FOURTH & FOURTEENTH AMENDMENTS — SEARCH AND SEIZURE — A WARRANTLESS SEIZURE OF NONTHREATENING CONTRABAND DURING A VALID FRISK IS REASONABLE IF THE OFFICER'S SENSE OF TOUCH MAKES IT IMMEDIATELY APPARENT THAT THE OBJECT IS CONTRABAND — *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

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I. INTRODUCTION

The Fourth Amendment[1] to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[2] Central to an understanding of the Fourth Amendment is the ability to perceive what police activities, under what circumstances, infringe upon an individual's privacy interests so as to constitute either a "search" or "seizure" within the meaning of this amendment.[3]

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[1]The Fourth Amendment states:

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

U.S. CONST. amend. IV. The United States Supreme Court has held the Fourth Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655-56 (holding that evidence obtained through searches and seizures that are violative of the Constitution are, by the same authority, inadmissible in state court), *reh'g denied*, 368 U.S. 871 (1961).

[2]The words "searches and seizures" are terms of limitation. 1 WAYNE LAFAVE, SEARCH AND SEIZURE § 2.1(a), at 299 (2d ed. 1987 & Supp. 1994) [hereinafter 1 LAFAVE] (citing Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974)). Under the traditional approach, a "search" is said to imply "some exploratory investigation or an invasion and quest . . . [such that] the mere looking at that which is open to view is not a 'search,'" 1 LAFAVE § 2.1(a), at 301-02 (quoting C.J.S. Searches and Seizures § 1 (1952)), whereas a "seizure" occurs when there is some "meaningful interference with an individual's possessory interests in [his] property." *Id.* at 299-300 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

[3]1 LAFAVE *supra* note 2, § 2.1, at 299.

Beginning in the early 1960's, the police practice referred to as "stop and frisk"[4] became highly visible. In 1968, the Supreme Court addressed its constitutionality for the first time directly in *Terry v. Ohio.*[5] Since *Terry*, however, there have evolved various police encounters involving searches and seizures which have required closer constitutional scrutiny. This note will trace the Court's recognition of the protective search in a "stop and frisk"[6] situation against the Fourth Amendment right against unreasonable searches and seizures.

Last term, in *Minnesota v. Dickerson*,[7] the United States Supreme Court addressed whether the Fourth Amendment permits the seizure and admission into evidence of contraband detected through a police officer's "sense of touch" during a protective patdown search.[8] Specifically, the Supreme

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[4]The practice of stop and frisk is "a time-honored police procedure for officers to stop suspicious persons for questioning and, occasionally, to search these persons for dangerous weapons." 3 WAYNE LAFAVE, SEARCH AND SEIZURE § 9.1(a), at 334 (2d ed. 1987 & Supp. 1994) [hereinafter 3 LAFAVE]. This practice authorizes police to stop an individual in a public place if the officer reasonably suspects that such individual is committing, is about to commit or has committed a crime. WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 273, at 335 (1st ed. 1972) (citing People v. Rivera, 14 N.Y.2d 441, *cert. denied*, 379 U.S. 978 (1965)). *See generally* Wayne R. LaFave, *Street Encounters and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40 (1968-69) (discussing the issue of "whether the police have the right to stop and question a suspect, without his consent, in the absence of grounds for arrest").

[5]392 U.S. 1 (1968). The Supreme Court in *Terry* held that when an officer observes suspicious or unusual conduct which leads him to reasonably conclude, based on his experience, that "criminal activity may be afoot," and that an individual may be "armed and presently dangerous" so as to incur reasonable fear for the officer's or others' safety, the officer is entitled to conduct a "carefully limited search" of the individual's outer clothing in an effort to discover weapons. *Id.* at 30. The Court cautioned, however, that any such search must be "limited to that which is necessary for the discovery of *weapons* which might be used to harm the officer or others nearby . . . ." *Id.* at 26 (emphasis added). *See also* 3 LAFAVE, *supra* note 4, § 9.1, at 334. For further discussion see *infra* note 53.

[6]*See supra* note 4.

[7]113 S. Ct. 2130 (1993).

[8]*Id.* at 2134. Because the sole justification for the search is for the protection of the officer and others nearby, a patdown is confined in scope to an intrusion "reasonably designed" to discover weapons. Terry v. Ohio, 392 U.S. 1, 27 (1968). Thus, *Terry* generally limits an officer to a patdown search of a suspect's outer garments and those areas most likely to contain a weapon. 2 WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 13.7a, at 13-64.1 to -64.2 (2d ed. 1993) [hereinafter 2

Court examined whether a police officer overstepped his lawful bounds, as established in *Terry v. Ohio*,[9] when the officer conducted a patdown search and determined that a small lump in the jacket pocket of the defendant was contraband only after "squeezing, sliding and otherwise manipulating the contents" of the pocket, which he knew contained no weapon.[10] Relying on the *Terry* protective search,[11] the Supreme Court held that a police officer may seize contraband which is detected through a protective patdown.[12] Nonetheless, the Supreme Court determined that the officer overstepped his lawful bounds when he manipulated the contents of respondent Dickerson's pocket even after the officer knew it contained no weapon.[13] Accordingly, the Court concluded that the contraband seized could not be admitted into evidence.[14]

II. STATEMENT OF THE CASE

While patrolling an area on the north side of Minneapolis, two police officers in a marked patrol car observed respondent Dickerson leaving an

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RINGEL]. Accordingly, an officer may be justified in searching the contents of the pockets of clothing when a patdown reveals a hard object which may be a weapon. *Id.* at 13-65 (citing United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972)). However, "[a]s soon as the officer discovers that there is no dangerous instrument in the pocket, he must desist from further exploration of the pocket's contents." *Id. See, e.g.*, United States v. Short, 570 F.2d 1051 (D.C. Cir. 1978) (holding that "seizure during frisk of soft bag containing packets of heroin was not a properly circumscribed frisk for weapons"); United States v. Thompkins, 405 F. Supp. 1104 (S.D.N.Y. 1975) (holding that "after discovery that hard object in pocket was a comb, any further search of pocket was unjustified").

[9]392 U.S. 1 (1968). *See supra* note 5.

[10]*Dickerson*, 113 S. Ct. at 2138 (quoting Minnesota v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)). For such a seizure to be lawful, the officer must "immediately" recognize the existence of contraband by his sense of touch. 2 RINGEL, *supra* note 8, § 13.8, at 13-69 to -70.

[11]*Dickerson*, 113 S. Ct. at 2138. *See supra* note 5.

[12]Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993).

[13]*Id.*

[14]*Id.*

apartment building considered to be a notorious "crack house."[15] The respondent exited the building and began walking toward the street.[16] When the respondent spotted the squad car, he made eye contact with one of the officers, abruptly stopped, turned around, and entered an alley on the opposite side of the building.[17] Based on his knowledge of past activities at the apartment and the defendant's evasive actions, the officer decided to stop the respondent to investigate further.[18] After pulling the squad car into the alley, the officer ordered the respondent to submit to a "patdown search."[19] Although the search revealed no weapons, the officer felt a small lump in the respondent's jacket.[20] After manipulating the lump with his fingers, the officer believed it was "crack cocaine" wrapped in cellophane.[21] He then reached into the respondent's jacket pocket and pulled out a small plastic bag containing .20 grams of crack cocaine.[22] The officer arrested respondent and charged him with possession of a controlled substance.[23]

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[15]*Id.* at 2133. At trial, one of the officers testified that he had executed several drug-related search warrants at the same address, seizing drugs, knives, and guns. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992).

[16]*Dickerson*, 113 S. Ct. at 2133.

[17]*Id.* Although the respondent testified that he never saw the police car or made eye contact with the officers, the trial judge credited the police officer's contrary testimony. State v. Dickerson, 481 N.W.2d 840, 842 (Minn. 1992).

[18]Minnesota v. Dickerson, 113 S. Ct. 2130, 2133 (1993).

[19]*Id.* The officer testified that he searched the respondent because he had seized weapons from people at that particular apartment building in the past and that drug traffickers often possessed weapons. *Dickerson*, 469 N.W.2d at 464.

[20]*Dickerson*, 113 S. Ct. at 2133 (citation omitted). The officer testified that he never believed the lump was a weapon. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992).

[21]*Dickerson*, 469 N.W.2d at 464.

[22]Minnesota v. Dickerson, 113 S. Ct. 2130, 2133-34 (1993). The officer described the confiscated material as being "the size of a pea or a marble." State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992).

[23]*Dickerson*, 113 S. Ct. at 2134.

