884. This comment is concerned only with the justification for the frisk, not the scope of the frisk.

The Supreme Court soon dropped its requirement that an investigating officer identify himself as such and make limited inquiries prior to conducting a frisk. *See* Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921 (1972). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 9.4, at 506 (2d ed. 1987).

10. The opinion contains what is arguably two different tests for analyzing an officer's conduct. The first of these is the "reasonable conclusion" test. *See supra* text accompanying note 9. The second is the reasonable belief test:

> [T]here 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 probable cause to arrest the individual for a crime.

Terry, 392 U.S. at 27, 88 S. Ct. at 1883. *See generally* LaFave, *supra* note 3, at 84-88. For simplicity, this comment will refer only to the reasonable belief test.

11. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. The Court also said "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27, 88 S. Ct. at 1883 (citation omitted).

12. Justice Harlan explicitly made this point in his concurrence. He said:

> [T]he right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime. Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence.

Id. at 33, 88 S. Ct. at 1886 (Harlan, J., concurring).

13. 392 U.S. 40, 88 S. Ct. 1889 (1968).

Terry. The facts of *Sibron* are conceptually similar to those of *Terry*: a police officer encountered by chance a citizen the officer suspected of criminal conduct. In *Terry*, the Court unhesitatingly assumed a daylight armed robbery was likely to involve the use of weapons. In *Sibron*, however, where the suspected criminal activity was possession of narcotics, the Court was unwilling to make such an assumption.[14] Justice Harlan summarized the Court's reluctance to uphold the frisk: "It is not clear that suspected possession of narcotics falls into this category [of crimes likely to involve the use of weapons]. *If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so.*"[15]

Adams v. Williams[16] was decided four years after *Terry* and *Sibron*. Robert Williams was frisked because a known confidential informant told a police officer that Williams was carrying a handgun. The frisk uncovered the weapon.[17] The Supreme Court stated that information from a confidential informant could supply a reasonable suspicion that a suspect was armed, provided the information contains sufficient indicia of reliability.[18] The Court considered this informant's tip sufficiently reliable and upheld the frisk.[19] *Adams* represents the first extension of *Terry* beyond the happenstance police-citizen encounter. Now, a reliable tip can provide the reasonable belief necessary to justify a frisk.

The Supreme Court's fourth opinion concerning the justification for a frisk was *Pennsylvania v. Mimms*.[20] Police officers stopped Harry Mimms for driving with an expired license plate. One of the officers noticed a large bulge under Mimms' jacket and frisked him, discovering a loaded revolver.[21] The Supreme Court held "[t]he bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer."[22] *Mimms* represents a second extension of *Terry*: the suspect's physical appearance can cause police to reasonably believe he is armed.

The Supreme Court's fifth decision regarding the justification for a frisk is *Ybarra v. Illinois*.[23] Illinois police officers executed a search warrant authorizing the search of the Aurora Tap Tavern and its bartender. The officers entered the tavern and began frisking the patrons, including Ventura Ybarra. The frisk of Ybarra uncovered a packet of heroin.[24]

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14. The majority said "[t]he suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb . . . than it justifies an arrest for committing a crime." *Id.* at 64, 88 S. Ct. at 1903.

15. *Id.* at 74, 88 S. Ct. at 1907 (Harlan, J., concurring) (emphasis added).

16. 407 U.S. 143, 92 S. Ct. 1921 (1972).

17. *Id.* at 144-45, 92 S. Ct. at 1922-23.

18. *Id.* at 146-47, 92 S. Ct. at 1923-24.

19. *Id.* at 147-48, 92 S. Ct. at 1924.

20. 434 U.S. 106, 98 S. Ct. 330 (1977).

21. *Id.* at 107, 98 S. Ct. at 331.

22. *Id.* at 112, 98 S. Ct. at 334.

23. 444 U.S. 85, 100 S. Ct. 338 (1979).

24. *Id.* at 87-89, 100 S. Ct. at 340-41.

> The Supreme Court held the frisk to be unjustified. The prosecution was unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.
>
> ... The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.[25]

Unlike the previous situations considered by the Supreme Court, the alleged justification for the frisk in *Ybarra* arose from neither the suspect's conduct (or alleged conduct, as in *Adams*), nor from his appearance. Instead, the justification arose from the suspect's physical proximity to a person and place being investigated by police. The Court refused to extend the right to frisk this far, and reiterated that police may only frisk persons they particularly suspect of being armed and dangerous.

The final relevant Supreme Court case is *Michigan v. Long*,[26] decided in 1983. Officers observed Long's car in a ditch on the side of a rural road late at night. They encountered Long—who appeared intoxicated—at the side of the car. When Long went to retrieve his vehicle registration from the car's interior, one of the officers noticed a large hunting knife on the floorboard. The officers then frisked Long and looked inside the car, where they found a leather pouch containing marijuana.[27] The Supreme Court, citing the late hour, the rural area, Long's apparent intoxicated state, and the presence of the knife inside the car, upheld the frisk.[28] *Long*, at least as it concerns the justification for a frisk, is noteworthy because the Court upheld the frisk based on a variety of circumstances that, considered individually, do not seem to suggest the possibility that Long was armed.[29]

III. LOUISIANA LAW

A. *Code of Criminal Procedure Article 215.1*

In 1968, Louisiana enacted Code of Criminal Procedure article 215.1.[30] In its current form, the article reads:

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25. *Id.* at 93-94, 100 S. Ct. at 343. Illinois argued unsuccessfully that police officers should be allowed to search persons present on "compact" premises being searched pursuant to warrant.

26. 463 U.S. 1032, 103 S. Ct. 3469 (1983).

27. *Id.* at 1035-36, 103 S. Ct. at 3473-74.

28. *Id.* at 1050, 103 S. Ct. at 3481.

29. The main significance of the case is that the Court upheld the search of the interior of Long's automobile.

30. 1968 La. Acts No. 305, § 1.

Article 215.1. Temporary questioning of persons in public places; frisk and search for weapons

A. A law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions.

B. When a law enforcement officer has stopped a person for questioning pursuant to this Article and reasonably suspects that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon. If the law enforcement officer reasonably suspects the person possesses a dangerous weapon, he may search the person.[31]

The article's wording and structure both clearly indicate that the justification for the frisk is separate from and independent of the justification for the stop. Furthermore, the article makes explicit what was implicit in the majority opinion in *Terry*: a valid stop must necessarily precede a valid frisk.

Paragraph (B), however, is less than a model of clarity. The first sentence refers to an officer's reasonable suspicion that he is in danger, whereas the second refers to an officer's reasonable suspicion that the suspect possesses a dangerous weapon. Depending on the suspicion the officer entertains (a dangerous suspect versus an armed suspect), the article arguably authorizes two different types of searches (a frisk versus a full, evidentiary search). Whatever the ambiguity, Louisiana courts have generally interpreted the paragraph as creating only one inquiry—whether the suspect possessed a dangerous weapon—and have almost unanimously interpreted the paragraph as authorizing only one type of search—a limited frisk for weapons.[32]

As the article indicates, an officer's belief that a suspect possesses a weapon must rise to the level of a reasonable suspicion. This standard has been defined by the Louisiana Supreme Court as "something less than probable cause, [which]

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31. Paragraph (C) reads: "[I]f the law enforcement officer finds a dangerous weapon, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person." La. Code Crim. P. art. 215.1 (1983).

32. *See, e.g.*, State v. Bolden, 380 So. 2d 40, 42 (La.) ("[N]othing transpired to dissuade Officer Gurley in his belief that defendant was armed and dangerous. Under the circumstances, a limited protective search of defendant's outer clothing for weapons was justified."), *cert. denied*, 449 U.S. 856, 101 S. Ct. 153 (1980); State v. de la Beckwith, 344 So. 2d 360, 372 (La. 1977) ("The police officers were also aware that defendant was carrying a fully loaded .45 caliber automatic pistol. Thus . . . they were justified in restraining him and in conducting a 'frisk' of his outer clothing."); State v. Dixon, 337 So. 2d 1165, 1167 (La. 1976) ("Moreover, since the movements of Dixon indicated that he might have a weapon, the officers were equally justified in . . . conducting a limited weapons pat-down."). *But cf.* State v. Jernigan, 377 So. 2d 1222, 1225 (La. 1979) ("Once a lawful detention is made, a police officer is justified in frisking the suspect for weapons under circumstances where he reasonably suspects that he is in danger of life or limb."), *cert. denied*, 446 U.S. 958, 100 S. Ct. 2930 (1980); State v. Price, 482 So. 2d 135, 138 (La. App. 4th Cir. 1986) ("[T]he officer, once he has stopped the suspect, may frisk the suspect's outer clothing and may even conduct a full search if the officer reasonably believes the suspect has a dangerous weapon.").

must be determined under the facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference."[33] This vague definition appears in many Louisiana stop and frisk cases; however, because the distinction between reasonable suspicion and probable cause is ultimately one only of degree, the definition is arguably as specific as it can be. To clarify this vague standard, Louisiana courts often supplement the definition with language similar to that found in United States Supreme Court opinions,[34] and no significant difference exists between the level of suspicion required by the United States Supreme Court and that required by the Louisiana Supreme Court.

