Louisiana Law Review

Volume 65 | Number 2
Winter 2005

To Stop and Presume: Balancing a Per Se Right to Frisk Suspected Narcotics Traffickers on the Fourth Amendment Scales

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I. INTRODUCTION

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law."[1] Justice Horace Gray of the Supreme Court of the United States wrote these words in 1891; they reflect a vision of freedom of privacy that is not seen today. Justice Gray's expounded guardianship arguably lacked fortitude. Or perhaps his inability to foresee modern dangers which necessitate restraints on freedom of privacy caused him to explicate a vision of freedom of privacy that is now rightfully considered naive. Whatever the case, rights to freedom of privacy are now more limited, and often times these limitations are imposed by courts in the absence of clear and unquestionable authority of law.

This comment points out fundamental flaws in two cases, decided by the Louisiana Supreme Court, that endorse a per se right to frisk those reasonably suspected of narcotics trafficking.[2] The endorsement is predicated on *Terry v. Ohio*,[3] but is an unconstitutional expansion of the police authority granted in that case. First, this paper discusses the constitutional analysis used to justify searches and seizures without warrants, and subsequently, searches and seizures without probable cause. Then, this paper discusses the *Terry* requirements and rationale in order to determine whether the holding is elastic enough to justify a per se right to frisk. Next, this paper discusses the decisions of the Louisiana Supreme Court that endorse the per se right to frisk as a justifiable extension of *Terry*.[4] These cases are discussed in order to highlight the flaws in the Court's methodology when endorsing the per se right, and also to highlight the breadth of authority granted the police by a per se right to frisk. Subsequently, this paper discusses the dangers of a per se right to frisk in light of *Minnesota v. Dickerson*.[5] In *Dickerson*, the United States Supreme Court held that police may seize non-

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1. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001 (1891).
2. State v. Small, 2000-0564 (La. 2000), 762 So. 2d 1071; State v. Wilson, 2000-0178 (La. 2000), 775 So. 2d 1051.
3. 392 U.S. 1, 88 S. Ct. 1868 (1968).
4. *Small*, 762 So. 2d at 1071; *Wilson*, 775 So. 2d at 1051.
5. 508 U.S. 366, 113 S. Ct. 2130 (1993).

threatening contraband discovered in a weapons frisk under a "plain feel" exception to the Fourth Amendment. Taken in combination with the "plain feel" doctrine, a per se right to frisk narcotics traffickers encourages police to conduct drug frisks rather than weapons frisks. The objective of *Terry* is to afford police flexibility in responding to danger; encouraging drug frisks does not advance this objective.[6] This paper then evaluates the likelihood that the Supreme Court's decision in *Richards v. Wisconsin*[7] precludes a finding that a per se right to frisk is constitutional. Finally, this paper discusses the implications of dicta found in the Supreme Court decision of *Florida v. J.L.*[8] Although the Court's decision evidences a potential willingness to allow a per se right to frisk, because it is dicta, it is not controlling.

II. BACKGROUND

The Fourth Amendment to the United States Constitution provides:

> 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.[9]

The amendment has spawned much debate regarding whether the two clauses of the Fourth Amendment stand alone, or whether the second Warrant Clause modifies the first Reasonableness Clause.[10] The ambiguity of the Fourth Amendment raises two questions: (1) whether a warrant is required before any search and/or seizure can validly take place and (2) whether, if a warrant was not required, probable cause is necessary for a valid search and/or seizure. In the seminal case of *Terry v. Ohio*,[11] the Supreme Court of the United States answered the question of whether, under the Fourth Amendment, a police officer must always have either a warrant or probable cause to arrest someone before seizing them and subjecting

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6. 392 U.S. at 29, 88 S. Ct. at 1884.

7. 520 U.S. 385, 117 S. Ct. 1416 (1997) (rejecting a blanket exception to the knock-and-announce requirement).

8. 529 U.S. 266, 120 S. Ct. 1375 (2000).

9. U.S. Const. amend. IV.

10. *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483 (1995) (summarizing the competing views).