Prior to trial, the respondent moved to suppress the evidence but the trial court denied the motion, ruling that the stop was justified pursuant to *Terry*.[24] The trial court reasoned that the respondent's departure from a "known crack house" coupled with his evasive conduct provided "reasonable suspicion" that he was engaged in criminal activity, justifying the patdown search for weapons.[25] Furthermore, the trial court stated that the "plain feel"[26] exception to the warrant requirement permitted a warrantless seizure of contraband found in "plain-view"[27] during a lawful search.[28] Accordingly, the trial court admitted the evidence obtained from the search.[29] The jury consequently convicted the respondent of possession of a controlled dangerous substance.[30]

Subsequently, the Minnesota Court of Appeals reversed the trial court's decision by declining to adopt the "plain feel" exception to the warrant requirement.[31] The court of appeals agreed with the trial court that the stop was justified based on the respondent's evasive conduct and the officer's

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[24]*Id.*

[25]State v. Dickerson, 469 N.W.2d 462, 464 (Minn. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn 1992).

[26]*Id.* The trial court described the "plain feel" exception as sanctioning the seizure of an object discovered by the "sensation of touch," rather than by sight, during a patdown search. *Dickerson*, 481 N.W.2d at 850.

[27]State v. Dickerson, 481 N.W.2d 841, 849-50 n.1 (Minn. 1992). Police officers armed with search warrants for "a given area for specified objects" frequently come across other articles of incriminating character. Coolidge v. New Hampshire, 403 U.S. 443, 465, *reh'g denied*, 404 U.S. 874 (1971). For example, a valid investigative stop of a suspect on the street often enables a police officer to see things that the officer would not otherwise see. 2 RINGEL, *supra* note 8, § 13.8, at 13-68 to -69. Specifically, bulges and other suspicious objects may become apparent. *Id.* Thus, when an officer is in a lawful position from which he sees an object which gives him probable cause to suspect that a crime is being committed, the officer may seize the article and arrest the suspect under the "plain-view" doctrine. *Id.* *See also infra* notes 98, 129 (discussing the "plain-view" doctrine in further detail).

[28]*Dickerson*, 469 N.W.2d at 466-67.

[29]*Dickerson*, 481 N.W.2d at 842.

[30]Minnesota v. Dickerson, 113 S. Ct. 2130, 2134 (1993).

[31]State v. Dickerson, 469 N.W.2d 462, 467 (Minn. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992).

personal knowledge of the presence of significant drug activity in the apartment building.[32] The court of appeals further acknowledged that the

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[32]*Id.* at 465. Courts repeatedly cite a police officer's experience as a "significant" factor in finding that reasonable suspicion existed to justify an investigative stop. 2 RINGEL, *supra* note 8, § 13.4a, at 13-27. *See, e.g.*, United States v. Oates, 560 F.2d 45, 61 (2d Cir. 1977) (holding that "highly experienced" undercover narcotics officer who was "thoroughly familiar" with drug peddler's "clandestine" methods of doing business rendered him capable of comprehending the significance of defendant's activities so as to obtain probable cause); United States v. Walling, 486 F.2d 229, 235-36 (9th Cir. 1973) (asserting that presence of two vehicles parked on a "remote rural road" late at night and combined knowledge of two officers that area had been used in past for "various criminal activities" was sufficient suspicion for temporary detention of automobile), *cert. denied*, 415 U.S. 923 (1974); United States v. Cepulonis, 530 F.2d 238, 242-43 (1st Cir.) (holding that where FBI agents knew of defendant's prior felony conviction and uses of alias, and agent's observation of defendant was corroborated by informant tip, they were reasonably warranted in stopping defendant for questioning and frisking him for weapons), *cert. denied*, 426 U.S. 908 (1976); United States v. Bull, 565 F.2d 869, 871 (4th Cir. 1977) (finding that where officer had "long been engaged" in investigation of night-time burglaries in shopping areas similar to the one involved, and defendant exhibited suspicious conduct, officer had founded suspicion that criminal activity may be afoot and was warranted in stopping defendant and conducting limited search for weapons), *cert. denied*, 435 U.S. 946 (1978); United States v. Tharpe, 536 F.2d 1098, 1100 (5th Cir. 1976) (concluding that police officer who stopped automobile late at night which contained three individuals, two of whom were suspected of burglary in another state and the driver who he knew was being sought for passing bad checks earlier that evening, was justified in conducting patdown search of two passengers); United States v. Solven, 512 F.2d 1059, 1060 (8th Cir.) (concluding that where arresting officer knew defendant had prior arrest record for robbery and officer observed defendant driving a vehicle that matched one used in recent drugstore robberies, there was sufficient probable cause for arrest of defendant and extensive search of automobile for weapons or contraband), *cert. denied*, 423 U.S. 846 (1975); State v. DeMasi, 452 A.2d 1150, 1153 (R.I. 1982) (stating that probable cause was buttressed by officer's knowledge that defendants were known criminals with previous records for similar criminal activity), *cert. denied*, 460 U.S. 1052 (1983); State v. Longa, 318 N.W.2d 733, 738-39 (Neb. 1982) ("[P]olice officers must have a particularized and objective basis for suspecting the person stopped of criminal activity . . . [which] includes all of the objective observations and considerations as well as the suspicion drawn by a trained and experienced police officer by inference and deduction . . . .") (emphasis omitted) (citations omitted)); People v. Foster, 443 N.Y.S.2d 835, 837 (App. Div. 1981) ("[T]o establish probable cause there must be evidence available to the police officer sufficient to lead a person of his experience and sophistication to reasonably conclude that a crime has been or was being committed."); Stuart v. State, 587 P.2d 33, 34 (Nev. 1978) ("[I]n order to justify a stop and detention, the police officer must 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 may be afoot.") (citations omitted)); Commonwealth v. Almeida, 366 N.E.2d 756, 759-60 (Mass. 1977) (concluding that the essential question is "whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety

officer had an objective, articulable basis to perform a "limited" patdown search.[33] The court opined, however, that pursuant to *Terry*[34] and *Sibron v. New York*,[35] a protective search is limited to a search for weapons, and, absent probable cause for a further intrusion, an officer may not seize an object unless it "reasonably resembles" a weapon.[36] Accordingly, the court concluded that the search of the respondent exceeded constitutional parameters and, therefore, the fruits of the search must be suppressed.[37]

The Minnesota Supreme Court affirmed the decision of the court of appeals but expressly declined to recognize a "plain feel" exception to the warrant requirement of the Fourth Amendment.[38] Nonetheless, the state supreme court acknowledged that the stop and frisk of Dickerson was valid under *Terry*,[39] but cautioned that once an officer is assured that no weapon is present, the frisk must cease.[40] The court further stated that, if during

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of the police or . . . [another] was in danger").

[33]*Dickerson*, 469 N.W.2d at 465. The court pointed out that the officer had previously seized weapons and drugs from the apartments, that Dickerson's conduct was evasive, and that, from the officer's experience, drug possessors often carried weapons. *Id.*

[34]Terry v. Ohio, 392 U.S. 1 (1968). *See infra* note 53.

[35]392 U.S. 40, 43-44 (1968) (examining the reasonableness of the search and seizure pursuant to New York's "stop-and-frisk" law, N.Y. CODE CRIM. PROC. § 180-a, and concluding that the search violated the defendant's Fourth Amendment rights). *See infra* note 53.

[36]State v. Dickerson, 469 N.W.2d 462, 466 (Minn. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992). The court interpreted *Terry* and *Sibron* to limit an officer's patdown search to "careful exploration of the outer surfaces of the person's clothing until and unless the officer discovers specific and articulable facts reasonably supporting the suspicion that the defendant is armed and dangerous." *Id.* The officer may then exceed the scope of such a limited search by reaching into the suspect's clothing for the *sole* "purpose of recovering an object that was thought to be a weapon." *Id.* (emphasis added).

[37]*Id.* at 467. Accordingly, the Minnesota Court of Appeals refused to admit the contraband into evidence. *Id.*

[38]State v. Dickerson, 481 N.W.2d 840 (Minn. 1992). The court based this rejection on its belief that "the sense of touch is inherently less immediate and less reliable than the sense of sight . . . [and] that the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." *Id.* at 845.

[39]392 U.S. 1 (1968).