The Louisiana stop and frisk cases encompass a variety of facts and circumstances held sufficient (and insufficient) to justify a frisk. Certain patterns continually reappear, however. In particular, four patterns comprise the vast majority of all stop and frisk cases in Louisiana. In the first group of cases, designated the "description" category, the suspect is stopped because he fits the description of someone wanted by police in connection with a reported crime. In the second group of cases, designated the "conduct" category, police stop the suspect because his conduct leads them to believe he is committing or about to commit a crime likely to involve a weapon.[35] In the third group of cases, designated the "appearance" category, the suspect's physical appearance leads police to believe he is armed. In the final group of cases, designated the "third person" category, police frisk a person whom they do not specifically suspect of being armed. This category comprises cases factually similar to *Ybarra*.[36]

B. The Description Cases

This category represents situations where police stop and frisk the suspect because he fits the description of someone wanted for a reported crime. Typically, there is an ongoing, "formal" investigation of a crime which was

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33. *Dixon*, 337 So. 2d at 1167.

34. *See, e.g.*, State v. Hunter, 375 So. 2d 99, 101 (La. 1979) ("[T]he officer's belief [that the suspect is armed and dangerous] is not reasonable unless the officer is 'able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.'" (quoting Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903 (1968)); State v. Bridges, 610 So. 2d 827, 829 (La. App. 4th Cir. 1992), *aff'd on reh'g*, 617 So. 2d 515 (1993) (per curiam) ("Reasonable suspicion . . . is something less than probable cause; and it must be determined under the facts of each case whether the officer had sufficient articulable knowledge of particular facts and circumstances to justify an infringement upon an individual's right to be free from governmental interference."); State v. Lightfoot, 580 So. 2d 702, 705 (La. App. 4th Cir. 1991) ("In determining whether or not the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

35. This is the type of stop and frisk at issue in *Terry*.

36. Other authors have previously categorized cases according to the suspect's conduct and appearance. *See, e.g.*, Michael B. Van Sicklen, *Terry Revisited: Critical Update on Recent Stop-And-Frisk Developments*, 1977 Wis. L. Rev. 877, 886-89 (1977).

committed prior to the encounter. However, this category also includes situations in which police suspicion arises from a confidential informant's or anonymous source's tip which alleges the suspect is armed.[37]

In the usual description case, police are already investigating a crime.[38] Prior to the encounter between the suspect and the police, the police possess a description of someone wanted for a particular crime. Officers on patrol then spot someone matching the description of the wanted person and stop him for questioning.

State v. Dotson[39] is typical of these cases. A woman walking to work one morning was robbed by a man brandishing a gun. The robber both approached and fled the scene on a bicycle. Two days later, officers on patrol in the vicinity of the robbery observed a man on a bicycle matching the description of the suspect. They stopped the man and frisked him, uncovering a revolver. The suspect—Dotson—was arrested and later convicted of armed robbery.[40] The Louisiana Fourth Circuit Court of Appeal affirmed Dotson's conviction. Regarding the justification for the frisk, the court wrote:

> In view of the totality of the circumstances presented herein, the stop and frisk of the defendant was justified. The victim gave a description of the perpetrator which was substantiated by the police officers' observations . . . . The officers knew that a crime involving a weapon had been committed two days before. . . . Knowing that the subject was possibly armed, the officers conducted a pat down for their protection and . . . removed a weapon. The officers had reasonable cause to make the stop and conduct the pat down.[41]

Thus, the justification for the frisk derived from the officers' knowledge that the earlier crime involved a weapon. Because the officers knew Dotson was armed when he committed the earlier crime, it was reasonable for them to believe he might be armed when they stopped him for questioning. Granting police an automatic right to frisk in this situation is appropriate. This automatic

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37. Police receive many tips alleging some crime has been or is being committed. Often, however, the tip does not allege that the perpetrator is armed. Whether a frisk is justified in those situations depends on factors independent from the tip. *See, e.g.*, State v. Wartberg, 586 So. 2d 627 (La. App. 4th Cir. 1991); State v. Lee, 485 So. 2d 555 (La. App. 5th Cir. 1986); State v. Stewart, 451 So. 2d 1208 (La. App. 4th Cir. 1984); State v. Bearden, 449 So. 2d 1109 (La. App. 5th Cir. 1984). The description category includes only those confidential informant and anonymous source cases in which the tip specifically alleged the perpetrator was armed.

38. It is not necessary, however, that there be a formal investigation. In State v. Tucker, 604 So. 2d 600 (La. App. 2d Cir. 1992), *aff'd on other grounds*, 619 So. 2d 38, *aff'd on reh'g*, 627 So. 2d 720 (1993), police responded to a report of an attempted burglary. The report, which was broadcast over the radio, included a description of the suspect. The officers stopped and frisked Tucker before reaching the scene of the attempted burglary because he matched the description. The frisk was held by the court to be justified. *Id.* at 606.

39. 598 So. 2d 1220 (La. App. 4th Cir.), *writ denied*, 604 So. 2d 969 (1992).

40. *Id.* at 1222.

41. *Id.* at 1223.

right is also appropriately granted when the earlier crime likely involved a weapon, but when police have no actual knowledge of that fact. However, because the right to frisk in these cases does seem automatic, and because the boundaries of the right are to be "narrowly drawn,"[42] courts should carefully circumscribe what constitutes a "crime of violence."[43] Louisiana courts have extended this automatic right to frisk to suspicion of homicide,[44] armed robbery,[45] burglary,[46] and theft.[47] The right should also be extended to suspicion of any crime involving a weapon.[48]

The description category includes a distinct group of cases in which information from a confidential informant or an anonymous source arouses police suspicion. These cases are conceptually similar to the typical description cases

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42. Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968).

43. *Id.* at 33, 88 S. Ct. at 1886 (Harlan, J., concurring).

44. State v. Bourque, 622 So. 2d 198 (La. 1993). The frisk took place in a parking lot outside a bar. Prior to the frisk, the investigating officer saw a handgun in plain view on the seat of defendant's car. The court partially relied on this fact in justifying the frisk; nevertheless, suspicion of the homicide certainly justified the frisk without more.

45. *See, e.g.*, State v. Evans, 388 So. 2d 774 (La. 1980); State v. Dotson, 598 So. 2d 1220 (La. App. 4th Cir.), *writ denied*, 604 So. 2d 969 (1992); State v. Sandifer, 544 So. 2d 1305 (La. App. 4th Cir. 1989); State v. Alexander, 450 So. 2d 61 (La. App. 3d Cir. 1984).

46. *See* State v. Dakin, 495 So. 2d 344 (La. App. 4th Cir.), *writ denied*, 498 So. 2d 752 (1986); State v. Johnson, 557 So. 2d 1030 (La. App. 4th Cir. 1990); State v. Tucker, 604 So. 2d 600 (La. App. 2d Cir. 1992), *aff'd on other grounds*, 619 So. 2d 38, *aff'd on reh'g*, 627 So. 2d 720 (1993).

In *Tucker*, the investigating officer was personally familiar with the defendant and knew the defendant routinely carried weapons. Furthermore, the officer observed a bulge in the defendant's clothing. The opinion recognized these circumstances as additional justification beyond the nature of the underlying crime. *Tucker*, 604 So. 2d at 606.

47. *See* State v. Landry, 393 So. 2d 713 (La. 1981). The investigating officer actually knew that the perpetrator of the theft had been armed, and "for this reason, the initial frisk or pat down of defendant was completely justified." *Id.* at 714.

See also State v. Fayard, 537 So. 2d 347 (La. App. 4th Cir. 1988), *writ denied*, 541 So. 2d 871 (1989). A patron inside a bar notified an officer that the defendant, who was also inside the bar, resembled a man wanted for boat theft. The doorman informed the officer that the defendant was carrying a weapon. The defendant was frisked and found to be carrying a weapon, and the court held the search justified. However, the court based its decision on the doorman's tip, and did not mention the thefts when analyzing the frisk. Thus, *Landry* and *Fayard* both leave room to argue a theft without more does not justify a frisk.