11. 392 U.S. at 1, 88 S. Ct. at 1868.

them to a limited search for weapons. The Court held that certain searches and seizures, euphemistically termed "stop and frisks," can be made upon "reasonable suspicion," which is something less than probable cause.[12]

The constitutionalization of a probable causeless search and seizure required the Supreme Court to shift fundamentally away from traditional Fourth Amendment analysis. To effect this shift, the Court replaced a bright line test with a balancing test that lower courts could use to determine the reasonableness of Fourth Amendment searches and seizures.[13] The test weighs the government's interest in conducting a search and seizure against the privacy rights encroached upon by conducting it.[14] Since *Terry*, the steadily declining weight of freedom of privacy has tipped the judicial scales in favor of broad police authority to "stop and frisk." The ever expanding police power to "stop and frisk" does, however, have its limits. Consequently, lower courts must take a more complex analytical approach when asked to evaluate the reasonableness of a search and seizure. After all, there is nothing more dangerous to freedom of privacy, nor more inconsistent with the Fourth Amendment, than rubber stamping any and all searches and seizures as reasonable.

III. *TERRY V. OHIO*

The analytical framework provided by the Supreme Court in *Terry v. Ohio* is too often misunderstood as a broad and flexible formula. While *Terry* obviously does expand police authority to "stop and frisk," the authority is only triggered by specific facts and circumstances. Therefore, because the Louisiana Supreme Court's per se right to frisk provides for searches and seizures in the absence of *Terry's* requirements, the per se right stands on unconstitutionally thin ice.

In *Terry*, a Cleveland Police Department detective frisked three men after stopping them in order to investigate whether they were planning an armed robbery.[15] Terry was convicted of carrying a

12. *Id.* at 30, 88 S. Ct. at 1884–85.
13. *See id.* at 19–21, 88 S. Ct. at 1879–80.
14. *Id.*
15. *Id.* at 5–7, 88 S. Ct. at 1871–72. The detective had observed the two men repeatedly walk past and peer into a store window, then confer with a third man after performing the ritual five or six times. The detective suspected the three men were planning a "stick up" and feared they might be armed, so when the three convened for a second time, he decided to investigate further. The detective approached the three men and asked for their names, they "mumbled something" in response, so he spun them around and patted down the outside of their clothing. *Id.*

concealed weapon.[16] The *Terry* Court was asked to evaluate whether the "stop and frisk" violated Terry's constitutional rights under the Fourth Amendment.[17] The Court emphatically rejected the notion that an investigatory stop was not a seizure, as well as the notion that a frisk was not a search, thus rejecting the notion that either act was outside of the purview of the Fourth Amendment.[18] The analysis then turned to whether the seizure and subsequent search were reasonable.[19] The Court formulated a reasonableness test which balanced the governmental interest served by allowing a search and seizure against the intrusion upon privacy rights of the citizen.[20] Using that test, the Court found that the governmental interest in general crime prevention outweighed the relatively minor intrusion upon the rights of the citizen seized in an investigatory stop.[21] Additionally, although the Court found that a frisk was a more serious intrusion than an investigatory stop, the Court held that the intrusion was outweighed by the interest police have in ensuring their safety.[22]

The *Terry* Court determined that a police officer may, in appropriate circumstances and in an appropriate manner, without probable cause to arrest, approach a person for purposes of investigating possibly criminal behavior.[23] The officer must, though, be able to point to specific and articulable facts which, taken together with rational inferences from those facts, lead the officer reasonably to conclude in light of his experience that criminal activity is afoot.[24] Furthermore, the Court concluded that when such a seizure is made, "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer."[25] The officer must, however, be justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.[26] The Court emphasized that because the *sole* justification for the search is to protect police and others nearby, it must be carefully limited in scope to a search of the outer clothing designed to discover possibly dangerous weapons.[27] Lastly, the Court required that a judge evaluate whether the officer was reasonable in his belief that the person he

16. *Id.* at 4, 88 S. Ct. at 1871.
17. *Id.* at 8, 88 S. Ct. at 1873.
18. *Id.* at 16, 88 S. Ct. at 1877.
19. *Id.* at 19, 88 S. Ct. at 1879.
20. *Id.* at 20–21, 88 S. Ct. at 1879–80.
21. *Id.* at 22, 88 S. Ct. at 1880.
22. *Id.* at 23, 88 S. Ct. at 1881.
23. *Id.* at 22, 88 S. Ct. at 1880.
24. *Id.* at 21, 88 S. Ct. at 1880.
25. *Id.* at 27, 88 S. Ct. at 1883.
26. *Id.* at 24, 88 S. Ct. at 1881.
27. *Id.* at 29, 88 S. Ct. at 1884.