[40]*Dickerson*, 481 N.W.2d at 844.

the course of a frisk, "the officer feels an object that cannot possibly be a weapon, the officer is *not* privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon."[41] Accordingly, the court asserted that, once it was apparent that Dickerson had no weapon, *Terry* no longer legitimized the officer's conduct.[42] The court also stated that the further intrusion into Dickerson's privacy without a warrant or probable cause to arrest violated the Fourth Amendment and therefore the fruits of the search must be suppressed.[43]

The United States Supreme Court granted certiorari to resolve the conflict among the federal and state courts regarding the extension of the "plain-view" doctrine to the sense of touch so as to establish a "plain feel" or "plain touch" standard.[44] Agreeing with both the Minnesota Court of Appeals and the Minnesota Supreme Court, the Court held that a *Terry* protective search without a warrant is justified on reasonable suspicion and that an officer may seize contraband detected through a sense of touch during a patdown search as long as the search does not go beyond what is necessary to determine whether the suspect is armed.[45]

III. THE EVOLUTION OF THE PROTECTIVE SEARCH DOCTRINE

The Fourth Amendment was first made applicable to the states through the Fourteenth Amendment in *Mapp v. Ohio*.[46] In *Mapp*, the petitioner was convicted of possession of obscene books, pictures, and photographs which the police found while conducting an illegal search of her house.[47] The Ohio Supreme Court upheld the conviction pursuant to the state obscenity

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[41]*Id.* (emphasis added). *See also* 3 LAFAVE, *supra* note 4, § 9.4(c), at 524 (agreeing that once it is concluded that an "object discovered in [a] pat-down [search] does not feel like a weapon . . . a further search [is] not [ ] justified under a *Terry* analysis").

[42]State v. Dickerson, 481 N.W.2d 840, 846 (Minn. 1992).

[43]*Id.*

[44]Minnesota v. Dickerson, 113 S. Ct. 2130, 2134 (1993). Although most federal and state courts have recognized a "plain feel" or "plain touch" corollary to the "plain-view" doctrine, some states like Minnesota have declined to do so. *Id.* at 2134-35 n.1.

[45]*Id.* at 2138-39. *See also supra* note 8.

[46]367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961).

[47]*Id.* at 644-45.

statute and declined to depart from the state's common law rule of admissibility of illegally seized evidence.[48] On appeal, the United States Supreme Court[49] held that evidence obtained through searches and seizures that violate the Constitution are, by the same authority, inadmissible in state court.[50] The Court reasoned that the essence of a healthy federalism depends upon avoiding unnecessary conflict between federal and state courts and that allowing the states to admit unlawfully seized evidence would serve to encourage disobedience of the Federal Constitution which the states are bound to uphold.[51] Moreover, the Court contended that federal and state cooperation in striving toward a solution for crime under constitutional standards will be promoted "only by recognition of their . . . mutual obligation to respect the same fundamental criteria in their approaches."[52]

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[48]*Id.* at 645.

[49]*Id.* Justice Clark, writing for the majority, held that evidence obtained by an unconstitutional search was inadmissible in a state prosecution. *Id.* at 654-55. Justices Black and Douglas authored separate concurring opinions agreeing with the majority's overruling of Wolf v. Colorado, 338 U.S. 25 (1949), and recognizing the double standard that would exist by allowing evidence that was inadmissible in federal court to be admissible in state court. *Mapp*, 367 U.S. at 661-66 (Black, J., concurring); *id.* at 666-72 (Douglas, J., concurring). In a vigorous dissent, Justice Harlan, joined by Justices Frankfurter and Whittaker, found the majority's reasoning to rest on the unsound premise that "whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise . . . enforceable against the States." *Id.* at 678-79 (Harlan, J., dissenting). The dissent declared that, as set forth in *Wolf*, "it is the principle of privacy 'which is at the core of the Fourth Amendment'" and this does not include the exclusionary rule. *Id.* at 679 (Harlan, J., dissenting) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

[50]*Mapp*, 367 U.S. at 654-55. The Supreme Court in effect overruled *Wolf*, which previously held that the Due Process Clause of the Fourteenth Amendment does not forbid admission in state court of evidence that was obtained by an unreasonable search and seizure. *Id.* (citing Wolf v. Colorado, 338 U.S. 25 (1949)). The Supreme Court opined that it was both logically and constitutionally necessary to extend the substantive protections of due process to state as well as federal prosecutions. *Id.* at 655-56.

[51]Mapp v. Ohio, 367 U.S. 643, 657-58, *reh'g denied*, 368 U.S. 871 (1961) (citing Elkins v. United States, 364 U.S. 206, 221 (1960) (holding that the purpose of the exclusionary rule "is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it")).

[52]*Id.* at 685. The Court reasoned that because "the right to privacy embodied in the Fourth Amendment is enforceable . . . in the same manner and to like effect as other basic rights secured by the Due Process Clause," this right cannot be revocable at the "whim" of a law enforcement officer. *Id.* at 660.

Shortly after *Mapp*, the Supreme Court examined a related Fourth Amendment search and seizure issue in *Terry v. Ohio,*[53] which questioned the validity of a "stop and frisk" and whether the police have the right to stop and question a suspect without consent or absent grounds for an arrest.[54] In *Terry*, a police officer became suspicious of two men standing on a street corner after observing their conduct.[55] Considering it his "duty"

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[53]392 U.S. 1 (1968). On the same day that *Terry* was decided, the Supreme Court decided Sibron v. New York, 392 U.S. 40 (1968). The case was consolidated for argument and involved two appellants, Sibron and Peters. In appellant Sibron's situation, a uniformed police officer observed petitioner for approximately eight hours during which time petitioner conversed with six or eight known narcotics addicts. *Id.* at 45. The officer later saw the petitioner enter a restaurant to talk with three more known addicts at which point the officer approached him and asked him to go outside. *Id.* Petitioner mumbled something and reached into his pocket, at which point the officer reached in and pulled out several glassine envelopes of heroin. *Id.* While the trial court ruled that the officer had grounds for arrest, the court of appeals affirmed his conviction on the basis of the "stop and frisk" law. *Id.* at 46-47. The Supreme Court granted certiorari and held that the search was unlawful because the officer was seeking narcotics rather than acting based on fear for his own safety when he reached into petitioner's pocket. *Id.* at 65.

In appellant Peters' situation, an off-duty police officer heard a noise outside his apartment door, so he looked out and saw two strangers tiptoeing toward the stairway. *Id.* at 48-49. The officer chased them and grabbed petitioner by the collar. *Id.* After the petitioner refused to identify the girlfriend whom he claimed to be visiting, the officer patted him down and felt what might have been a knife in his pocket. *Id.* at 49. The officer, however, removed an opaque plastic envelope containing burglar's tools. *Id.* Although three New York courts upheld the officer's actions based on the "stop and frisk" law, the Supreme Court concluded that there was no need to consider the "stop and frisk" because the officer made an arrest on probable cause and thus could search the suspect for weapons to prevent the destruction of evidence. *Id.* at 66-68.

These companion cases to *Terry* were consolidated for argument before the Supreme Court because they presented related questions under the Fourth and Fourteenth Amendments in the context of New York's "stop-and-frisk" law, N.Y. CODE CRIM. PROC. § 180-a. *Sibron*, 392 U.S. at 43.

[54]*Terry*, 392 U.S. at 9. *See supra* notes 4, 5.

[55]*Terry*, 392 U.S. at 5-6. Officer McFadden testified that he had been a police officer for thirty-nine years and had been assigned to patrol this downtown vicinity for pickpockets and shoplifters for thirty years. *Id.* at 5. Moreover, because he had never seen either of the two men before, he became suspicious when he observed one of the suspects walk up the street, peer into a store window, continue walking and then start back, look in the same window, and confer with his companion. *Id.* at 5-6. The officer stated that the second suspect repeated this ritual and between them they went through this performance about a dozen times. *Id.* The officer also testified that at one point, the two suspects approached and conversed with a third man who they followed up the street about ten minutes after his departure. *Id.* The officer suspected the two men of "casing" a stick-up. *Id.*

as a police officer to investigate, he followed the two suspects, approached them, identified himself as a police officer, and asked them for their names.[56] In response, the men mumbled something, at which point the officer grabbed petitioner Terry, spun him around, patted down the "outside" of his clothing, and felt a pistol in the breast pocket of his overcoat, which he promptly removed.[57] Terry was subsequently charged with carrying a concealed weapon.[58] At trial, Terry moved to suppress the gun as evidence.[59] The trial judge denied Terry's motion[60] and upheld the officer's removal of the weapon based on the "stop and frisk" theory.[61]

Writing for the majority,[62] Chief Justice Warren emphasized that "the

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[56]*Id.* at 6-7. Officer McFadden approached the two men in front of the store, where they were talking with the same man with whom they had previously conferred at the street corner. *Id.*

[57]*Id.* at 7. When Officer McFadden reached inside Terry's overcoat pocket and could not remove the gun, he ordered all three of the men to stand against the wall with their hands raised. *Id.* The officer removed Terry's overcoat and a .38-caliber revolver from the coat's pocket and then proceeded to patdown the outer clothing of Terry's companion, Chilton, and found a revolver. The officer then patted down Katz, the third man, and found no weapons. *Id.*

[58]*Id.*

[59]*Id.*

[60]*Id.* The trial judge denied the defendants' motion on the ground that, based on his experience, Officer McFadden "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should [have] be[en] made of their action." *Id.* at 8. The court explained that Officer McFadden's need for protection justified his patdown of the men's outer clothing based on his reasonable belief that they might be armed. *Id.*

[61]*Id.* at 7-8. The trial court distinguished between an "investigatory stop" and an arrest and between a "frisk" of outer clothing for weapons and a full search for evidence of a crime, concluding that the officer's "investigatory duties" compelled the frisk. *Id.* *See infra* note 64.