48. For a list of other crimes that arguably should automatically justify a frisk, see LaFave, *supra* note 9, § 9.4, at 506. For a list of crimes that arguably should not automatically justify a frisk, see LaFave, *supra* note 9, § 9.4, at 507.

For an example of a case that does not cleanly fall into a particular crime of violence, but which certainly justified a frisk, see State v. Griffin, 520 So. 2d 1206 (La. App. 5th Cir.), *writ denied*, 523 So. 2d 1320 (1988). Officer Evans was on patrol when she stopped to speak to another officer in front of a bar. The other officer informed her that police had earlier received a call reporting a disturbance at the bar. The call also indicated shots had been fired during the disturbance. Evans continued on patrol, and several minutes later she heard three gunshots. She went in the direction of the shots and came upon defendant, who matched the description of the man wanted in the earlier altercation at the bar. She frisked the defendant, and the frisk was later held to be justified. *Id.* at 1207-09.

because police have reason to believe the suspect is armed prior to stopping him. However, they warrant separate consideration because of the questionable reliability of the information. *Adams* established that the Fourth Amendment does not necessarily prohibit police from relying on such information.[49] Whether reliance is constitutional depends on whether the information contains sufficient indicia of reliability.

The definitive Louisiana case regarding frisks based on information supplied by anonymous sources is *State v. Jernigan*.[50] Police received an anonymous phone call alleging that a man wearing blue pants and a yellow shirt and armed with a handgun was sitting in a neighborhood bar. An officer entered the bar and spotted a man matching the description given in the tip. The officer approached the man, asked him to stand up, and frisked him, finding a .38 caliber handgun.[51] The Louisiana Supreme Court noted the distinction between the anonymous source at issue here and the confidential informant at issue in *Adams*, but still held "an anonymous tip can provide the basis of an investigatory stop. However, the information received from the anonymous source must carry enough indicia of reliability, such as specificity of the information and corroboration by independent police work, to justify the stop."[52] The court then held the stop was reasonable based on the officer's corroboration of the suspect's description. Without separate analysis, the court held the frisk was also justified,[53] although it seems clear the reliability of the tip provided the justification for the frisk.

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49. *Adams* involved a confidential informant. *See supra* text accompanying notes 16-19. However, the Supreme Court said, "[W]e reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person." Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924 (1972). Thus, *Adams* embraces both confidential informants and anonymous sources. A broad interpretation of *Adams* is supported by the Supreme Court's denial of Archie Jernigan's petition for a writ of certiorari, Jernigan v. Louisiana, 446 U.S. 958, 100 S. Ct. 2930 (1980), after the Louisiana Supreme Court affirmed Jernigan's conviction. State v. Jernigan, 377 So. 2d 1222 (La. 1979). Police suspicion of Jernigan was aroused by an anonymous source. *See infra* text accompanying notes 50-53. Justices White, Brennan, and Marshall dissented from the denial of certiorari, arguing *Adams* did not embrace anonymous sources.

50. 377 So. 2d 1222 (La. 1979), *cert. denied*, 446 U.S. 958, 100 S. Ct. 2930 (1980).

51. *Id.* at 1224.

52. *Id.* at 1225. Interestingly, although *Jernigan* is recognized as the leading Louisiana case, the Louisiana Supreme Court employed the same reasoning two years earlier in State v. de la Beckwith, 344 So. 2d 360 (La. 1977). The court there held that an informant's tip that the defendant would be driving to New Orleans with a bomb and a .45 caliber pistol did not justify a stop and frisk until corroborated by the police. *Id.* at 372.

Louisiana courts have followed the lead of *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983), and adopted a "totality of the circumstances" test for evaluating a tip from an anonymous source or confidential informant. *See, e.g.*, State v. Bridges, 610 So. 2d 827 (La. App. 4th Cir. 1992), *aff'd on reh'g*, 617 So. 2d 515 (1993); State v. Thomas, 583 So. 2d 895 (La. App. 1st Cir. 1991).

53. *Id.* at 1225.

Thus, in *Jernigan*, Louisiana adopted the United States Supreme Court's views on anonymous sources. There must be some indication of the tip's reliability, because

> [c]asually allowing police officials to stop and search someone on the basis of any telephone call wherein the caller makes an accusation (anonymously) and supplies a few innocent details is dangerous to individual liberty, inviting of manipulation of police power by anonymous callers, and wholly open to abuse by the police themselves.[54]

If the tip contains the requisite indicia of reliability, the right to frisk the suspect after stopping him appears to be automatic.[55]

The *Jernigan* analysis has appropriately been applied in cases where a confidential informant supplies the justification for the frisk.[56] There seems to be a presumption that neither an anonymous source nor a confidential informant is reliable, but at least police are familiar with the confidential informant. And if corroboration or specificity is sufficient to validate an anonymous tip, then it also should be sufficient to validate a known confidential informant's tip.[57]

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54. State v. Lee, 485 So. 2d 555, 558 (La. App. 5th Cir. 1986).

55. Only two other Louisiana cases were found in which an anonymous tip alleged only that the suspect was armed. State v. Bolden, 380 So. 2d 40 (La. 1980); State v. Anderson, 478 So. 2d 163 (La. App. 4th Cir. 1985). In *Bolden*, the court upheld the frisk based solely on the tip's allegation that the suspect was armed. In *Anderson*, however, the suspect was carrying a towel in his hand, and the court relied on this fact in justifying the search (since the suspect conceivably could have been concealing a weapon underneath the towel).

See State v. Price, 482 So. 2d 135 (La. App. 4th Cir. 1986), for a case blending elements of both a typical description case and an anonymous source case. Police received an anonymous tip that an armed robbery suspect was walking on Orleans Avenue. Responding officers spotted Price, who matched the description given in the tip. The officers stopped and frisked Price, uncovering a pistol. The court said, "On the basis of this corroboration of the tipster's information, the officers had reasonable cause to stop the suspect and to search him . . . ." *Id.* at 139. The justification arose from suspicion of a crime involving the use of a dangerous weapon, but the suspicion arose from an anonymous tip. This holding is subject to criticism. The court said the frisk was justified solely because of a description given in an anonymous tip and corroborated by the police. The tip neither identified a particular crime the suspect was guilty of (the tip only generically characterized the suspect as an armed robber), nor alleged the suspect was armed. Mere corroboration of a person's physical appearance should not be enough to justify a frisk.

56. *See* State v. Woods, 406 So. 2d 158 (La. 1981); State v. Thomas, 583 So. 2d 895 (La. App. 1st Cir. 1991); State v. Smason, 572 So. 2d 710 (La. App. 4th Cir. 1990), *writ denied*, 575 So. 2d 376 (1991).

57. Louisiana courts do not subject tips to the indicia-of-reliability test when the information is supplied by an ordinary citizen who is neither an anonymous source nor a confidential informant. This is so probably because the citizen has nothing to gain from notifying police, whereas an informant might be serving his own interests by cooperating with police. Additionally, the citizen—unlike the anonymous source—subjects himself to possible prosecution for making a false statement to a police officer if he is wrong. La. R.S. 14:126.1 (1986). *See* State v. Magee, 416 So. 2d 930 (La. 1982); State v. Fayard, 537 So. 2d 347 (La. App. 4th Cir. 1988), *writ denied*, 541 So. 2d 871 (1989); State v. LaLanne, 507 So. 2d 857 (La. App. 5th Cir. 1987). In State v. Bolden, 380 So. 2d 40 (La. 1980), a citizen approached an officer and informed him that the defendant was

C. *The Conduct Cases*

The second category represents encounters where the suspect's conduct causes police to believe he is armed. This category may be broken down into two subcategories: (1) pre-stop conduct cases, and (2) post-stop conduct cases. In the typical pre-stop case, an officer on patrol observes someone conducting himself suspiciously. The officer believes the conduct might be criminal, and he further believes it is the type of crime likely to involve the use of weapons. In the typical post-stop case, the officer has no reason to believe the suspect is armed until after the officer has stopped him. The suspect's subsequent behavior then causes the officer to believe the suspect is armed.