frisked might be armed and dangerous.[28] The standard of review is objective, so the judge should evaluate whether the circumstances would lead a man of reasonable caution to believe that the person searched was armed and dangerous.[29]

IV. THE PER SE RULE

A. The Louisianian Origins of the Per Se Right to Frisk

Terry requires a police officer to have individualized suspicion that the person he is investigating is armed and dangerous before he may conduct a weapons frisk. The officer's suspicion must be based on specific and articulable facts, and must be found reasonable by a judge based on an objective standard. The structure of *Terry* implies that the Supreme Court intended both the stop and the frisk be evaluated on a case by case basis in order to determine the reasonableness of police conduct in light of the facts. Justice Harlan, concurring in *Terry,* enunciated a divergent view. Justice Harlan urged that where an investigatory stop is reasonable, the right to frisk should be immediate and automatic if the reason for that stop is "an articulable suspicion of a crime of violence."[30] Soon after *Terry*, courts following Justice Harlan's logic broke away from the case by case model. These courts began to view the association between the possession of weapons and particular types of criminal behavior with an eye towards finding reasonable suspicion in classes of cases, rather than on a case-by-case basis.

It is quite obvious that someone suspected of armed robbery can justifiably be expected to possess a weapon. Therefore, it is reasonable that a per se right to frisk those suspected of armed robbery exists. Comparatively, because narcotics trafficking is not a crime of violence and does not *necessarily* involve the use of a weapon, the reasonability of a per se right to frisk someone suspected of the activity is lacking even under Justice Harlan's view. The difficulty in the latter cases is not in determining whether suspected perpetrators of particular types of criminal behavior are more likely than the average criminal to be armed and dangerous, but in determining whether the increased likelihood can constitutionally rise to the level of automatic reasonable suspicion. The Louisiana Supreme Court, in *Louisiana v. Small*[31] and *Louisiana v. Wilson*,[32] dealt with the former determination without contemplating the latter.

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28. *Id.* at 21–22, 88 S. Ct. at 1880.
29. *Id.*
30. *Id.* at 33, 88 S. Ct. at 1886 (Harlan, J., concurring).
31. 2000-0564 (La. 2000), 762 So. 2d 1071.
32. 2000-0178 (La. 2000), 775 So. 2d 1051.

The Louisiana Supreme Court, in *Small*,[33] implicitly recognized a per se right to frisk suspected narcotics traffickers. In *Small*, the Court reversed a decision granting a motion to suppress evidence obtained by officers during a pat down.[34] John Small was under surveillance for drug trafficking when he was observed looking up and down the street nervously while carrying a package from a residence associated with narcotics trafficking.[35] Mr. Small placed the package in his pocket and walked towards a McDonald's that a confidential informant had described as a drug dealing location.[36] After Small observed a police car he quickened his pace, purportedly in an attempt to leave the scene.[37] The police stopped and immediately frisked Small, found drugs, and arrested Small for drug possession.[38] The Louisiana Supreme Court found that the totality of the circumstances justified the investigatory stop. The Court also found the subsequent frisk valid based on the officers' "experience that weapons were often associated with narcotics trafficking."[39] By validating a frisk based on suspicion of trafficking alone, and without even attempting to offer statistical data or evidentiary support for the presumption that traffickers carry weapons, the Louisiana Supreme Court implicitly endorsed a per se right to frisk anyone suspected of narcotics trafficking.

The Louisiana Supreme Court confronted the issue again in *Louisiana v. Wilson*,[40] and again reversed a trial court judgment granting a motion to suppress evidence. In *Wilson*, a police officer turned a corner in his squad car at approximately midnight and saw Mr. Wilson crouched outside of a parked car and speaking to the driver.[41] When the driver and Wilson noticed the officer's police car, Wilson backed away from the car, put his hands in his pockets, and began to walk away.[42] The officer concluded that he had interrupted a drug transaction as the area was known for trafficking, and stopped and frisked Wilson.[43] The Louisiana Supreme Court, in admitting the drugs seized in the frisk of Wilson, again relied on the officer's acquaintance with the "close association between narcotics traffickers and weapons" in finding the frisk reasonable.[44]

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33. 762 So. 2d at 1071.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. 2000-0178 (La. 2000), 775 So. 2d 1051.
41. *Id.* at 1052.
42. *Id.*
43. *Id.*
44. *Id.* at 1053.

