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Criminal Law - Fourth Amendment - Search and Seizure - Scope of Search

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Finally, it has been recommended that each case be determined as it arises. Policy, statutory and historic law would combine to either preclude or permit litigation.[108]

Conclusions

The *DiGirolamo* decision, in its total reliance upon the statutes in question, adhered to Pennsylvania's longstanding acceptance of a traditional position in respect to the interspousal immunity doctrine. Its analysis, however, which neither questioned the fictional conceptualistic unity of spouses nor inquired into the policy reasons underlying its existence, failed to take into account many of the issues that are raised by a contemporary challenge to the doctrine.

The rationales which have long supported the doctrine are beginning to lose their acceptance. The fictional unity theory, and with it the immunity doctrine, is now being frequently rejected.[109] The underpinnings of the policy arguments that secured the rule are slowly being eroded by changes in the social fabric of American society. Novel arguments are being advanced by judges and commentators to circumvent longstanding precedent upholding the rule. Nevertheless, *DiGirolamo* would seem to indicate that change in this doctrine in Pennsylvania must come from the legislature or not at all.

David Schmitt

Criminal Law—Fourth Amendment—Search and Seizure—Scope of Search—The United States Supreme Court has held that a search incident to a valid arrest for a traffic violation is not limited

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108. 3 Rutgers-Camden L.J. 183 (1971).

> Thus, when presented with an interspousal suit, a court must determine whether there are factors present that warrant the imposition of the immunity doctrine. If no such factors are found, one spouse can sue the other.

Id. at 186.

109. The number of states that have abolished the doctrine is rapidly approaching, if it has not already passed, twenty-five. The following are some of the states that have limited or abolished the rule:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Washington, Wisconsin.

to a frisk of the arrestee's outer clothing; the custodial arrest itself gives rise to the authority for a full search, regardless of whether there exists either further evidence of the crime or a belief by the arresting officer that the arrestee is armed or dangerous.

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

On April 19, 1968, Officer Richard Jenks of the District of Columbia Metropolitan Police Department made a routine spot check of the defendant's vehicle. When asked to do so, Robinson produced a temporary driver's permit, the vehicle registration, and a selective service classification card. The officer made a note of the discrepancy between birth dates on the draft card and permit, returned the items to the defendant, and permitted him to continue on his way. Jenks later found that the defendant's operator's license had been revoked and that the application for the driver's permit had contained a fictitious birth date. When Jenks observed the defendant driving the same vehicle four days later, the officer signaled him to stop, intending to arrest him for operating a vehicle after revocation of his operator's permit[1] and for obtaining a permit by misrepresentation.[2] The defendant produced the same temporary permit, and Jenks placed him under arrest. After advising Robinson of his rights, Jenks conducted a "field-type search," patting down the defendant while standing face to face with him.[3] Jenks felt an object in the left breast pocket of the defendant's coat[4] and removed a crumpled cigarette package containing gelatin capsules. Later chemical analysis confirmed Jenks' belief that the capsules contained heroin.

1. D.C. CODE ANN. § 40-302(d) (1967). This provision carries a fine of $100 to $500, or imprisonment from 30 days to one year, or both.

2. Traffic Regulations of the District of Columbia § 157(e). A violator is subject to punishment by a fine of not more than $300 or 10 days in jail.

3. Since operating a vehicle after suspension or revocation of an operator's license is an offense for which an officer is permitted to make a summary arrest, a full field search incident to the arrest was required before the defendant could be transferred to the station for booking. D.C. Metropolitan Police Department General Order 3, April 24, 1959.

4. A defense witness who was a passenger in the car at the time of the arrest testified that Robinson's coat was on the back seat of the car when the defendant alighted from the vehicle, and that the coat was removed and searched by Jenks after he placed Robinson under arrest. The defendant testified that he had loaned the coat to a friend who had placed it in the car, that the coat had been out of his control, and that he had not again gained possession of it until the time of the search. The jury, apparently, discounted this testimony.