The pre-stop conduct cases involve the same kind of police-citizen encounter at issue in *Terry*. In Louisiana, the pre-stop conduct most often at issue is drug trafficking. Typically, the officer observes conduct consistent with that of a street dealer trafficking in small amounts of drugs. In *State v. Green*,[58] for example, officers on patrol received a radio dispatch of a possible drug deal being transacted in their area. They proceeded to the location given in the dispatch, parked their vehicle, and approached the suspects without being seen. The officers observed a man accept cash from another man in exchange for a small object. The defendant did not participate in this transaction, but was standing with the man who accepted the cash. The officers, certain they had witnessed a drug transaction, stopped the three men and frisked them, uncovering cocaine.[59]

The Louisiana Fourth Circuit Court of Appeal said "[b]ecause the defendant was with Williams and Jones during the drug purchase in a high drug trafficking area, the officers were justified . . . to conduct a pat-down search of the three men under *Terry v. Ohio*."[60] The court did not elaborate further on why the frisk was justified; apparently, the court considered the fact of the drug transaction to be sufficient. The court also noted the transaction took place in a high crime area. However, analysis of similar cases indicates that Louisiana courts regard street drug transactions as crimes likely to involve weapons; therefore, when police observe what they believe to be a drug transaction, they

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carrying a shotgun. The citizen then disappeared. The court properly analyzed this situation as involving an anonymous source and subjected the tip to the indicia-of-reliability test.

58. 586 So. 2d 639 (La. App. 4th Cir. 1991).

59. *Id.* at 640. Whether the frisk ever took place is unclear. The officers prepared to frisk the men by ordering them to "spread eagle" against the patrol car. The defendant and one of the other suspects then tried to surreptitiously discard rocks of cocaine, apparently before the frisk was executed. The officers saw this motion, as well as the discarded cocaine, and arrested the men. However, the court observed, "[t]he issue is whether the police officers were justified in conducting a pat-down search of the defendant for safety reasons. That search precipitated the defendant's placing of the rock cocaine on the hood of the car." *Id.*

60. *Id.* (citations omitted).

are justified without more in frisking the suspects.[61] In the language of the description cases, Louisiana courts consider a street drug transaction to be a crime of violence. Such an assumption is reasonable in light of the widespread proliferation of firearms amongst drug dealers.[62]

Courts must be concerned with the distinction between possession of drugs and distribution of drugs. A person possessing drugs and loitering on the street may in fact be attempting to deal drugs. However, classifying simple possession as a crime of violence makes the frisk, as opposed to an evaluation of the suspect's conduct, the object of the stop.[63] Absent observation of an actual

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61. *See* State v. Scott, 561 So. 2d 170 (La. App. 1st Cir.), *writ denied*, 566 So. 2d 394 (1990); State v. Jones, 483 So. 2d 1207 (La. App. 4th Cir.), *writ denied*, 488 So. 2d 197 (1986). *But cf.* State v. August, 503 So. 2d 547 (La. App. 4th Cir. 1987); State v. Stewart, 451 So. 2d 1208 (La. App. 4th Cir. 1984). In *August*, an officer observed the defendant taking money from the driver of a car through the driver's window. The officer stopped the defendant and began frisking him. As in *Green*, the defendant tried to dispose of drugs clutched in his hand without being noticed. The officer saw this motion and arrested the defendant. The court held the stop was justified; moreover, the court held the drugs were abandoned because of the stop, not the frisk. However, the court also said "[T]he officers . . . were not able to point to any particular facts from which it could be reasonably inferred that the defendant was armed and dangerous . . . ." *August*, 503 So. 2d at 549. This statement is apparently dicta because the court decided the drugs were abandoned because of the stop. Furthermore, *Green* was decided four years later by the same court. Thus, the precedential authority of *August* on this point is slight.

In *Stewart*, police received a tip from a confidential informant who claimed he had just purchased heroin from the defendant inside a neighborhood bar. Officers went to the bar and immediately identified the defendant based on the description given in the tip. Without further corroboration, the officers approached the defendant and frisked him. The court held the frisk unjustified, saying the police lacked "any articulable reasonable suspicion that the suspect possessed a weapon." *Stewart*, 451 So. 2d at 1210. This holding is proper. If courts deem retail drug trafficking to be a crime of violence likely to involve the use of weapons, then police should be allowed to frisk a person they reasonably suspect of dealing drugs, regardless of whether they actually observe any transactions. But how reasonable can a suspicion of drug trafficking be when based solely on a description given by an informant and corroborated by police? Courts should require more than corroboration of "a few innocent details." State v. Lee, 485 So. 2d 555, 558 (La. App. 5th Cir. 1986).

62. Ten officers were killed and 5,410 were assaulted in 1991 while investigating suspicious persons. An additional three officers were killed while making drug-related arrests. Federal Bureau of Investigation, United States Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 1991* (1992). The "investigating suspicious persons" category embraces more than drug-related investigations; however, drug-related investigations doubtless make up a large percentage of these numbers.

63. There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true.

> . . . .
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> . . . [*Terry*] was meant for the serious cases of imminent danger or of harm recently perpetrated to persons or property, not the conventional ones of possessory offenses. . . . [Should this contrary view] be followed, *Terry* will have opened the sluicegates for serious and unintended erosion of the protection of the Fourth Amendment.

Adams v. Williams, 407 U.S. 143, 151-53, 92 S. Ct. 1921, 1926 (1972) (Brennan, J., dissenting) (quoting Williams v. Adams, 436 F.2d 30 (2d Cir. 1970) (citations omitted)).

transaction, suspecting a person loitering on the street of intending to sell drugs tends to become an "inchoate and unparticularized suspicion or 'hunch.'"[64] Louisiana courts have usually analyzed these situations as involving only possessory offenses and have refused to uphold frisks in these situations.[65]

Accepting that police are justified in frisking someone observed dealing drugs on a street corner, they are at least equally justified in frisking someone observed dealing drugs from an automobile. An officer confronts an "inordinate risk . . . as he approaches a person seated in an automobile,"[66] because persons in automobiles conceivably have access to weapons out of the sight of an approaching officer. Louisiana courts have consistently upheld frisks in these situations.[67] Louisiana courts also invariably uphold frisks when the pre-stop conduct arousing police suspicion is consistent with large scale drug trafficking.[68]

Finally, there are several pre-stop conduct cases that do not involve drug dealing and that are not easily grouped with other cases. In *State v. Taylor*,[69] police officers were stopped at a traffic light when two men came running toward them. The men ceased running when they spotted the officers, and one of the men momentarily hid behind the other. The officers stopped and frisked the men. The court upheld the frisk because the men's conduct "was consistent with that of one who has just committed a crime," and because the area was known for its high crime rate.[70] In *State v. Snoddy*,[71] officers went to the defendant's home to arrest his brother. Upon arrival, they observed the defendant standing in his driveway holding a shotgun. The defendant put the shotgun down, but the officers frisked him anyway and discovered a handgun.

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64. Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968).

65. State v. Melton, 412 So. 2d 1065 (La. 1982); State v. Bourgeois, 609 So. 2d 1003 (La. App. 5th Cir. 1992). The suspect in *Melton* was observed holding a bag of pills in a restroom, not on the street.

66. Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S. Ct. 330, 333 (1977).

67. *See* State v. Miller, 440 So. 2d 867 (La. App. 2d Cir. 1983); State v. Smith, 466 So. 2d 752 (La. App. 4th Cir. 1985); State v. Wartberg, 586 So. 2d 627 (La. App. 4th Cir. 1991). In State v. Lee, 485 So. 2d 555 (La. App. 5th Cir. 1986), officers received an anonymous tip that two men were selling marijuana from an automobile. Responding officers asked the occupants to exit the vehicle, then executed what the prosecution later contended was a protective search for weapons of the passenger compartment of the vehicle. The court held the frisk was unjustified. However, the court held this way expressly because the officers never observed any drug transactions, and only corroborated innocent details. Had the officers observed someone approach the vehicle and appear to purchase marijuana, a subsequent frisk of the vehicle's occupants would probably have been upheld.

68. *See* State v. Bordelon, 538 So. 2d 1087, 1089 (La. App. 3d Cir.) (confidential informant alerted police that defendant was distributing "substantial quantities of marijuana," which was corroborated by police), *writ denied*, 546 So. 2d 1211 (1989); State v. Bearden, 449 So. 2d 1109, 1112 (La. App. 5th Cir. 1984) (confidential informant alerted police that defendant was dealing "a large quantity of Quaaludes" from his home, which was corroborated).

69. 363 So. 2d 699 (La. 1978).

70. *Id.* at 703.

71. 389 So. 3d 377 (La. 1980).