[62]Terry v. Ohio, 392 U.S. 1 (1968). In an 8-1 decision, Justices Harlan and White wrote concurring opinions. *Id.* at 31-34 (Harlan, J., concurring); *id.* at 34-35 (White, J., concurring). Justice Douglas wrote a dissenting opinion agreeing with the majority that there had indeed been a "search" and a "seizure," but the Justice found it a mystery how this "search" and "seizure" could be constitutional unless there was "probable cause." *Id.* at 35 (Douglas, J., dissenting). Specifically, the Justice pointed out that the crime was carrying a concealed weapon, there was no probable cause, and thus if a warrant was sought, a magistrate would have been unauthorized to issue one without probable cause.

Fourth Amendment protects people, not places."[63] Accordingly, the Chief Justice defined the issue as whether the petitioner's right to personal security was violated by an "unreasonable search and seizure," given the circumstances of the on-the-street encounter.[64] Chief Justice Warren emphasized that the central inquiry in classical "stop-and-frisk" theory[65] is "the reasonableness based on all the circumstances of the particular governmental invasion of a citizen's personal security."[66] The Court also

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Id. at 36 (Douglas, J., dissenting). The Justice further asserted that the majority's opinion permits police officers to effect an arrest or search without a warrant, based on reasonable suspicion, thereby giving the police greater power than a magistrate. *Id.* at 37-38 (Douglas, J., dissenting). Justice Douglas conceded that such a step may indeed be desirable to cope with the lawlessness in modern society, but that such action "should be the deliberate choice of the people through a constitutional amendment." *Id.*

[63]*Id.* at 9. (citations omitted). Therefore, the Chief Justice continued, the inestimable right of personal security as stated in the Fourth Amendment belongs as much to the individual on the streets as to the individual in his home. *Id.* at 8-9.

[64]*Id.* at 9. Chief Justice Warren acknowledged the constitutional and practical arguments on both sides of the debate over police authority to "stop and frisk" suspicious persons. *Id.* at 10. On the one hand, the Chief Justice posited that police need flexible responses to handle "rapidly unfolding and often dangerous situations on city streets." *Id.* Chief Justice Warren reasoned that police should be permitted to "stop" and briefly detain a person for questioning upon suspicion that such person may be involved with criminal activity. *Id.* Additionally, the Chief Justice proffered that "frisking" suspicious persons for weapons upon further suspicion that the person may be armed is also warranted. *Id.* at 10-11.

Conversely, Chief Justice Warren noted that police authority must be "strictly circumscribed by the law of arrest and search as it has developed . . . [within the confines of] the traditional jurisprudence of the Fourth Amendment." *Id.* at 11. *See, e.g.*, Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L. CRIMINOLOGY & P.S. 402 (1960). Therefore, the Chief Justice continued, acquiescence to the field interrogation practices at issue would encourage a substantial interference with personal security and liberty by police officers whose judgment may be colored by their power image and the competitive nature of crime control. *Terry*, 392 U.S. at 11-12.

[65]*Terry*, 392 U.S. at 19. *See supra* note 4.

[66]*Terry*, 392 U.S. at 19. In determining whether it was reasonable for the officer to interfere with petitioner's personal security, the Chief Justice set forth a dual inquiry to decide "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 19-20. The Chief Justice stated that, in order to assess the "reasonableness" of the officer's conduct, the initial focus is on the balance between the governmental interest and need which justifies a search against the intrusion upon a private citizen's constitutionally protected interests. *Id.* at 21. Acknowledging the governmental interest

recognized the governmental interest in investigating crime and the immediate interest of law enforcement officers in protecting themselves and other citizens from prospective violence.[67]

The majority held that when an officer observes suspicious conduct which leads him to reasonably conclude that "criminal activity may be afoot" and that an individual is armed and presently dangerous to the officer or to others, the officer may conduct a carefully "limited" search of the individual's outer clothing to determine whether the individual is carrying a weapon.[68] Applying this standard to the facts and circumstances of *Terry*, the Court concluded that the officer's search was reasonable and the weapons seized were admissible.[69]

Over a decade later, in *Ybarra v. Illinois*,[70] the Court clarified that the *Terry* doctrine required a reasonable belief or suspicion that a person is armed and dangerous before a search may be conducted, even though such person is on premises which is the subject of a warrant.[71] In *Ybarra*,

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of effective crime prevention and detection and considering the suspicious actions of the petitioner and his companions, the Court concluded that the officer properly investigated the behavior further. *Id.* at 22-23.

[67]*Id.* at 23-24. Although the Court acknowledged the further need to consider the nature and quality of an officer's intrusion on an individual's rights, the Court rejected petitioner's argument that such intrusion is permissible "only incident to a lawful arrest." *Id.* at 25. Nonetheless, the majority emphasized that a search for weapons, absent probable cause for arrest, must be "strictly circumscribed by the exigencies which justify its initiation." *Id.* at 25-26 (citing Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). Specifically, the Court held that this search must be "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion." *Id.* at 26.

[68]*Id.* at 30. The majority concluded that based on the facts and circumstances presented by Officer McFadden, a reasonably prudent person would have believed that petitioner was armed and presented a threat to the officer's safety. *Id.* at 28. With regard to the conduct of the search and seizure, the Court asserted that Officer McFadden confined his search to what was "minimally necessary to learn whether the [suspects] were armed and to disarm them . . . [but] did not conduct a general exploratory search for whatever evidence of criminal activity he might find." *Id.* at 29-30.

[69]*Id.* at 31. The Court pointed out that each case of this sort should be decided on the facts. *Id.*

[70]444 U.S. 85 (1979), *reh'g denied*, 444 U.S. 1049 (1980).

[71]*Id.* at 95.

police officers entered a tavern to execute a warrant authorizing the search of a tavern and a bartender "for evidence of the offense of possession of a controlled substance."[72] The police officers announced their purpose and informed everyone present that they would conduct a "cursory search for weapons."[73] The officer frisked the petitioner and felt what he described as a "cigarette pack with objects in it" but did not remove anything from the petitioner's pocket; instead, he continued to patdown other customers.[74] After completing the other searches, the officer returned to the petitioner to frisk him again at which point he retrieved the cigarette pack from the petitioner's pants pocket.[75] The officer opened the pack and found a brown powdery substance, later determined to be heroin.[76] As a result, petitioner was indicted for unlawful possession of a controlled substance.[77] Prior to trial, petitioner moved to suppress the contraband seized.[78] The trial court denied the motion and the petitioner was subsequently convicted.[79]

The United States Supreme Court granted Ybarra's petition for certiorari and Justice Stewart, writing for the majority,[80] rejected the State's

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[72]*Id.* at 88. The search warrant was issued based on an informant's statements that he observed tin-foil packets on the bartender and heard that the bartender would have heroin for sale. *Id.*

[73]*Id.* One of the officers conducted patdown searches of the nine to thirteen customers present in the tavern while the other officers extensively searched the premises. *Id.*

[74]*Id.* at 88-89.

[75]*Id.* at 89.

[76]*Id.* The second search of petitioner took place approximately two to ten minutes later. *Id.*

[77]*Id.*

[78]*Id.*

[79]*Id.* The trial court found that the search was conducted pursuant to subsection (b) of the governing Illinois statute, to "prevent the disposal or concealment of [the] things particularly described in the warrant." *Id.* (quoting ILL. REV. STAT. ch. 38, § 108-09(b) (1975)).