In *Small* and *Wilson*, the Louisiana Court sidestepped the constitutional concerns presented by a per se right to frisk suspected narcotics traffickers. Instead, the Court focused its attention on the reasonableness of police officers' beliefs that narcotics traffickers are often armed. *Wilson* cited the United States Court of Appeals for the First Circuit which stated, "[W]e have recognized that to substantial dealers in narcotics, firearms are as much 'tools of the trade' as are most commonly recognized articles of drug paraphernalia . . . ."[45] Admittedly, this belief is widespread and is likely warranted.[46] However, proving a connection between drugs and guns leaves the most important constitutional questions regarding a per se right to frisk unanswered. A proper analysis of the constitutionality of a per se right to frisk must consist of an evaluation of the risks associated with it. A proper analysis must also set forth arguments rebutting the Supreme Court's presumption against the constitutionality of per se rules under the Fourth Amendment.

B. The Per Se Right to Frisk and the "Plain Feel" Doctrine

The Supreme Court of the United States, in *Minnesota v. Dickerson*,[47] allowed for the admission of non-threatening contraband discovered during a frisk. Although the admissibility of evidence discovered in a frisk does not directly impact the constitutionality of a per se right to frisk, it greatly impacts the risks associated with such a right. Therefore, the relevance of *Dickerson* should not be understated.

The factual scenario in *Dickerson* was strikingly similar to those seen in both *Small* and *Wilson*. In *Dickerson,* police officers observed Timothy Dickerson leave an apartment building considered a drug dealing location.[48] The officers saw Mr. Dickerson walking toward them, but when he saw their squad car and made eye contact with one of them, he abruptly turned and walked the other way.[49] The officers pulled their car into an alley, ordered Dickerson to stop, and subjected him to a pat down.[50] The officer felt a small lump in Dickerson's jacket during the pat down and, suspecting it was narcotics, removed it. Because the lump turned out to be crack cocaine, Dickerson was arrested.[51]

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45. United States. v. Trullo, 809 F.2d 108, 113–14 (1st Cir. 1987) (quoting United States. v. Oates, 560 F.2d 45, 62 (2d Cir. 1977)).

46. *See id.*; United States. v. Weiner, 534 F.2d 15, 18 (2d Cir. 1976); United States. v. Griffin, 150 F.3d 778, 786 (7th Cir. 1998).

47. 508 U.S. 366, 113 S. Ct. 2130 (1993).

48. *Id.* at 368, 113 S. Ct. at 2133.

49. *Id.* at 368–69, 113 S. Ct. at 2133.

50. *Id.* at 369, 113 S. Ct. at 2133.

51. *Id.*, 113 S. Ct. at 2133–34.

Mr. Dickerson did not contest the validity of either the stop or the frisk, so the Court was unable to answer the question of whether suspicion of drug related activity could justify a frisk.[52] Consequently, the only issue raised was whether the police could seize non-threatening contraband detected during a weapons frisk.[53] The *Dickerson* Court held that when an officer lawfully conducts a pat down of a suspect's outer clothing and feels an object, the contour or mass of which makes its identity immediately apparent as contraband, the officer may seize the object without a warrant.[54] This is commonly known as the "plain feel" doctrine. Fortunately for Dickerson, the Court excluded the evidence against him because it determined the bulge was not immediately apparent as contraband, a conclusion supported by the fact that the officer had to squeeze and slide it between his fingers before he was able to determine its identity.[55]

The expansion of *Terry* to include a per se right to frisk suspected narcotics traffickers, regardless of how logical it might seem, must not be viewed in a vacuum. Despite concerns that the "plain feel" exception alone might encourage frisks for drugs rather than weapons, it is now the law of the land.[56] A per se right to frisk suspected drug traffickers under *Terry*, combined with the "plain feel" doctrine, multiplies the likelihood that police will conduct drug frisks rather than weapons frisks. Additionally, *Small* and *Wilson* illustrate that reasonable suspicion of narcotics trafficking is easily attained. Thus, after conducting a frisk of a suspected trafficker, police need only articulate their belief that an item seized was immediately apparent as contraband before they can charge the friskee for its possession. In light of *Terry*, this authority seems dangerously broad, especially considering it can occur without the police ever actually suspecting that the person they were dealing with is armed or dangerous.