The court held the frisk unjustified because it was unreasonable "to conclude that defendant was illegally carrying a concealed weapon on his person because of his possession of a shotgun, particularly . . . [because] defendant had already set aside the shotgun."[72] Finally, in *State v. Rodriguez*,[73] a nightwatchman at a hospital noticed the defendant walking towards a woman in the parking lot. The watchman approached the defendant and observed that his speech was slurred. When the defendant then walked behind a building across the street, the watchman called police. The responding officer stopped and frisked the defendant. The court upheld the frisk, noting the officer "was alone with defendant, late at night, in a secluded area. Under these circumstances, the amenities of an initial investigatory conversation may be excused. Officer Whitney was not required to stand by and allow the defendant the first move before taking action."[74]

The post-stop conduct cases encompass situations where the suspect is stopped for reasons not justifying a frisk for weapons, but where his subsequent conduct causes police to believe he is armed. For instance, there are cases in which the suspect reaches for a pocket after being stopped. Police cannot be required to allow an otherwise innocuous suspect to draw a weapon before being allowed to frisk the suspect. On the other hand,

> [e]qually important is the protection of the suspect, presumed innocent by law, from the harm that could result to him should he naively do an act interpretable as reaching for a weapon at a time when a police officer may reasonably suspect the presence of a weapon. Within this class of actions could be such innocent acts as reaching into the back pocket to produce a wallet or thrusting a hand into a jacket for a pack of cigarettes.[75]

Characteristic of this situation is *State v. Spears*.[76] Two police officers were writing summonses for persons violating an ordinance prohibiting alcohol in open containers. The defendant, not realizing what was happening and carrying an open container of alcohol, approached the scene. The officers directed the defendant to come over to them; instead, he froze and began to reach into a pocket. One of the officers intercepted the movement, reached into the pocket himself, and removed a bag containing phenmetrazine tablets, a controlled substance. The Louisiana First Circuit Court of Appeal, saying it was

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72. *Id.* at 380.

73. 476 So. 2d 994 (La. App. 1st Cir. 1985).

74. *Id.* at 997.

75. State v. Wade, 390 So. 2d 1309, 1312-13 (La. 1980), *cert. denied*, 451 U.S. 989, 101 S. Ct. 2326 (1981).

76. 459 So. 2d 1328 (La. App. 1st Cir. 1984), *writ denied*, 463 So. 2d 600 (1985).

reasonable to infer that the defendant was reaching for a weapon, upheld the frisk.[77]

Police must be allowed to protect themselves, and when a suspect makes a movement towards a pocket the officer has only seconds to react. Yet justifying frisks because of a movement towards a pocket is subject to police abuse, because almost any movement of a suspect's hands can be alleged to be a movement for a weapon. Louisiana courts tend to uphold frisks in these situations,[78] but also tend to distinguish between moving a hand towards a pocket and other, closely related movements. In *State v. Hunter*,[79] officers stopped the defendant when they observed him trying to open the trunk of an unoccupied police vehicle. Uncertain whether the defendant was an officer himself, the officers began questioning him. The defendant admitted he was not an officer and began nervously patting his coat pocket. The officers then frisked the defendant and uncovered a vial of cocaine. The Louisiana Supreme Court held the frisk was unjustified: "there was no indication that [the defendant] was or had been involved in the commission of a violent crime. . . . While the defendant displayed nervousness and patted the breast pocket of his coat, the officer who made the weapons search did not indicate that this action precipitated the frisk."[80]

Another recurring type of post-stop conduct involves a suspect in a vehicle. After being stopped, the suspect reaches down to the floorboard of the car. Such a movement can reasonably be interpreted as one for a weapon, and given the particular risks associated with suspects in vehicles, Louisiana courts have almost always upheld protective frisks under these circumstances.[81]

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77. *Id.* at 1330-31.

78. *See e.g.*, State v. Evans, 388 So. 2d 774 (La. 1980); State v. Walters, 464 So. 2d 1052 (La. App. 1st Cir. 1985).

79. 375 So. 2d 99 (La. 1979).

80. *Id.* at 102. Despite the language of the opinion, it is not clear from the officer's testimony whether or not the defendant's hand movements precipitated the frisk. The officer testified, "[A]t the time I asked him if he was a police officer, he placed his right hand toward his left chest several times. Before questioning him any further I decided to frisk Mr. Hunter for any weapons . . . ." *Id.*

Cf. State v. Olive, 544 So. 2d 606 (La. App. 3d Cir. 1989). The court upheld the frisk of defendant when he continuously grabbed and pulled at one of his pockets. However, the defendant also reeked of marijuana, a fact the court relied on in upholding the frisk.

81. State v. Dixon, 337 So. 2d 1165 (La. 1976); State v. Leagea, 442 So. 2d 699 (La. App. 1st Cir. 1983); State v. Sanchez, 617 So. 2d 948 (La. App. 4th Cir. 1993); State v. Davis, 612 So. 2d 256 (La. App. 4th Cir. 1992); State v. Williams, 489 So. 2d 286 (La. App. 4th Cir. 1986); State v. Archie, 477 So. 2d 864 (La. App. 4th Cir. 1985). The courts in *Davis*, *Williams*, *Archie*, and *Leagea* approved extending the scope of the frisk to the passenger compartment of the vehicle. Officers in such a situation are "not obliged to let [the defendant] reenter the car without checking to see what he had placed under the seat . . . ." *Archie*, 477 So. 2d at 865.

The facts of State v. Daigre, 364 So. 2d 902 (La. 1978), are similar to these other cases. A police officer stopped the defendant for making an illegal turn, and after stopping the car noticed the defendant bending down over the floorboard. The officer asked the defendant to get out of the car, then looked under the seat and found six bags of marijuana. The Louisiana Supreme Court held the search unjustified because "[t]he police officer had no reason to believe that the defendant or his

Several post-stop conduct cases involve unique circumstances and are not easily categorized. In *State v. Gallow*,[82] the protective search of an automobile interior was upheld because the driver and a passenger hurriedly exited their vehicle without being directed to do so and walked rapidly towards the police vehicle which had just pulled them over. In *State v. Bridges*,[83] police stopped the defendant for suspicion of selling narcotics. The defendant refused to unclench his fist despite the officers' request to do so, at which time the officers pried open his fingers and found a crack pipe. The court held the search of the defendant's clenched fist was justified because it was conceivable he was holding a knife. Likewise, in *State v. Anderson*[84] police took away a towel the suspect was holding in his hand. The court upheld this action because the towel was "a very expectable location of the possible concealed weapon."[85] Finally, and alarmingly, the Louisiana Supreme Court upheld a frisk in *State v. Wade*[86] because the defendant began to flee when he realized officers were watching him. According to the court, this conduct "appeared to indicate that the defendant was worried about apprehension for more than just a minor crime."[87] Even assuming that fleeing from police would justify a stop, it is an attenuated leap in logic to hold that such conduct leads one reasonably to believe the suspect is armed.

D. The Appearance Cases

The third category contains cases in which the suspect's physical appearance leads police to conclude he is armed. In many of these cases, police notice a bulge suggestive of a concealed weapon in the suspect's clothing. In other cases, police search the suspect because he appears to be under the influence of alcohol or drugs. Finally, a suspect's nervous demeanor often is cited as helping to justify a search.

The bulge-in-the-clothing situations comprise the majority of cases in this category. Justification for the frisk arises from "the officer's observation of a bulge under the suspect's clothing or an unusual appearance of the suspect's clothing indicative of the presence of a weapon."[88] This is as precise a

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passenger was armed or dangerous." *Id.* at 905. This opinion is the exception to what appears to be a well-recognized justification for a frisk.

82. 452 So. 2d 227 (La. App. 1st Cir.), *writ denied*, 456 So. 2d 1016 (1984).

83. 610 So. 2d 827 (La. App. 4th Cir. 1992).

84. 478 So. 2d 163 (La. App. 4th Cir. 1985).

85. *Id.* at 165. The defendant was stopped because of an anonymous tip that he was carrying a gun. Thus, there was additional justification for the search.

86. 390 So. 2d 1309 (La. 1980), *cert. denied*, 451 U.S. 989, 101 S. Ct. 2326 (1981).

87. *Id.* at 1313.