[80]*Id.* at 90. Chief Justice Burger authored a dissent, joined by Justices Blackmun and Rehnquist, in which the Chief Justice refused to subscribe to the Court's unjustified narrowing of Terry v. Ohio, 392 U.S. 1 (1968), so as to require "a particularized and individualized suspicion that a person is armed and dangerous" as a precondition to conduct a *Terry* search. Ybarra v. Illinois, 444 U.S. 85, 96-97 (1979) (Burger, C.J.,

contention that the seizure was constitutional on the ground that the officer had obtained probable cause to reasonably believe that the petitioner was carrying contraband during the course of a lawful *Terry* search.[81] The Court reasoned that although the officers possessed a valid warrant to search the tavern, petitioner's "mere propinquity" to other individuals suspected of criminal activity does not alone give rise to "probable cause" to search him.[82] Therefore, the Court concluded that the initial frisk of the petitioner

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dissenting), *reh'g denied*, 444 U.S. 1049 (1980). The Chief Justice proffered that, when executing a search warrant for narcotics in a location of known narcotics activity, police officers may indeed protect themselves by conducting a *Terry* search. *Id.* at 97.

Justice Rehnquist also authored a dissenting opinion which was joined by Chief Justice Burger and Justice Blackmun. *Id.* at 85, 98 (Rehnquist, J., dissenting). Justice Rehnquist found the majority's analysis faulty and believed that it was erroneous to analyze this case as if the officers were obligated to act within an exception to the warrant requirement. *Id.* at 106 (Rehnquist, J., dissenting). The Justice emphasized that to obtain a search warrant, the officer must offer sufficient information to the magistrate so as to confine the search and leave enough flexibility to be able to react "reasonably" to whatever situation with which he is confronted. *Id.* at 102 (Rehnquist, J., dissenting). In this case, the Justice continued, the officers' actions satisfied the "scope/justification test of reasonableness" established by the Fourth Amendment, as they were cognizant that heroin was for sale and it was reasonable to conclude that any person at the bar may have been involved in the drug trafficking. *Id.* at 106 (Rehnquist, J., dissenting). Because firearms are "tools of the trade," the Justice reasoned, the frisk minimized the potential danger to the executing officers in preparation for their search of the premises. *Id.* at 106-07 (Rehnquist, J., dissenting). Accordingly, Justice Rehnquist proffered that "the officers did not exceed the reasonable scope of [the] warrant in locating and retrieving the heroin" in the petitioner's pocket. *Id.* at 110 (Rehnquist, J., dissenting).

[81] *Id.* at 92. The majority emphasized that there was no evidence that the authorities had "probable cause" to believe that any person on the premises, other than the bartender, violated the law when the search warrant was issued. *Id.* at 90. The majority pointed out that the search warrant never mentioned the patrons of the tavern much less that patrons who purchased drugs frequented the tavern. *Id.* Moreover, the Court found no probable cause to search the petitioner upon execution of the warrant because the officers had "no reason to believe that he had committed, was committing, or was about to commit, any offense" in violation of law, nor had he made any suspicious gestures consistent with criminal conduct. *Id.* at 91.

[82] *Id.* at 91 (citing Sibron v. New York, 392 U.S. 40, 62-63 (1968)). The majority proffered that search or seizure of an individual must be supported by probable cause that is "particularized with respect to that person." *Id.* Accordingly, the Court concluded that each patron at the tavern when the warrant was executed was entitled to a constitutional protection against an unreasonable search or seizure. *Id.* In addition, because this individualized protection of the patrons was separate and distinct from the protection afforded to the tavern owner and the bartender, the Court concluded that the officers had no authority to invade the individual constitutional protections of the tavern patrons. *Id.*

was not supported by "a reasonable belief that he was armed and presently dangerous" and thus was not justified under the Fourth and Fourteenth Amendments.[83]

A few years later, the Court in *Michigan v. Long*[84] expanded upon the *Terry* protective search doctrine elucidated in *Ybarra* and held that under certain circumstances police officers may seize contraband detected during a lawful investigatory stop of an automobile.[85] In *Michigan v. Long*,[86] police officers approached the respondent, who had driven his car into a ditch and "appeared to be under the influence of something."[87] As the respondent re-entered the car, the officers spotted a hunting knife on the floorboard and subsequently conducted a patdown search of Long and a protective search of the vehicle for other weapons.[88] During the search, the officers discovered and seized an open pouch of marijuana and then arrested

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at 91-92.

[83]*Id.* at 92-93. Recall that the Fourth Amendment specifically directs that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; *see also supra* note 1. Thus, the Court concluded that "general" or "open-ended" warrants are constitutionally prohibited and a warrant to search a designated location cannot be construed so as to permit a search of each individual at that location. *Ybarra*, 444 U.S. at 92 n.4.

[84]463 U.S. 1032 (1983).

[85]*Id.*

[86]*Id.*

[87]*Id.* at 1035-36 (quoting Michigan v. Long, 320 N.W.2d 866, 868 (Mich. 1982)). Two police officers, while on patrol in a rural area after midnight, observed a car traveling in an erratic manner and at excessive speed which swerved off a side road into a ditch. *Id.* The officers stopped to investigate and found Long, the occupant of the vehicle, behind the rear of the car, having left the driver's side door wide open. *Id.* When Long did not respond to the initial requests to produce his license and registration, the officers believed that Long was under the influence of some intoxicant. *Id.* at 1036 (citing *Long*, 320 N.W.2d at 868).

[88]*Id.* at 1036. Specifically, one of the officers shined his flashlight in the vehicle but did not enter it. *Id.*

Long.[89] After the trial court dismissed the petitioner's motion to suppress the contraband, the petitioner was convicted of possession of marijuana.[90]

The United States Supreme Court granted certiorari to address whether an officer, during a lawful investigatory stop of the occupant of a motor vehicle, has authority to conduct a *Terry*-type search of the vehicle's passenger compartment.[91] Writing for the majority,[92] Justice O'Connor rejected Long's contention that the officer's entry into the vehicle was not justified under *Terry* because "'*Terry* authorized only a limited pat-down search of a

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[89]*Id.* The officer noticed something on the front seat extending from under the armrest, lifted the armrest, and saw an open pouch on the front seat containing marijuana. *Id.* The officers then decided to impound the vehicle; when they opened the trunk, which had no lock, they found an additional seventy-five pounds of marijuana. *Id.*

[90]*Id.* The Michigan Court of Appeals affirmed by holding that the officer's search of the passenger compartment in the vehicle was a valid protective search under *Terry*, *id.* at 1036-37, and that the officer's search of the trunk was a valid inventory search under South Dakota v. Opperman, 428 U.S. 364, 376 (1979) (holding that a routine inventory search of locked, lawfully impounded automobile did *not* involve "unreasonable" search, especially because inventory consisted of valuables in "plain-view" inside the vehicle and one officer was lawfully inside the vehicle to secure this personal property) (emphasis added). Michigan v. Long, 463 U.S. 1032, 1037 (1983).

The Michigan Supreme Court reversed and held that "the sole justification of the *Terry* search, protection of the police officers and others nearby, [could] not justify the search in this case." *Id.* (quoting Michigan v. Long, 320 N.W.2d 866, 869 (Mich. 1982)).

[91]*Id.* (citing Michigan v. Long, 459 U.S. 904 (1982)). The Supreme Court declined to address the issue of the marijuana found in the trunk, reasoning that it was not addressed by the Michigan Supreme Court. *Id.* at 1053.

[92]*Id.* at 1047. Justice Blackmun authored a brief concurring opinion rejecting the majority's presumption of jurisdiction over cases from state court, *id.* at 1054 (Blackmun, J., concurring), while Justice Brennan, joined by Justice Marshall, dissented. *Id.* at 1054 (Brennan, J., dissenting). The dissent opined that the majority distorted *Terry* into a weapon against the fundamental requirement of the Fourth Amendment that all searches and seizures shall be based on probable cause. *Id.* at 1055 (Brennan, J., dissenting) (citation omitted). Specifically, the dissent stated that *Terry* only authorized limited searches "of the person" for weapons; nothing in *Terry* authorized officers to search a "suspect's car" based on reasonable suspicion. *Id.* at 1056 (Brennan, J., dissenting). Thus, the dissent continued, the majority impermissibly employed the narrow exception established by *Terry* "'to swallow the general rule that Fourth Amendment [searches of cars] are 'reasonable' only if based on probable cause.'" *Id.* at 1064 (Brennan, J., dissenting) (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)). The dissent opined that the officers could have pursued "less intrusive, but equally effective," means of insuring their safety. *Id.* at 1065 (Brennan, J., dissenting).

person [it] suspected of criminal activity' rather than a search of an area."[93] The Court opined that *Terry* need not be interpreted to restrict the protective search to the detained suspect's person because investigative detentions are fraught with danger to police officers.[94] Accordingly, the Court concluded that the search of a passenger compartment of an automobile, limited to areas where a weapon may be hidden or placed, is permissible[95] if the police officer reasonably believes based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" that the suspect is dangerous and could obtain immediate access to a weapon.[96]

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[93]*Id.* at 1045-46 (quoting Michigan v. Long, 320 N.W.2d 866, 869 (Mich. 1982) (emphasis omitted) (footnote omitted)).