The defendant's motion to suppress[5] was denied, and the heroin was admitted into evidence. Robinson was convicted in the United States District Court for the District of Columbia for possession and facilitation of concealment of heroin.[6] On appeal, the case was remanded to the district court to determine whether the search violated the defendant's fourth amendment rights.[7] The district court found no violation; Robinson again appealed to the court of appeals, which reversed the conviction.[8] Certiorari was granted, and the case was set for argument in the United States Supreme Court with *Gustafson v. Florida*,[9] in which the permissible scope of a search incident to a custodial arrest for a traffic violation was also at issue.

The court of appeals based its opinion upon its interpretation of the permissible scope of a search as discussed by the United States Supreme Court in *Terry v. Ohio*.[10] Recognizing the need for adequate protection of police officers while performing their duties, the Supreme Court in *Terry* attempted to balance this interest with fourth amendment guarantees.[11] The Court held that searches of

5. The motion to suppress was based on two arguments: First, demand and presentment of Robinson's driver's permit satisfied the purpose of Officer Jenks' "spot check." The officer had no right to demand the showing of a draft card. To the extent, then, that the draft card originally gave Jenks cause for suspicion, the arrest and subsequent seizure of the narcotics were forbidden fruit and, thus, inadmissable as evidence. Second, there was no proof of an unbroken chain of custody of the seized heroin. Both contentions were originally rejected by the district court; the chain of custody was stipulated to at the trial.

6. The convictions were obtained under Act of July 18, 1956, ch. 629, § 105, 70 Stat. 570; Act of Aug. 31, 1954, ch. 1147, § 8, 68 Stat. 1004; Act of Aug. 16, 1954, ch. 736, 68A Stat. 550 (These laws were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* (1970)).

7. United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1971) (en banc). In a special evidentiary inquiry, the court sought clarification of the following: (1) whether the search was potentially justifiable by means of the "plain view" doctrine; (2) whether there existed any evidentiary purpose for the search; (3) whether Jenks had continued to search the defendant following the discovery of the heroin and, if so, to what extent; and, (4) whether the search was within Metropolitan Police Department guidelines.

8. United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972) (en banc).

9. 414 U.S. 260 (1973). A Florida municipal police officer stopped the defendant's vehicle after having observed him weave repeatedly across the center line of the road. The defendant was placed under arrest for failure to have his operator's license in his possession. Incident to the arrest, the defendant was "patted down." At the completion of the patdown, the officer placed his hand in Gustafson's coat pocket, removed a cigarette box, opened it, and found marijuana. Gustafson's conviction for unlawful possession of marijuana was reversed on appeal. The search was held to be violative of the fourth and fourteenth amendments, Gustafson v. State, 243 So. 2d 615 (Fla. Ct. App. 1971). The Supreme Court of Florida reversed, 258 So. 2d 1 (Fla. 1972), and certiorari was granted, 410 U.S. 982 (1973).

10. 392 U.S. 1 (1968).

11. U.S. CONST. amend. IV, provides:

persons stopped for purely investigative purposes were permissible only in those instances where the officer reasonably believed that the person he had stopped was both armed and presently dangerous.[12] The Court warned that such a search must be restricted in scope. Only searches necessary to discover weapons which might be used to harm the officer would be permitted. The court of appeals construed the *Terry* "scope of permissible search" inquiry to apply to searches incident to lawful arrests, as well as to *Terry*-type street encounters.[13] Thus, to justify the search of the defendant in *Robinson*, the court reasoned, Jenks' search must have been " 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[14]

In support of its position, the appellate court cited the Supreme Court's recent application in *Chimel v. California*[15] of the "scope limitation principle."[16] Applying that standard, the court of appeals sought to determine what constituted a justifiable basis for an incidental search. The Court in *Chimel* had justified the search by the need to seize weapons, or objects which could be used as weapons, in order to prevent an escape or assault upon the arresting officer. An additional justification was the need to prevent the destruction of evidence. However, the Court disallowed the search, finding that

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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.

12. 392 U.S. at 30.

13. In *Terry* the officer detained three suspects on the street and conducted investigative searches of their persons. Although there was no probable cause to believe that a crime had been or would be committed, the Court held that the officer's belief that the suspects were dangerous was reasonable, and that a search limited to a patdown for weapons was permissible.

14. 471 F.2d at 1093, *citing* Chimel v. California, 395 U.S. 752, 762 (1969).

15. 395 U.S. 752 (1969).