88. Cheney C. Joseph, Jr. et al., Louisiana Law Enforcement Handbook 41 (4th ed. 1982). For an example of the unusual appearance of a suspect's clothing, see State v. Scott, 561 So. 2d 170 (La. App. 1st Cir.), *writ denied*, 566 So. 2d 394 (1990), in which a frisk was justified partly because the suspect was wearing a trench coat on a balmy day when everyone else was wearing short sleeve

definition as can be found; indeed, it seems a bulge in clothing is a bulge in clothing and needs no elaboration. Additionally, observance of a bulge under a suspect's clothing reasonably gives rise to a suspicion he is carrying a weapon. Yet this situation is susceptible to abuse. Louisiana courts have repeatedly held that observing a bulge in a suspect's clothing justifies a frisk for weapons.[89] Furthermore, a knife or even a small handgun can be concealed on a person with only a minimal bulge. Thus, any time a suspect is wearing anything other than skin-tight clothes, the investigating officer can allege he observed a bulge in the suspect's clothing and be reasonably certain the frisk will be upheld. This is not to suggest law enforcement personnel should be precluded from frisking a suspect when the only justification is a bulge in the suspect's clothing: "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."[90] Instead, such a frisk should initially be limited to the bulge itself. If this limited frisk does not uncover a weapon, then a complete frisk—and a more serious intrusion on the suspect's rights—would not be justified. This approach appears reasonable because the scope of any search must be "strictly circumscribed by the exigencies which justify its initiation."[91]

Whether a suspect seems to be under the influence of alcohol or drugs is another aspect of physical appearance that police sometimes rely on in frisking a suspect. The underlying logic is not that people under the influence of alcohol or drugs are likely to carry weapons; instead, it is that they are less likely to act rationally. Thus, police probably should not be permitted to frisk a suspect merely because he appears intoxicated or high. However, because the risk of irrational conduct is greater, circumstances which might not otherwise justify a

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shirts.

89. *See* State v. Amphy, 259 La. 161, 249 So. 2d 560 (1971), *cert. denied*, 405 U.S. 1074, 92 S. Ct. 1502 (1972); State v. Schuler, 457 So. 2d 1240 (La. App. 1st Cir.), *writ denied*, 462 So. 2d 191 (1984); State v. Johnson, 559 So. 2d 911 (La. App. 4th Cir. 1990); State v. Brown, 482 So. 2d 115 (La. App. 4th Cir.), *writ denied*, 487 So. 2d 436 (1986); State v. Jackson, 452 So. 2d 776 (La. App. 4th Cir. 1984); State v. Denis, 441 So. 2d 801 (La. App. 4th Cir. 1983). Carrying a concealed weapon is illegal in Louisiana, and in *Johnson*, *Jackson*, and *Schuler*, the bulge alone justified both the stop and the frisk.

Louisiana courts have also used a bulge in the suspect's clothing to supplement other circumstances giving rise to the frisk. *See* State v. Tucker, 604 So. 2d 600 (La. App. 2d Cir. 1992); State v. Fayard, 537 So. 2d 347 (La. App. 4th Cir. 1988), *writ denied*, 541 So. 2d 871 (1989), *reconsideration denied*, 543 So. 2d 10 (1989).

In *State v. Wade*, the recitation of events leading up to the frisk said nothing of a bulge in the suspect's clothing. Then, almost as an afterthought, the court added: "[T]he defendant was wearing a leather jacket, thereby rendering a visual search for a suspicious 'bulge' in his clothing inadequate to insure [the officers'] safety." *Wade*, 390 So. 2d at 1313. Because the presence of a bulge is so easy for a police officer to allege and so difficult for a defendant to disprove, and because such an allegation may be used to justify a serious intrusion on a person's constitutional rights, such offhand references should be avoided.

90. Terry v. Ohio, 392 U.S. 1, 23, 88 S. Ct. 1868, 1881 (1968).

91. *Id.* at 26, 88 S. Ct. at 1882 (citing Warden v. Hayden, 387 U.S. 294, 310, 87 S. Ct. 1642 1652 (1967) (Fortas, J., concurring)).

frisk may be sufficient. *State v. Keller*[92] is an example of such a situation. Police officers frisked a man who was passed out over the steering wheel of a parked car in the French Quarter. The Louisiana Supreme Court upheld the frisk, primarily because the French Quarter is a high crime area, but also because the officer could reasonably have concluded the defendant was intoxicated or drugged.[93] No Louisiana case was located in which a frisk was justified solely because the stop occurred in a high crime area, which suggests Keller's intoxicated state allowed the officers to execute the frisk based on otherwise insufficient circumstances.[94]

Louisiana courts also occasionally cite a suspect's nervous appearance as tending to justify a frisk.[95] Courts which have relied on this factor have always done so in a supplementary fashion;[96] alone, a suspect's nervous demeanor should never justify a frisk.[97]

One issue Louisiana courts have yet to confront is whether a frisk is justified when the suspect's appearance matches a drug courier profile. Police in airports may stop a person matching a drug courier profile.[98] But frisks rarely occur in these cases; instead, either the suspect consents to a search of his luggage,[99] or police exceed the permissible bounds of an investigatory stop, in which case the encounter must be analyzed as an arrest.[100] Accepting the premise that drug

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92. 403 So. 2d 693 (La. 1981).

93. *Id.* at 697. Keller reacted to the frisk by punching the officer. The officers did not actually find the phencyclidine until after they had subdued Keller. Nevertheless, the issue was whether the officers were justified in executing the frisk (which led to the struggle and the eventual discovery of the drugs).

94. *See also* State v. Edwards, 630 So. 2d 302 (La. App. 5th Cir. 1993); State v. Ashbury, 612 So. 2d 884 (La. App. 5th Cir. 1993); State v. Olive, 544 So. 2d 606 (La. App. 3d Cir. 1989); State v. Walters, 464 So. 2d 1052 (La. App. 1st Cir. 1985). In *Edwards*, the defendant was asleep in his truck parked on the side of a state highway. The investigating officer awoke the defendant and asked him to step outside the vehicle. The defendant admitted he had been drinking and had pulled off the road to sober up. The defendant also told the officer that he had a previous murder conviction. The court said, "[g]iven the knowledge . . . that the defendant was a convicted murderer, we find that a pat down search was justified." *Edwards*, 630 So. 2d at 305.

95. State v. Wade, 390 So. 2d 1308, 1311 (La. 1980), *cert. denied*, 451 U.S. 989, 101 S. Ct. 2326 (1981); *Ashbury*, 612 So. 2d at 886; *Olive*, 544 So. 2d at 608.

96. *See infra* notes 119-26 and accompanying text for a discussion of other supplemental factors. The suspect's nervous demeanor, though itself a supplemental factor, fits more appropriately in the appearance category.

97. *See, e.g.*, *Wade*, 390 So. 2d at 1313 ("The officers knew they were riding in a high crime area where violent crimes were numerous. They observed the defendant walking nervously. This alone would not lead a reasonable person to believe that the defendant was armed.").

98. United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581 (1989).

99. *See e.g.*, State v. Jones, 624 So. 2d 1249 (La. App. 5th Cir. 1993); State v. Garriga, 592 So. 2d 453 (La. App. 5th Cir. 1991), *writ denied*, 596 So. 2d 553 (1992).

100. *See, e.g.*, State v. Moreno, 619 So. 2d 62 (La. 1993). Officers frisked the suspect in State v. Jackson, 457 So. 2d 660 (La. 1984), *cert. denied*, 471 U.S. 1053, 105 S. Ct. 2113 (1985), but the Louisiana Supreme Court reversed Jackson's conviction because his detention escalated into an arrest without probable cause. Thus, the court never reached the issue of whether the frisk was justified.

trafficking is likely to involve the use of weapons, there is support for the argument that police should be allowed to frisk persons matching drug courier profiles. Balanced against this, however, is the recognition that airport security measures generally deter persons from carrying weapons inside airports.[101] Absent extraordinary circumstances, police should not be allowed to search suspected drug couriers in airports, at least those suspects within areas protected by metal detectors.

E. The Third Person Cases

As noted earlier, the frisk of the defendant in *Ybarra* was held unconstitutional by the United States Supreme Court.[102] The Court held that Ybarra's mere presence on premises being searched pursuant to a warrant did not give rise to a reasonable suspicion that he was armed.[103] Only three Louisiana cases factually resemble *Ybarra*. These cases, however, merit separate analysis as a distinct category.