[94]*Id.* at 1047. Justice O'Connor explained that in examining the reasonableness of an officer's conduct, there is "'no ready test for determining the reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.* at 1046 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). Justice O'Connor relied on *Terry*, where the Court weighed "the interest of the individual against the legitimate interest in 'crime prevention and detection,'" and concluded that when an officer has a reasonable belief that a suspicious individual is 'armed and presently dangerous,' it is reasonable to permit the officer "to take necessary measures to determine whether the person is [indeed] carrying a weapon and to neutralize the threat of physical harm." *Id.* at 1047 (quoting *Terry*, 392 U.S. at 22).

[95]*Id.* at 1049. *See, e.g.*, New York v. Belton, 453 U.S. 454, 460 (holding that officer may examine contents of *any* container within passenger compartment, for as the compartment is within the arrestee's reach, so is a container) (emphasis added), *reh'g denied*, 453 U.S. 950 (1981); Adams v. Williams, 407 U.S. 143, 148-49 (1972) (stating that police, based on an informant's tip, may reach into the passenger compartment of vehicle to remove a gun from driver's waistband even if the gun's presence was not apparent); Chimel v. California, 395 U.S. 752, 763 (finding that it is reasonable for the arresting officer to search "the arrestee's person and the area within his immediate control"), *reh'g denied*, 396 U.S. 869 (1969).

[96]Michigan v. Long, 463 U.S. 1032, 1049 (1983) (quoting *Terry*, 392 U.S. at 21). *See also* Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (holding that officer may order persons out of vehicle during a stop for a traffic violation and frisk them for weapons based on reasonable belief that such persons are armed and dangerous); Coolidge v. New Hampshire, 403 U.S. 443, 465 (asserting that a warrantless seizure by police of an item that comes into "plain-view" during a lawful search of a private area is reasonable under the Fourth Amendment), *reh'g denied*, 404 U.S. 874 (1971).

Subsequently, in *Arizona v. Hicks*,[97] the Court applied the "plain-view" doctrine[98] and held that the seizure of stolen stereo equipment by police while executing a proper search warrant for other evidence was invalid.[99] In *Hicks*, while police officers were searching an apartment for a suspected gunman, an officer noticed stereo equipment that he believed was stolen, so he moved some of the components to read the serial numbers.[100] After phoning headquarters, the officer learned that the equipment had been taken during an armed robbery, and he seized it immediately.[101] Hicks was then arrested and indicted for robbery.[102] The trial court granted his motion to suppress the equipment as evidence, and the court of appeals affirmed, rejecting the state's contention that the officer's actions were justified under the "plain-view" doctrine.[103]

Justice Scalia, writing for the majority,[104] affirmed and held that

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[97]480 U.S. 321 (1987).

[98]*Id.* at 326. This doctrine was introduced in *Coolidge*, 403 U.S. at 465 (holding that in certain circumstances police may seize evidence in "plain-view" without a warrant). *See supra* note 27.

[99]*Hicks*, 480 U.S. at 328.

[100]*Id.* at 323. The officers entered the apartment to search for the individual who had shot a bullet through the floor injuring a man on the floor below. *Id.* One of the officers noticed expensive stereo components which he claimed seemed out of place in the "squalid" and "ill-appointed" four-room apartment. *Id.* The officer decided to check the serial numbers and *moved* some of the components to do so. *Id.* (emphasis added).

[101]*Id.*

[102]*Id.* at 324.

[103]*Id.* The Arizona Court of Appeals conceded that the shooting justified the initial warrantless entry and search. *Id.* (citing Arizona v. Hicks, 707 P.2d 331 (Ariz. Ct. App. 1985)). The court of appeals, however, viewed the officer's actions in obtaining the serial numbers by moving the items as an additional search unrelated to the exigency. *Id.*

[104]Arizona v. Hicks, 480 U.S. 321 (1987). In a 6-3 decision, Justice White concurred and both Justice Powell and Justice O'Connor wrote dissenting opinions. *Id.* Justice Powell, joined by the Chief Justice and Justice O'Connor, dissented and found the majority's holding that "moving" or "disturbing" an object in plain-view to investigate a reasonable suspicion as lawful was unreasonable. *Id.* at 332-33 (Powell, J., dissenting). Likewise, Justice O'Connor, joined by the Chief Justice and Justice Powell, dissented and rejected the majority's "search is a search" approach as too remote to justify the damage it inflicts on legitimate, effective law enforcement. *Id.* at 339. (O'Connor, J., dissenting). In addition, the Justice opined that the majority ignored the existence of probable cause and

probable cause is required to invoke the "plain-view" doctrine.[105] The Justice concluded that any seizure unrelated to the original exigencies that justified the officers' warrantless entry onto the premises must be supported by probable cause, despite the fact that the seized object was in "plain-view" on the premises.[106] The Court opined that the standard of reasonableness of police action should be the same for both searches and seizures.[107] Indeed, the majority asserted that if the standard for searches is more liberal than for seizures, the police would be permitted to "'extend a general exploratory search from one object to another until something incriminating at last emerges'" contrary to the principles of the "plain-view" doctrine.[108] Accordingly, the Court held that the officer's actions in moving the stereo equipment observed in "plain-view" to read its serial numbers constituted a "search" which required probable cause.[109]

Further expanding the "plain-view" doctrine, the Supreme Court in *Horton v. California*[110] held that the view need not be inadvertent for a valid warrantless "plain-view" seizure.[111] In *Horton*, a police officer

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thereby upset accepted precedent on the "standard of reasonableness for the cursory examination of evidence in plain-view." *Id.*

[105]*Id.* at 326. The Court initially rejected the position of the Arizona Court of Appeals which stated that the officer's action with regard to the stereo equipment was *ipso facto* unreasonable because such action was "unrelated to the justification for their entry into [Hicks'] apartment." *Id.* at 325. Justice Scalia clarified that Mincey v. Arizona, 437 U.S. 385 (1978), which stated that a warrantless search had to be "strictly circumscribed by the exigencies which justify its initiation," only addressed the scope of the primary search and did not overrule by implication the cases which acknowledged that the "plain-view" doctrine could legitimize actions beyond such scope. *Hicks*, 480 U.S. at 325-26 (quoting *Mincey*, 437 U.S. at 393).

[106]*Id.* at 326-28. The Court explained that there was no apparent reason why an object discovered during an "unrelated search and seizure" should be seizable on grounds less than those governing objects known at the issuance of the search warrant. *Id.* at 327-28.

[107]*Id.*

[108]*Id.* at 328 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 466, *reh'g denied*, 404 U.S. 874 (1971)).

[109]*Id.* at 329.

[110]496 U.S. 128 (1990).

[111]*Id.* at 130. The Court acknowledged that inadvertence is a characteristic of most legitimate "plain-view" seizures but declined to deem it a requisite condition. *Id.*

determined that there was probable cause to search petitioner Horton's home for the proceeds from, and the weapons used in, a robbery.[112] Upon executing the warrant, the officer did not find the stolen property but did find the weapons in "plain-view" and seized them.[113] The trial court refused to grant petitioner's motion to suppress the evidence and petitioner was subsequently convicted.[114]

Justice Stevens, writing for the majority,[115] initially relied upon the criteria that generally guided "plain-view" seizures as set forth in *Coolidge v. New Hampshire*.[116] In addition to the essential predicate set forth in

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[112]*Id.* at 130-31. The officer's affidavit for a search warrant referred to weapons and proceeds but the Magistrate only authorized a search for the proceeds, which included three specifically described rings. *Id.* at 131.

[113]*Id.* The officer seized a .38 caliber revolver, an Uzi machine gun, two stun guns, a San Jose Coin Club brochure, a handcuff key, and a few articles of clothing identified by the victim. *Id.* at 131. The officer viewed other handguns and rifles but did not seize them because there was "no probable cause to believe they were associated with criminal activity." *Id.* at 131 n.1. Moreover, the officer testified that he was concerned with finding other evidence, in addition to the rings, to connect the petitioner to the robbery. *Id.* at 131. Therefore, the Court concluded that the seized evidence was not discovered "inadvertently." *Id.*

[114]*Id.* The California Court of Appeals affirmed and rejected petitioner's argument that, pursuant to *Coolidge*, the seized evidence not listed in the warrant had to be suppressed because its discovery was not "inadvertent." *Id.* at 131 (citing Coolidge v. New Hampshire, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971)).