C. Supreme Court Case Law and the Per Se Right to Frisk

There are numerous cases as well as statistics that support the statement that narcotics dealers often carry weapons.[57] However, the

52. *Id.* at 377, 113 S. Ct. at 2138.
53. *Id.* at 373, 113 S. Ct. at 2136.
54. *Id.*
55. *Id.* at 377, 113 S. Ct. at 2138.
56. *Id.* at 382, 113 S. Ct. at 2141 (Scalia, J., concurring).
57. *See, e.g., id.*; Oates, 560 F.2d at 62; United States. v. Weiner, 534 F.2d 15, 18 (2d Cir. 1976); United States. v Griffin, 150 F.3d 778, 786 (7th Cir. 1998) (cases supporting the proposition that narcotics dealers carry weapons); Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock*

question remains whether a per se right to frisk a person suspected of this particular type of activity is constitutional. The United States Supreme Court has not yet directly confronted the issue, but it has treated per se rules under the Fourth Amendment with hostility. On the other hand, the Supreme Court has acknowledged that certain courts have held it "*per se* foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well."[58] These courts, however, are ambiguous as to what constitutes a "significant amount" of illegal drugs,[59] and by acknowledging the existence of the per se rule, the Supreme Court did not necessarily imply its future validation. Thus, it remains unclear whether the exception will survive Supreme Court review.

i. The Impact of Richards v. Wisconsin

The Wisconsin Supreme Court, in *Wisconsin v. Richards*,[60] reviewed the constitutionality of a statute that created a per se exception to the knock-and-announce requirement of the Fourth Amendment. The statute provided for "no-knock" warrants in all felony drug investigations, and the Supreme Court of Wisconsin upheld the exception.[61]

The Fourth Amendment generally requires that officers executing warrants knock-and-announce their presence before entering the place to be searched.[62] This requirement analytically parallels the general Fourth Amendment requirement that probable cause exist before a search and seizure can be effected. In *Wilson v. Arkansas*, the United States Supreme Court held that the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given."[63] *Wilson* parallels *Terry* in that both cases incorporate the notion that the threat of physical violence to police can sometimes justify exceptions to the general requirements of the Fourth Amendment.

Warrant is an Idea Whose Time has Come, 64 Notre Dame L. Rev. 552, 558 n.32 (1989) (article statistically supports argument relating guns to drugs).

58. Florida v. J.L., 529 U.S. 266, 273, 120 S. Ct. 1375, 1380 (2000).

59. *See generally* United States. v. Sakyi, 160 F.3d 164 (4th Cir. 1998); United States. v. Dean, 59 F.3d 1479 (5th Cir. 1995); United States. v. Odom, 13 F.3d 949 (6th Cir.1994); United States. v. Martinez, 958 F.2d 217 (8th Cir. 1992).

60. 549 N.W.2d 218 (Wis. 1996), *aff'd*, 520 U.S. 385, 117 S. Ct. 1416 (1997).

61. *Id.*

62. Wilson v. Arkansas, 514 U.S. 927, 115 S. Ct. 1914 (1995) (discussing the knock-and-announce requirement of the Fourth Amendment).

63. *Id.* at 936, 115 S. Ct. at 1919.

The Wisconsin Supreme Court considered criminal conduct surveys, newspaper articles, and other judicial opinions relating drugs and guns when evaluating the constitutionality of the "no-knock" statute.[64] The Wisconsin Court concluded that all felony drug crimes will involve "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police."[65] Consequently, the Wisconsin Supreme Court justified the exception to the knock-and-announce requirement as an acceptable expansion of *Wilson*.[66] The expansion of *Wilson* was argued as necessitated by the special circumstances of today's drug culture, and implicit in the Wisconsin Court's decision is the idea that all drug dealers can be considered armed and dangerous under the Fourth Amendment.[67] This notion is also relied upon by the Louisiana Supreme Court in expanding *Terry* to include a per se right to frisk.[68]