In *State v. MacDonald*,[104] officers searched Kenneth Melton's trailer for drugs pursuant to a valid warrant. Drugs had already been seized and several people arrested when the defendant stopped by for an untimely visit with Melton. He knocked on the door and entered, whereupon one of the officers recognized him as a person previously alleged by a confidential informant to be holding some of Melton's drugs. The officer frisked the defendant and found a single capsule of demerol in a shirt pocket.[105]

The Louisiana Supreme Court affirmed MacDonald's conviction for violation of the Louisiana Uniform Controlled Dangerous Substances Law.[106] The court noted that MacDonald was a suspect in the same drug trafficking investigation of Melton. However, it is unclear from the opinion whether this knowledge

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101. *See generally* Stephen P. Halbrook, *Firearms, The Fourth Amendment, and Air Carrier Security*, 52 J. Air L. & Com. 585 (1987).

102. *See supra* text accompanying notes 23-25.

103. Ybarra v. Illinois, 444 U.S. 85, 94, 100 S. Ct. 338, 343 (1979).

104. 390 So. 2d 1276 (La. 1980).

105. *Id.* at 1278. The officer who frisked MacDonald properly limited the search to MacDonald's outer clothing. The Louisiana Supreme Court said once the officer felt what appeared to be a drug capsule, because he "was an experienced narcotics officer, in the environment in which the search occurred, [he] was justified in believing the capsule contained contraband." *Id.* at 1279. The seizure of the demerol thus seems justified by the kind of "plain feel" doctrine the United States Supreme Court would expound thirteen years later in Minnesota v. Dickerson, 113 S. Ct. 2130 (1993). The Supreme Court there said:

> [I]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view doctrine.

Id. at 2137 (footnote omitted).

106. La. R.S. 40:967 (1992 & Supp. 1993); La. R.S. 40:968 (1992).

helped to justify only the stop, or the frisk as well. The court also said the officers "had reasonable grounds to fear for their safety as there were several people in the trailer who had just been arrested and who were beginning to give them some trouble."[107] The opinion is less than precise in its explanation of why the frisk was justified, particularly given the casual manner in which the court mentions the unrest developing inside the trailer.[108] The majority opinion did not mention *Ybarra*. The dissent, citing *Ybarra*, argued "the majority opinion, in effect, adopts a construction of the Fourth and Fourteenth Amendments which has been specifically rejected by the Supreme Court."[109]

The second case in this trilogy, and the one with facts most closely aligned with those of *Ybarra*, is *State v. Jackson*.[110] Sheriff's officers executed a search warrant against the Belton Green Paradise, alleged to be a "blind tiger"; i.e., an establishment selling alcohol without a license. After entering the establishment, officers ordered the patrons, including Jackson, to remain still. Jackson placed her hands on a table and made no threatening gestures. Despite her compliance with the officers' instructions, one of the officers searched her purse. The purse contained a .38 caliber revolver, and Jackson was subsequently convicted of illegally carrying a weapon.[111]

The Louisiana Second Circuit Court of Appeal relied exclusively on *Ybarra* in reversing Jackson's conviction. Paraphrasing *Ybarra*, the court said "[a] person may not be searched simply because he is present with others suspected of criminal activity or at a location where such activity is occurring. Consequently, defendant's presence in Belton's 'blind tiger' provided no justification for the search of her purse without a warrant."[112]

The final of these three cases is *State v. Cabler*,[113] which does not fit as neatly into this category as do *MacDonald* and *Jackson*. A man at the Breaux Bridge Crawfish Festival was jumped from behind by three men he described as "biker-type fellows" with long hair. The victim could not identify the three alleged assailants, but told officers the three men joined a group of ten to fifteen persons standing nearby. The officers approached the group pointed out by the victim and frisked each of the persons. Cabler was among those persons, and the officer frisking Cabler discovered a prescription bottle containing LSD. Cabler was convicted of possession of illegal drugs.[114]

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107. *MacDonald*, 390 So. 2d at 1279.

108. In the opinion's recitation of the facts preceding the frisk, there is no mention of any resistance offered by the persons already under arrest: the recitation only says several persons had been arrested. The suggestion that there was a potentially explosive situation at the trailer is only mentioned later when the opinion holds the frisk to have been justified.

109. *MacDonald*, 390 So. 2d at 1281 (Dennis, J., dissenting).

110. 459 So. 2d 169 (La. App. 2d. Cir. 1984).

111. *Id.* at 170.

112. *Id.* at 170-71 (citations omitted).

113. 526 So. 2d 1177 (La. App. 3d Cir. 1988).

114. *Id.* at 1179-81.

The Louisiana Third Circuit Court of Appeal reversed Cabler's conviction, holding the frisk was not justified by a reasonable suspicion that Cabler was armed. Relying primarily on *Ybarra*, the court emphasized that a reasonable suspicion must be particularly directed at the person frisked, rather than at a group of persons including the person frisked. Furthermore, Cabler displayed no suspicious or nervous conduct which might have created a particularized suspicion. Finally, the court noted the officers frisked several women standing with the group, despite the victim's assertion that his attackers were all men. This indicated to the court "the officers . . . had some other motive for the search of this group but, unfortunately, no other justification has been provided."[115]

Considering these cases together, Louisiana courts have refused any inroads against the limitation of *Ybarra*. *MacDonald* arguably encroaches on that limitation, but is perhaps better classified as a description case in which a suspicion of drug trafficking arose from a confidential informant's tip. Certainly the officers had a pre-existing suspicion of MacDonald, a factor not present in *Ybarra*, *Jackson*, and *Cabler*. Nevertheless, it is unclear whether this suspicion was considered during the inquiry into whether the frisk was justified, and regrettably the court did not attempt to distinguish *Ybarra*. *Jackson*, on the other hand, represents a straightforward application of *Ybarra*. Finally, *Cabler* applied *Ybarra* in a slightly different context, but stressed *Ybarra*'s requirement that law enforcement personnel have a reasonable suspicion directed particularly towards the person frisked.

A second type of third person case involves the "automatic companion" rule. This rule was established by the United States Ninth Circuit Court of Appeals in *United States v. Berryhill*[116] and approves the frisk of an arrestee's companion.[117] Louisiana courts have not yet confronted the rule. The United States

115. *Id.* at 1182.

116. 445 F.2d 1189 (9th Cir. 1971).

117. According to the court in *Berryhill*:

> It is inconceivable that a peace officer effecting a lawful arrest . . . must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed.

Id. at 1193. *See generally* John J. O'Shea, *The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's Companion*, 62 Notre Dame L. Rev. 751 (1987); Jeanne C. Serocke, *The Automatic Companion Rule: An Appropriate Standard to Justify the Terry Frisk of an Arrestee's Companion?*, 56 Fordham L. Rev. 917 (1988).

Fifth Circuit Court of Appeals indicated in dictum in *United States v. Tharpe*[118] a reluctance to follow this rule.

F. Supplemental Factors

In addition to the four patterns just discussed, several supplemental factors reappear throughout the cases. These factors alone generally do not justify a frisk, but are often cited as buttressing the justification for a frisk. These factors include: (1) the presence of a high crime area, (2) the investigating officer's personal knowledge of the suspect, (3) the time of day (or night), and (4) the presence of more suspects than officers.

The high crime factor is more often cited than the other supplemental factors. In *State v. Scott*,[119] the court said "the reputation of an area is an articulable fact upon which a police officer may legitimately rely. Such so-called high-crime areas are places in which the character of the area gives color to conduct which might not otherwise arouse the suspicion of an officer."[120] Although the high-crime area is cited as a supplemental factor in a variety of contexts, it most often appears in conjunction with stops and frisks based on suspicion of drug trafficking.[121] Undeniably, a police officer making an investigatory stop in an area known for its high crime rate must be more sensitive to any suggestion a suspect is armed. Unfortunately, however, these high-crime areas are most often low-income and/or public housing areas populated by minorities, particularly blacks. So while courts cannot deny the influence of this factor, they must continue to be sensitive to possible police harassment of minorities. One way of avoiding the appearance of disregard for these concerns is to avoid the offhand reference to the presence of a high-crime area. Opinions need not include a dissertation on why an area deserves designation as a high-crime area. Instead, a brief explanation of why the label applies to a particular area might alleviate perceptions of insensitivity.[122]

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118. 536 F.2d 1098 (5th Cir. 1976) (en banc), *overruled on other grounds by* United States v. Causey, 834 F.2d 1179 (5th Cir. 1987). The court in *Tharpe* stated:

> We need not go so far as the Ninth Circuit's [automatic companion] rule . . . . We simply hold that where there was good reason for an officer to apprehend that he was in a position of real danger from companions of an arrestee, that officer's pat-down search is compatible with *Terry*.

Tharpe, 536 F.2d at 1101 (citation omitted).

119. 561 So. 2d 170 (La. App. 1st Cir.), *writ denied*, 566 So. 2d 394 (1990).