16. In *Chimel*, police officers, armed with a warrant for the defendant's arrest for burglary, were admitted into his home by his wife. When the defendant returned, he was placed under arrest. Despite his refusal to consent to a search, the officers searched the entire home on the basis of the lawful arrest. Items seized were admitted over the defendant's objection that they had been unconstitutionally obtained. Chimel's conviction was affirmed by the California Supreme Court, People v. Chimel, 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968). Although the court agreed that the warrant was invalid, it held that the arrest was lawful, since probable cause for the arrest existed even in the absence of an arrest warrant. The United States Supreme Court reversed, holding that the arrest itself had not warranted the scope of the search actually conducted. The scope must be limited to that for which there exists a constitutionally justified basis.

the search had exceeded its permissible scope.

Judge Wright, speaking for the court of appeals in the instant case, applied the *Terry* holding in light of the Supreme Court's opinion in *Sibron v. New York*,[17] a companion case also involving the proper limits of an investigative search.[18] Wright felt that each factual situation should be reviewed according to its own circumstances. For crimes where evidence potentially exists on the person arrested,[19] the "search incident" exception to the fourth amendment's warrant requirement[20] provides a reasonable basis for a search of the person of the arrestee. The officer may, at the same time, search for weapons. In factual situations such as the present one, where no evidentiary purpose could be served by the search, the court did not believe an officer is to be granted the same leeway.[21] Where the officer's sole concern is for his safety, a reasonable suspicion of the presence of a weapon must be the basis for an incidental search. The arrest itself cannot provide that basis. The court remarked that the physical risk to the officer is created by the circum-

17. 392 U.S. 40 (1968).

18. *Sibron* involved an officer's seizure of narcotics from the pocket of the defendant. Several hours prior to the search, the officer had observed the defendant in conversation with six or eight known narcotic users. At the suppression hearing it was found that probable cause existed for the arrest. The search was upheld as incident to a valid arrest, and defendant was convicted.

The United States Supreme Court reversed. Finding that no probable cause had existed prior to the search, the Court reasoned that the search could not be justified as incident to a lawful arrest. In the absence of a belief that Sibron was presently armed and dangerous, the Court found no adequate grounds to support a search for weapons. Even had there been such justification, the officer failed to "pat down" the defendant for weapons before inserting his hand into the defendant's pocket.

19. In the instant case, since Robinson had been observed driving the vehicle, there was no additional evidence needed to convict him for operating a motor vehicle after revocation of his operator's permit. At one point in the proceeding, the government did suggest a possible evidentiary purpose. Notices of permit revocation are normally sent to those whose licenses have been revoked. If Robinson had such a notice in his possession, it would have indicated a knowing commission of the crime. By reason of his review of Robinson's traffic record, Jenks knew that the notice had been sent to the defendant over five years before this arrest. Any chance that Robinson had the notice in his possession was highly remote.

20. United States v. Rabinowitz, 339 U.S. 56 (1950).

> Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England.

Id. at 60. *See also* Harris v. United States, 331 U.S. 145 (1947); Agnello v. United States, 269 U.S. 20 (1925).

21. Arrests for driving under the influence of alcohol or narcotics are exceptions to the general rule that no evidentiary purpose is to be served by the search of a traffic violator. 471 F.2d at 1094 n.16.

stances of the detention rather than by the "niceties of the law of arrest."[22]

The Supreme Court reversed the court of appeal's decision and upheld the district court's conviction.[23] Justice Rehnquist, speaking for the majority,[24] spoke initially of a search incident to a lawful arrest[25] as a traditional exception to the warrant requirement.[26] The arresting officer has unqualified authority to conduct searches of both the arrestee's person and the area within the arrestee's control at the time of arrest.[27] Those searches, Rehnquist concluded, impliedly satisfy the fourth amendment's requirement of reasonableness.[28]

The Court then sought to determine whether the *Robinson* search had exceeded the scope necessary to accomplish legitimate governmental objectives.[29] As the Court in *Terry* stated, the manner in which the search was conducted was as much at issue in terms of reasonableness as was the presence of a warrant.[30] The *Robinson* majority distinguished the street-encounter frisk from the *Robinson* case. *Terry* and *Sibron* dealt with a permissible "frisk" for investigative purposes based upon less than probable cause, while the search conducted by Officer Jenks was performed incident to an arrest and, therefore, with probable cause.[31] The Court thus refused

22. *Id.* at 1096, *citing* People v. Superior Court, 7 Cal. 3d 186, 204, 496 P.2d 1205, 1218, 101 Cal. Rptr. 837, 850 (1972) (en banc).