The United States Supreme Court, in *Richards v. Wisconsin*, reviewed the Wisconsin Court's decision allowing the "no-knock" warrant. The Supreme Court did not contest the connexity of drugs and weapons.[69] Nevertheless, the Supreme Court struck down Wisconsin's per se rule.[70] The Supreme Court noted that exceptions to the Fourth Amendment based on the culture surrounding a general category of behavior presented two serious concerns. First, the Court found that the exception contained considerable over-generalization.[71] The Court believed that, while drug investigations often pose risks to officer safety and preservation of evidence, "not every drug investigation will pose the risks to a substantial degree."[72] In the latter cases, the Court found that a blanket rule would afford excessive insulation from judicial review.[73] Second, the Court was concerned that the reasons justifying the exception in this category could, relatively easily, be applied to others.[74] The Court noted that if a per se exception were allowed for each category of criminal

64. Wisconsin v. Richards, 549 N.W.2d 218 (Wis. 1996).
65. *Id.* at 219.
66. *Id.*
67. *See id.*
68. State v. Small, 2000-0564 (La. 2000), 762 So. 2d 1071 (generalization based on the officer's experience that weapons are often associated with narcotics trafficking is essentially a presumption based on the drug culture).
69. 520 U.S. 385, 117 S. Ct. 1416 (1997) (rejecting the blanket exception to the knock-and-announce requirement but affirming judgment of the Wisconsin Supreme Court).
70. *Id.*
71. *Id.* at 393, 117 S. Ct. at 1421.
72. *Id.*
73. *Id.*
74. *Id.*

investigation that included a hypothetical risk of danger to officers, the knock-and-announce requirement of the Fourth Amendment would be rendered meaningless.[75]

The *Richards* Court's first concern, that excessive over-generalization is inherent in a presumption that all drug dealers will be armed, is more stark in the context of a per se right to frisk than it is in the context of a per se right to conduct the no-knock. The Wisconsin Court's presumption that drug dealers will be armed was limited to people police had probable cause to believe were involved with felony drug dealing. In Louisiana, on the other hand, the presumption applies to all those suspected of narcotics trafficking. Therefore, the presumption hypothetically includes high school students who peddle in small quantities of marijuana, a group of suspects most would agree are unlikely to be armed.

The *Richards* Court's second concern, that the reasons justifying one exception to the knock-and-announce requirement of the Fourth Amendment can relatively easily be used to justify others, is equally valid in the context of a per se right to frisk. If a per se right to frisk suspected narcotics traffickers is allowed, courts need only draw parallels between weapons possession and any other crime in order to justify a per se right to frisk suspects of those crimes. Applying the reasoning of the Supreme Court in *Richards*, and realizing that the concerns voiced are just as strong in the context of a per se right to frisk as they are in the context of a per se right to execute "no-knock" warrants, it appears that the per se right to frisk cannot survive constitutional attack.

The Supreme Court in *Richards*, invalidating the per se right to conduct "no-knock" warrants, reinforced what it had previously said in *Wilson*. The *Wilson* Court held that a "no-knock" entry could be made only if police have reasonable suspicion that knocking and announcing their presence, under the particular circumstances (at the time conducted), would be dangerous or futile, or would lead to the destruction of evidence.[76] Citing *Terry*, the *Richards* Court pointed out that the showing of reasonable suspicion necessary to justify a pat-down search, like the showing necessary to justify a no-knock entry, was not high, but the officers should be required to make it.[77] The holding supports the idea that, because officers still have the freedom under *Terry* to take necessary steps to ensure their safety, a per se right to frisk provides police little to no benefit while increasing the risk of encouraging unconstitutional behavior.

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75. *Id.* at 393–394, 117 S. Ct. at 1421.
76. Wilson v. Arkansas, 514 U.S. 927 at 936, 115 S. Ct. 1914 at 1919 (1995)
77. 520 U.S. at 394–395, 117 S. Ct. at 1422.

As things stand under *Richards v. Wisconsin*, the Supreme Court might find the per se right to frisk reasonable only if it can justify a shift in the Fourth Amendment scales. A shift in the Fourth Amendment balance might occur in one of two ways. First, the Supreme Court might find a weapons frisk to be less intrusive upon citizens' privacy interests than the "no-knock" entry. Second, the Court might find that the governmental interest in conducting the frisk is greater than the governmental interest in conducting "no-knock" entries.