[115]Horton v. California, 496 U.S. 128, 134 (1990). In a dissenting opinion, Justice Brennan, joined by Justice Marshall, criticized the majority's "rewriting" of the Fourth Amendment in eschewing its "inadvertent discovery" requirement and ignoring its express command that search warrants particularly describe the places to be searched as well as the things to be seized. *Id.* at 142-43 (1990) (Brennan, J., dissenting). The dissent complained that the majority ignored the possessory interests protected by the Fourth Amendment in order to eliminate an accepted element of the "plain-view" doctrine. *Id.* at 149 (Brennan, J., dissenting).

[116]*Id.* at 128. See *supra* notes 96, 98, discussing Coolidge v. New Hampshire, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971). In *Horton*, the Court recognized that searches and seizures may invade a person's Fourth Amendment rights in different ways. *Horton*, 496 U.S. at 133. As the Court previously held, a search compromises an individual's interest in privacy whereas a seizure deprives an individual of dominion over property. *Id.* (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)). Although the "plain-view" doctrine is considered an exception to the general rule that "warrantless searches are presumptively unreasonable," the Court opined that this notion overlooked the important difference between search and seizure. *Id.* Accordingly, the Court continued,

Coolidge that the officer could not violate the Fourth Amendment in arriving at the location from which the evidence would be "plainly" viewed, the Court promulgated two additional conditions to justify a valid warrantless seizure: (1) the item's incriminating character must be "immediately apparent"[117] and (2) the officer must also have a lawful right of access to the object itself.[118] Applying these criteria to the case at hand, the Court concluded that the items seized from the petitioner's home were discovered pursuant to a "lawful search" authorized by a "valid warrant" and that upon discovery it was "immediately apparent" to the officer that the items

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if an item is already in "plain-view," neither its observation nor seizure invade privacy. *Id.* at 133-34 (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987); Illinois v. Andreas, 463 U.S. 765, 771 (1983)). The Court cautioned, however, that a seizure invades the owner's possessory interest. *Id.* at 134 (citing Maryland v. Macon, 472 U.S. 463, 469 (1985); *Jacobsen*, 466 U.S. at 113). Hence, the Court opined that any "plain-view" exception to the warrant requirement must arise from concerns implicated by seizures, not searches. *Id.* As the Court opined in *Coolidge*:

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant . . . . The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than simply the normal concomitant of any search, legal or illegal . . . . What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Coolidge, 403 U.S. at 465-66 (citations omitted) (footnote omitted).

[117]*Horton*, 496 U.S. at 136-37 (citing Coolidge v. New Hampshire, 403 U.S. 443, 466, *reh'g denied*, 404 U.S. 874 (1971)).

[118]*Id.* at 137.

constituted incriminating evidence.[119] Accordingly, the majority upheld the seizure despite the absence of inadvertence.[120]

IV. *MINNESOTA v. DICKERSON* — THE FOURTH AMENDMENT PERMITS A PROTECTIVE PATDOWN SEARCH ONLY TO THE EXTENT NECESSARY TO DETERMINE WHETHER A SUSPECT IS ARMED

A. JUSTICE WHITE ANALOGIZES THE "PLAIN-VIEW" DOCTRINE TO THE SENSE OF TOUCH IN REAFFIRMING THE PROTECTIVE SEARCH

Writing for the majority, Justice White first addressed the merits of the Fourth Amendment[121] issue of whether police officers are permitted to seize nonthreatening contraband detected through the sense of touch during

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[119]*Id.* at 142. Specifically, the Court explained that the officer had probable cause to obtain a search warrant for the stolen property and to believe that the weapons were used in the crime under investigation. *Id.* The Justice reasoned that the warrant authorized the search and the "plain-view" exception authorized the seizure. *Id.*

[120]*Id.* at 137-38. The Court found two flaws in the *Coolidge* plurality's conclusion that "plain-view" required inadvertence to avoid a violation of the Fourth Amendment's mandate that a valid warrant "'particularly describ[e] . . . [the] . . . things to be seized.'" *Id.* at 138 (quoting *Coolidge*, 403 U.S. at 469-71). The Court first stressed that evenhanded law enforcement requires objective standards of conduct, not subjective standards of the officer. *Id.* The Court stated that seizure of an item should not be invalidated merely because an officer is interested in that particular item of evidence, anticipates finding it during a confined search, but did not specifically include it in the warrant. *Id.* at 138-39. Moreover, the Court held that if there is a valid warrant to search for one particular item and only a suspicion concerning another item which may or may not amount to probable cause, the second item is not immunized from seizure. *Id.* at 139.

The Court did not find persuasive the suggestion that the "inadvertence" requirement is necessary to prevent general searches from being conducted or from conversion of specific into general warrants. *Id.* The Court explained that seizure of an object does not involve intrusion on one's privacy but if one's interest in privacy has been invaded, such violation must have occurred before the object came into "plain-view." *Id.* at 141. Because the prohibition against general searches and warrants serves as a protection against "unjustified intrusions" on privacy, as the Court in *Coolidge* concluded, the Court opined that there is no need for an "inadvertent" limitation on seizures. *Id.* at 141-42 (citing *Coolidge*, 403 U.S. at 469-71).

[121]Minnesota v. Dickerson, 113 S. Ct. 2130, 2135 (1993). *See also supra* note 1.

a protective patdown search.[122] The Court noted that it has consistently observed that warrantless searches and seizures are *per se* unreasonable subject to a few specifically delineated exceptions[123] such as in *Terry v. Ohio*.[124] The Court recounted its decision in *Terry* to explain that an officer is justified in conducting a patdown search to determine whether the individual detained is carrying a weapon.[125] The Court noted, however, that a protective search is "strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'"[126] Similarly, the Court recounted its holding in *Michigan v. Long*[127] that an officer is justified in conducting a protective search of a vehicle based on suspicion that weapons could be stored there, and if the officer does discover contraband during the search, it may be lawfully seized.[128]

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[122]*Dickerson*, 113 S. Ct. at 2135. The Court rejected respondent's assertion that the case was moot because the original criminal charges had been dismissed. *Id.* at 2135 n.2. The respondent was found guilty of the drug possession charge and the trial court sentenced him to a two-year period of probation under a diversionary sentencing statute, which allowed no judgment of conviction but dismissal of the original charges upon completion of probation. *Id.*

The Court stated that "the possibility of a criminal defendant's suffering 'collateral legal consequences' from a sentence already served precludes a finding of mootness." *Id.* (quoting Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977)). Specifically, Justice White noted that Minnesota Statute section 152.18 indicates that there is a public record kept containing the charges dismissed pursuant to the statute, and the state supreme court has construed this provision to contemplate use of the record should a defendant have "future difficulties with the law." *Id.* (citing MINN. STAT. ANN. § 152.18 (1992)). Moreover, the Court recognized that the Eighth Circuit has held that diversionary disposition under § 152.18 may be included in the calculation of a defendant's criminal history. *Id.* (citing United States v. Frank, 932 F.2d 700, 701 (1991)).

[123]*Id.* at 2135.

[124]392 U.S. 1 (1968). *See supra* notes 66-68.

[125]*Dickerson*, 113 S. Ct. at 2136.

[126]*Id.* (quoting *Terry*, 392 U.S. at 26).

[127]463 U.S. 1032 (1983).

[128]Minnesota v. Dickerson, 113 S. Ct. 2130, 2136 (1993). *See supra* note 94.

In light of *Terry* and *Long*, the Court opined that the "plain-view" doctrine[129] is applicable by analogy where the officer discovers contraband through his "sense of touch" while conducting a lawful patdown search.[130] Specifically, the Court maintained that a lawful patdown of a suspect's outer clothing which reveals an object, the mass or contour of which makes its identity "immediately apparent," is not an invasion of privacy.[131] In so reasoning, the Court articulated that the Fourth Amendment's requirement of probable cause for belief that an item is contraband prior to its seizure protects an individual against excessively speculative seizures.[132] Accordingly, the Court explained that "[t]he seizure of an item whose identity is already known occasions no further invasion of privacy,"[133] and a suspect's privacy interest is not advanced by a categorical rule that bars seizure of contraband detected through an officer's sense of touch.[134]

The Court deemed the dispositive question to be whether the officer was acting within the lawful bounds of a *Terry* search when he obtained probable cause to believe that the object in the respondent's jacket was indeed contraband.[135] In invalidating the search and seizure, the majority adopted

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[129]*Dickerson*, 113 S. Ct. at 2137. The "plain-view" doctrine established that if an officer is in a lawful position to view an object of which incriminating character is immediately apparent and if the officer has a lawful right of access to the object, the officer may seize it despite the absence of warrant. Horton v. California, 496 U.S. 128, 135-36 (1990). *See also supra* note 98.