120. *Id.* at 173 (citations omitted).

121. *See, e.g.*, State v. Ashbury, 612 So. 2d 884 (La. App. 5th Cir. 1993); State v. Lightfoot, 580 So. 2d 702 (La. App. 4th Cir. 1991); *Scott*, 561 So. 2d 170; State v. August, 503 So. 2d 547 (La. App. 4th Cir. 1987).

122. *See* State v. Leary, 627 So. 2d 777 (La. App. 2d Cir. 1993), for a case in which the high-crime character of the area provided the primary justification for the search.

A second circumstance sometimes cited in support of a frisk is the late hour at which the stop takes place.[123] Two assumptions underlie reliance on this factor. First, a suspect might use the darkness to conceal his movements to draw a weapon. Second, there is less likelihood that citizens have any legitimate reason for being on the street late at night.[124] Clearly it is reasonable for police to feel more at risk late at night. However, it seems equally clear this circumstance can never play more than a supporting role.

Two final supporting circumstances are the officer's familiarity with the suspect and the number of suspects an officer confronts. In *State v. Tucker*,[125] the investigating officer was familiar with Tucker and his propensity to carry weapons. The court emphasized the officer's familiarity with Tucker in upholding the frisk, although the court also stressed that Tucker was stopped for suspicion of burglary. Finally, when the investigating officer(s) is outnumbered by the suspects, there might well be additional justification for a frisk. This consideration must take into account other factors bearing on the control the officer had of the situation, such as whether he had his gun drawn and whether any of the suspects were handcuffed or otherwise restricted in their movement.[126]

IV. CONCLUSION: A FRAMEWORK FOR STOP AND FRISK ANALYSIS

Generally, Louisiana courts have recognized the separate nature of the frisk. Fifty-two of the sixty-six Louisiana stop and frisk cases included in this comment (eighty percent) analyze the justification for the frisk separate and apart from the justification for the stop. Many of the cases spend a disproportionate amount of time analyzing the stop, and some are too casual in their analysis of the frisk. Nevertheless, they all analyze the frisk as a separate entity. Of the remaining thirteen cases, eleven[127] merged the stop and frisk inquiries into one. For

123. *See* State v. Taylor, 363 So. 2d 699 (La. 1978); State v. Rodriguez, 476 So. 2d 994 (La. App. 1st Cir. 1985); State v. Miller, 440 So. 2d 867 (La. App. 2d Cir. 1983); State v. Darby, 550 So. 2d 963 (La. App. 5th Cir. 1989).

124. Van Sicklen, *supra* note 36, at 890.

125. 604 So. 2d 600 (La. App. 2d Cir. 1992).

126. *See Leary*, 627 So. 2d 777; State v. Bordelon, 538 So. 2d 1087 (La. App. 3d Cir.), *writ denied*, 546 So. 2d 1211 (1989); State v. Darby, 550 So. 2d 963 (La. App. 5th Cir. 1989). In *Bordelon*, the court upheld a frisk when there was present one officer and only one suspect.

127. State v. Amphy, 259 La. 161, 249 So. 2d 560 (1971), *cert. denied*, 405 U.S. 1074, 92 S. Ct. 1502 (1972); State v. Schuler, 457 So. 2d 1240 (La. App. 1st Cir.), *writ denied*, 462 So. 2d 191 (1984); State v. Dotson, 598 So. 2d 1220 (La. App. 4th Cir.), *writ denied*, 604 So. 2d 969 (1992); State v. Green, 586 So. 2d 639 (La. App. 4th Cir. 1991); State v. Johnson, 559 So. 2d 911 (La. App. 4th Cir. 1990); State v. Brown, 482 So. 2d 115 (La. App. 4th Cir.), *writ denied*, 487 So. 2d 436 (1986); State v. Dakin, 495 So. 2d 344 (La. App. 4th Cir.), *writ denied*, 498 So. 2d 752 (1986); State v. Price, 482 So. 2d 135 (La. App. 4th Cir. 1986); State v. Smith, 466 So. 2d 752 (La. App. 4th Cir. 1985); State v. Jackson, 452 So. 2d 776 (La. App. 4th Cir. 1984); State v. Ashbury, 612 So. 2d 884 (La. App. 5th Cir. 1993).

instance, in *State v. Dakin*,[128] the court recited the pertinent facts, then concluded: "[u]nder these circumstances, it is clear that the officers had reasonable suspicion to stop and frisk the defendants."[129] Such an analysis is adequate; however, separate analysis of the stop and the frisk would make the justification for the frisk significantly more clear. The remaining three cases[130] make no attempt to explain why the frisks were either justified or unjustified. In *State v. Jones*,[131] a frisk of Jones uncovered pentazocine tablets. The court determined the stop was justified and affirmed Jones' conviction without further inquiry.[132] Judge Ciaccio, in dissent, pointed out the flaw in the court's reasoning:

> While I tend to agree that the officers had the requisite reasonable suspicion to conduct an investigatory stop, I think it clear that our inquiry should not end with the stop.
>
> . . . .
>
> The officers in this case did not articulate any reason why they thought the defendant might have possessed a weapon of any sort. Absent reasonable suspicion, articulated for the record, the court has no basis for justifying either a "pat-down" or a more extensive search for weapons conducted in connection with an investigatory stop. . . . This is not to say that the officer did not, or could not, have a reasonable suspicion, only that there is no mention of it in the record.[133]

Finally, this comment suggests courts should employ a more structured approach to stop and frisk analysis, regardless of the circumstances surrounding the encounter. That the frisk is an entity separate from the stop is well-established. This fact, combined with the knowledge that stops and frisks intrude on different constitutional protections,[134] mandates that courts analyze each

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128. 495 So. 2d 344 (La. App. 4th Cir.), *writ denied*, 498 So. 2d 752 (1986).

129. *Id.* at 347.

130. State v. Johnson, 557 So. 2d 1030 (La. App. 4th Cir. 1990); State v. Jones, 483 So. 2d 1207 (La. App. 4th Cir.), *writ denied*, 488 So. 2d 197 (1986); State v. LaLanne, 507 So. 2d 857 (La. App. 5th Cir. 1987).

Eight cases, including five Louisiana Supreme Court cases, never mention Code of Criminal Procedure Article 215.1. State v. Bourque, 622 So. 2d 198 (La. 1993); State v. Landry, 393 So. 2d 713 (La. 1981); State v. Evans, 388 So. 2d 774 (La. 1980); State v. MacDonald, 390 So. 2d 1276 (La. 1980); State v. Hunter, 375 So. 2d 99 (La. 1979); State v. Leagea, 442 So. 2d 699 (La. App. 1st Cir. 1983); State v. Green, 586 So. 2d 639 (La. App. 4th Cir. 1991); State v. Ashbury, 612 So. 2d 884 (La. App. 5th Cir. 1993). This omission is surprising, considering that Louisiana prides itself on its civilian heritage, and that civil-law systems treat legislation as the starting point for legal analysis.

131. 483 So. 2d 1207 (La. App. 4th Cir.), *writ denied*, 488 So. 2d 197 (1986).

132. *Id.* at 1209.

133. *Id.* at 1209-10 (Ciaccio, J., dissenting).

134. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a

element separately. Certainly, the same facts giving rise to the stop may also give rise to the frisk, as when police stop a person suspected of a prior crime of violence. Nevertheless, courts should always employ a two-step test when determining the validity of a stop and frisk. The first part should state the facts relevant to whether the stop was justified, as well as explain why these particular facts could have led the officer reasonably to believe the suspect was committing, had committed, or was about to commit a crime. If the stop is held invalid, the analysis should end. If the stop is held valid, then the second part should state the facts relevant to whether the frisk was justified, as well as explain why these particular facts could have led the officer reasonably to believe the suspect was armed. Each part of the analysis need only be long enough to communicate the necessary information, but bifurcating the analysis better recognizes the distinct nature of the frisk.[135]

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"search."

Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877 (1968).

135. Examples of Louisiana cases that do an excellent job of separately analyzing the stop and the frisk include: State v. Hunter, 375 So. 2d 99 (La. 1979); State v. Gallow, 452 So. 2d 227 (La. App. 1st Cir.), *writ denied*, 456 So. 2d 1016 (1984); State v. Leary, 627 So. 2d 777 (La. App. 2d Cir. 1993); State v. Alexander, 450 So. 2d 61 (La. App. 3d Cir. 1984); State v. Lightfoot, 580 So. 2d 702 (La. App. 4th Cir. 1991).