A finding by the Supreme Court that the frisk is less intrusive than a "no-knock" entry is unlikely. The Supreme Court of Wisconsin, in *Wisconsin v. Richards*, weighed the citizens' privacy interests in a knock-and-announcement. The Wisconsin Court appropriately pointed out that, while privacy interests in the home are fundamental, these privacy interests are only "slightly advanced by a knock-and-announcement rule."[78] Police officers who have a search warrant will enter a home within seconds of their arrival even if they do knock-and-announce their presence.[79] Comparatively, police officers might not have the authority to conduct a frisk of a suspected narcotics trafficker in the absence of a per se right to frisk. Thus, it is likely that Fourth Amendment privacy interests are heavier in the context of a per se right to frisk than they are in the context of the per se right to conduct "no-knock" entries. Accordingly, the Fourth Amendment scales favor striking the per se right to frisk.

A finding that the government's interest in conducting a frisk is greater than its interest in conducting the "no-knock" is also unlikely. The Wisconsin Supreme Court accurately pointed out in *Wisconsin v. Richards* that police face an "unquantifiable risk" in entering one's home to execute a warrant.[80] The Wisconsin Court noted that, because the officers are coming onto their adversaries' turf that has a unique configuration unknown to the officers, the danger is great.[81] To demonstrate the danger created by a knock-and-announcement by police, the Court hypothesized that a suspect who sees or knows where an officer is and has time to arm himself, need only aim his firearm at the door and wait for the target to appear.[82] These unique dangers are less apparent in a street encounter than they are in a home. Police officers are likely to be at least vaguely familiar with the area they

78. 549 N.W.2d 218, 226 (Wis. 1996), *aff'd*, 520 U.S. 385, 117 S. Ct. 1416 (1997).

79. *Id.*

80. *Id.* at 223.

81. *Id.*

82. *Id.* at 223–24 (quoting D. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why The No-Knock Warrant is an Idea Whose Time Has Come*, 64 Notre Dame L. Rev. 552, 566).

patrol. Additionally, even if officers are on their adversaries' turf to perform an investigatory stop, during such a stop in a public place, the police will likely be able to keep a keen eye on the suspect. Therefore, an ambush of police in an investigatory stop is much less likely than an ambush of officers executing a warrant at one's home. Consequently, because the governmental interest of police safety is lighter in regard to a per se right to frisk than it is in a per se right to execute a "no-knock" warrant, again the Fourth Amendment scales favor citizens' privacy.

The Fourth Amendment issues presented by a per se right to execute "no-knock" warrants are markedly similar to those presented by a per se right to frisk those suspected of narcotics trafficking. Therefore, *Richards v. Wisconsin* is the best guidepost available to those seeking insight regarding what can reasonably be expected if the Supreme Court does confront the issue of a per se right to frisk. Considering that all of the justifications for striking the per se right to conduct the "no-knock" are equally present in the context of a per se right to frisk, as well as the likelihood that the Supreme Court will find both prongs of the Fourth Amendment balancing test favor striking the per se right to frisk, it is difficult to see how the United States Supreme Court could justify the per se right to frisk without overruling *Richards*.

ii. The Implications of Florida v. J.L.

The strongest support for the argument that the Supreme Court will find the per se right to frisk constitutional is found in the 2000 case of *Florida v. J.L.*[83] In *J.L.*, the Supreme Court was asked to contract the protections afforded citizens under the Fourth Amendment.[84] Generally, the Fourth Amendment requires that anonymous tips carry with them some indicia of reliability before officers may act on them.[85] The *J.L.* Court was asked to modify *Terry* to license a "firearm exception" that would allow officers to conduct a weapons frisk based on bare bones tips about the possession of weapons.[86] The Court refused to allow the "firearm exception" out of concern that numerous per se exceptions under the Fourth Amendment might result in the exceptions eventually swallowing the rule.[87]

The *J.L.* Court cited *Richards v. Wisconsin* in order to reiterate its belief that per se exceptions to the Fourth Amendment are undesirable because the reasons for their creation can relatively easily be applied to