[130]*Dickerson*, 113 S. Ct. at 2137.

[131]*Id.* The Court discredited the Minnesota Supreme Court's claim that "'the sense of touch is inherently less immediate and less reliable than the sense of sight' and . . . 'is far more intrusive into the personal privacy'" protected by the Fourth Amendment. *Id.* (quoting State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992)). On the contrary, the Court posited that *Terry* itself demonstrated that the sense of touch is capable of revealing an object's nature with sufficient reliability to warrant a seizure. *Id.*

[132]*Id. See also* Ybarra v. Illinois, 444 U.S. 85, 95 (1979) (requiring a reasonable belief or suspicion that an individual to be frisked is armed and dangerous before authorized narcotics search can be conducted even if individual was on premises subject to a warrant), *reh'g denied*, 444 U.S. 1049 (1980).

[133]Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993). *See also supra* note 120.

[134]*Dickerson*, 113 S. Ct. at 2138.

[135]*Id.*

the Minnesota Supreme Court's interpretation of the record[136] and agreed that the officer overstepped the bounds of a weapons search pursuant to *Terry*.[137] Specifically, the Court emphasized that the officer's "continued exploration" of respondent's pocket, after concluding that it did not contain a weapon, was unrelated to the "sole justification" for the search under *Terry* and, therefore, amounted to an unauthorized evidentiary search.[138] Accordingly, the Court reasoned that because the continued search of respondent's pocket was not constitutionally valid, the seizure of the contraband was likewise unconstitutional.[139]

B. JUSTICE SCALIA EXPRESSES CONCERN FOR THE PRESERVATION OF THE FOURTH AMENDMENT

In a concurring opinion, Justice Scalia stated that the purpose of the Fourth Amendment is to preserve the same degree of respect for the right to privacy that existed when the amendment was first adopted.[140] The Justice

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[136]*Id.* The Minnesota Supreme Court concluded that the officer determined that the object was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket — a pocket which the officer already knew contained no weapon." *Id.*

[137]*Id.* The Court recognized that the trial court did not make precise findings as to the probable cause issue other than the fact that the officer made no claim of suspecting the object to be a weapon, and therefore, accepted the findings of the Minnesota Supreme Court. *Id.*

[138]*Id.* at 2138-39.

[139]*Id.* at 2139. In addition, the Court analogized Dickerson's case to the "plain-view" doctrine as set forth in *Hicks*, in which the Court held that the seizure of stolen stereo equipment during the execution of a valid search warrant was not justified because the "incriminating character of the equipment was not immediately apparent," but only arose as a result of a further search. *Id.* (citing Arizona v. Hicks, 480 U.S. 321 (1987)). The Court found the facts in *Dickerson* similar. *Id.* Specifically, the Court stated that although the officer was lawfully permitted to feel the lump in respondent's pocket under *Terry*, the incriminating character of the object was *not* "immediately apparent," and thus he was only able to determine that the item was contraband after conducting "a further search, [ ] not authorized by *Terry*." *Id.* (emphasis added).

[140]*Id.* at 2139 (Scalia, J., concurring). The Justice maintains this fundamentalist view even if development of a "later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Id.*

opined that *Terry v. Ohio*[141] made no serious attempt to preserve traditional privacy standards but adjudged that a "stop and frisk" search was "reasonable" according to the estimations of the Court at the time the *Terry* decision was rendered.[142] Justice Scalia observed that the "stop" portion of a *Terry* "stop and frisk" search was in accord with the common law and it was reasonable to detain suspicious persons in order to demand that they account for themselves.[143]

Justice Scalia contended, however, that there was no precedent permitting a physical search of a person temporarily detained for questioning unless such detention resulted in a full custodial arrest.[144] Although conceding that "it may be desirable to permit frisks for weapons" as a policy matter, the Justice opined that it is "not [desirable] to encourage frisks for drugs by admitting evidence other than weapons."[145] Nevertheless, Justice Scalia adhered to the meaning of *Terry* and did not conclude that its result was erroneous.[146] Rather, the Justice observed that the constitutionality of the frisk was not challenged, assumed that the search was indeed lawful, and concurred with the Court's premise that any evidence "incidentally" discovered during a *Terry* search is admissible.[147]

C. Chief Justice Rehnquist Stresses The Requisite Element of Probable Cause For Patdown Searches

Chief Justice Rehnquist, joined by Justices Blackmun and Thomas, concurred with the majority's Fourth Amendment analysis and the protective

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[141]392 U.S. 1 (1968).

[142]Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993) (Scalia, J., concurring). Accordingly, Justice Scalia expressed uncertainty that the physical search that produced the evidence in this case complied with the constitutional standard. *Id.*

[143]*Id.* at 2140 (Scalia, J., concurring). *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

[144]*Dickerson*, 113 S. Ct. at 2140 (Scalia, J., concurring). Justice Scalia agreed that if the temporary detention of a suspicious individual was elevated to a full arrest upon probable cause at that point, not only a protective "frisk," but a complete physical search would be permitted. *Id.*

[145]*Id.* at 2141 (Scalia, J., concurring) (emphasis omitted).

[146]*Id.*

[147]*Id.*

patdown search permitted by *Terry*.[148] The Chief Justice, however, sought to vacate the judgment of the Minnesota Supreme Court and remand the case for further proceedings.[149] Specifically, the Chief Justice argued that the majority merely accepted the findings of the Minnesota Supreme Court which did not directly address whether the officer who conducted the search acted lawfully under the scope of *Terry*.[150] The Chief Justice perceived these findings to be imprecise because they did not expressly address whether the officer had probable cause to believe that the object in the respondent's jacket was contraband.[151] Accordingly, Chief Justice Rehnquist concluded that because the Supreme Court of Minnesota employed a Fourth Amendment analysis significantly different from that adopted by the majority, the judgment should be vacated and remanded for further proceedings.[152]

V. CONCLUSION

The *Dickerson* decision attempts to clarify the extent to which a police officer may conduct a protective patdown search and the permissible scope of evidence obtained pursuant to that search. In essence, the ultimate question is whether and to what extent a police officer may use his *sense of touch* coupled with his knowledge and experience to conduct a patdown search under the standard set forth in *Terry v. Ohio*.[153] In this case, the majority prudently concluded that the police officer overstepped his lawful bounds under *Terry* when he continued to manipulate the contents of the respondent's jacket, even after he knew that it contained no weapon.[154] If the majority had held otherwise, the scope of a patdown search would become too extensive, and the undesirable result would be a patdown search for both weapons and contraband. It would essentially allow an officer to stop any person in the vicinity of a neighborhood known for drug activity

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[148]Minnesota v. Dickerson, 113 S. Ct. 2130, 2141 (1993) (Rehnquist, J., concurring in part and dissenting in part); *see* 392 U.S. 1 (1968).

[149]*Dickerson*, 113 S. Ct. at 2141.

[150]*Id.*

[151]*Id.*

[152]*Id.*

[153]392 U.S. 1 (1968). *See* Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993).

[154]*See Dickerson*, 113 S. Ct. at 2138.

and then subject that person to a frisk for drugs. To permit such a search would indeed abuse the Fourth Amendment by effectively dispensing with the notion of probable cause.

Undoubtedly, *Terry* permits an officer to use his sense of touch during a protective patdown search, and if the object felt appears to be a weapon, the officer may remove it for examination.[155] Nonetheless, under *Terry*, once the officer determines that the object encountered is not a weapon, no *further* search may be conducted.[156] Specifically, as the *Dickerson* majority stressed, the patdown search must reveal an object, the mass or contour of which makes its identity "immediately apparent."[157] If an officer continues to search a suspect after concluding that the object revealed is not a weapon, the search becomes unrelated to the "sole justification" for the search and thus unauthorized.[158]

An officer who feels something during a *Terry* frisk that might be contraband has options in lieu of continuing the search. For instance, the officer could ask for consent to search the jacket or continue to question the suspect in search for probable cause, which permits an arrest and a seizure incident to that arrest. In this case, however, the officer searched the respondent for the purpose of finding drugs but lacked probable cause to believe that the object he felt was contraband because the illegal nature of the object was not "immediately apparent."[159] In order to minimize the arbitrariness that could result from a protective patdown search during a "stop and frisk," an officer must have probable cause to believe that an object discovered is contraband and the illegal nature of such object must be "immediately apparent."

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[155]*See supra* notes 67-68 and accompanying text.

[156]*See supra* notes 5, 8 and accompanying text.

[157]*Dickerson*, 113 S. Ct. at 2137.

[158]*Id.*

[159]*See supra* note 139 and accompanying text.