83. 529 U.S. 266, 120 S. Ct. 1375 (2000).
84. *Id.*
85. Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921 (1972); Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412 (1990).
86. 529 U.S. at 272, 120 S. Ct. at 1379.
87. *Id.* at 273, 120 S. Ct. at 1380.

new exceptions.[88] To illustrate this undesirable phenomenon, the Court acknowledged that "[S]everal Courts of Appeals have held it *per se* foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well," and determined that allowing frisks based on bare bones tips about guns would indirectly affirm the right to conduct frisks based on bare boned tips about drugs.[89] It is this statement that creates confusion regarding a per se right to frisk. The discussion is incongruous because, while disdainfully rebuffing the offer to create one per se exception to the Fourth Amendment, the Court acknowledged the existence of another without contempt.

The *J.L.* Court's intention in acknowledging the presumption that those carrying significant amounts of drugs will foreseeably be carrying guns is unclear. Yet, because the discussion refers directly to *Terry*, the Court arguably implied support for a per se right to frisk those carrying *significant* amounts of drugs. The acknowledgment in *J.L.* referenced four cases decided in the United States Courts of Appeals.[90] Three of the cited cases dealt with drug transactions involving cocaine valued at $5000 or more, indicating that suspicion of large drug transactions is required before the foreseeability of weapons possession becomes legitimate.[91] Another case cited by the *J.L.* Court, however, indicates that the standard is much lower. The Fourth Circuit case of the *United States v. Sakyi*[92] involved an officer who stopped an automobile and observed a Phillies Blunt cigar box in the automobile's glove box when speaking with the driver. The officer conducted a frisk of the passengers and the vehicle based on a number of factors, but the Fourth Circuit found that the officer's experience that Phillies Blunt cigar boxes were commonly associated with marijuana established reasonable suspicion that illegal drugs were in the vehicle, and that the indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer.[93]

The Supreme Court's decision in *J.L.* evidences potential willingness on the part of the Court to accept a per se right to frisk those suspected of carrying drugs. However, because the acknowledgment in *J.L.* came in the form of dicta, it does not carry the authoritative weight that *Richards* does. Therefore, applying *Richards*, the per se right to frisk remains unconstitutional despite *J.L.*

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88. *Id.*
89. *Id.*
90. *Id.*
91. United States v. Dean, 59 F.3d 1479, 1490, n.20 (5th Cir. 1995); United States v. Odom, 13 F.3d 949 (6th Cir. 1994); United States v. Martinez, 958 F.2d 217, 219 (8th Cir. 1992).
92. 160 F.3d 164 (4th Cir. 1998).
93. *Id.* at 169.

V. CONCLUSION

In considering when it should be appropriate to allow police to conduct a frisk, it is important to keep in mind what a frisk is. A police manual describes a weapons frisk as follows:

> Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area should also be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.[94]

As current Justice Antonin Scalia opined, "it is unlikely that our founding fathers would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity."[95] That is not to say that frisk should never be allowed, though, because such an allowance is the law of the land. Allowing a frisk without requiring even mere suspicion, however, goes too far.

The per se right to frisk suspected narcotics traffickers also has the undesirable effect of encouraging drug frisks rather than weapons frisks. *Terry* never contemplated drug frisks, its sole objective was police safety. Therefore, because *Terry* affords the police great flexibility in responding to danger, a per se right to frisk offers them no more safety than they already had. Most importantly, under *Richards v. Wisconsin*, a per se right to frisk violates the Fourth Amendment.

Benjamin Franklin once wrote "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[96] One should remember this when interpreting the Fourth Amendment. In the case of a per se right to frisk, not only is liberty surrendered, but no safety is obtained. Therefore, in allowing the per se right to frisk suspected narcotics traffickers, the Louisiana Supreme Court wrongly decided the cases of *Small* and *Wilson*.

*Joshua Lewis**

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94. Minnesota v. Dickerson, 508 U.S. 366, 381–82, 113 S. Ct. 2130, 2140 (1993) (Scalia, J., concurring) (quoting J. Moynahan, Police Searching Procedures 7 (1963) (citations omitted)).

95. *Id.*

96. John Bartlett, Familiar Quotations 310 (10th ed. 1919).

* J.D./B.C.L., May 2005, Paul M. Hebert Law Center, Louisiana State University.