23. 414 U.S. 218 (1973).

24. Chief Justice Burger and Justices Powell, White, Stewart, and Blackmun joined Justice Rehnquist to comprise the majority.

25. There was no contention that the arrest was without probable cause and therefore unlawful.

26. *See* note 20 *supra*.

27. 414 U.S. at 224-26.

28. Many commentators have discussed the relationship between the reasonableness clause and the warrant clause of the fourth amendment. Scholars have long questioned whether: (1) a search conducted with a warrant on probable cause can be unreasonable; and (2) whether a search without both a warrant and probable cause can be reasonable. *See generally* Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093, 1101 (1967); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 397-98 (1963); Note, 28 U. CHI. L. REV. 664, 667 (1961).

29. Legitimate governmental objectives include seizure of: (1) fruits of the crime; (2) instruments used to commit the crime; (3) weapons which could be used to place the arresting officer in danger or to aid an escape; (4) contraband, the possession of which is a crime; and (5) any material which is evidence that the arrestee has committed the crime. Amador-Gonzales v. United States, 391 F.2d 308, 314 (5th Cir. 1968).

30. 392 U.S. at 28.

31. The Court in *Terry* also distinguished the purpose, character, and extent of the two types of searches.

to apply those stop and frisk limitations to a probable cause arrest.

The majority also expressed its disagreement with the court of appeals' suggestion that each factual situation be reviewed to determine whether there existed authority for a search incident to the arrest. A police officer's determination, the Court felt, is necessarily a "quick ad hoc judgment"[32] which the fourth amendment does not require to be analyzed in detail. Such a case-by-case adjudication was not supported by historical practice in either this country or England.[33] No precedent was cited for this assertion. The majority believed that the authority to conduct an incidental search is not dependent upon a court's later determination of the probability that weapons or fruits of the crime would have been found upon the person of the suspect. Instead, the Court held that a custodial arrest based upon probable cause will fully justify any incidental search.

In a dissenting opinion, Justice Marshall, joined by Justices Brennan and Douglas, analyzed the search in three phases: the original patdown of the defendant's coat pocket; the removal of the cigarette package; and the opening of that package. Since the patdown had been conducted pursuant to an in-custody arrest, there was no question of its validity.[34] With regard to the second phase, however, Marshall believed the removal of the unknown object from the defendant's pocket to be an unwarranted extension of *Terry*'s scope-of-frisk, since Officer Jenks had testified at the suppression hearing that he had not suspected the object was a weapon.[35] Even assuming, as the majority found, that the removal of the package was reasonable within fourth amendment guidelines, Marshall felt that there was no justification for the officer's opening of the package.[36]

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32. 414 U.S. at 235.

33. *Id.*

34. *Id.* at 250.

35. An object cannot be removed from a suspect's pocket unless the officer reasonably believes it to be a dangerous weapon. *See* Sibron v. New York, 392 U.S. 40, 65 (1968); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 110.2(4) (Proposed Official Draft No. 1, 1972).

Even if Jenks had believed the object to be a weapon, it is questionable whether such a belief would have been upheld as reasonable. The testimony of an instructor at the District of Columbia Police Training Division indicated that police trainees are instructed that objects such as a wadded-up cigarette package ordinarily should not be removed from the pocket of a frisked suspect.

36. 414 U.S. at 255-56. The sole purpose to be served by the removal of weapons from a suspect or arrestee is the prevention of either an escape or infliction of harm upon the officer. If the officer believes that an object may contain a weapon, that purpose can be fully served by placing the object beyond the reach of the suspect. There seems to be no need to examine the contents of the object.

The majority, however, chose not to discuss the opening of the cigarette pack as a search in its own right.

Marshall also objected strenuously to the majority's rejection of a case-by-case adjudication of the reasonableness of the arresting officer's decision to search. He cited this form of review as perhaps the most basic of fundamental fourth amendment principles. The majority's fear of overruling the "quick ad hoc judgment," he believed, was in direct conflict with the very function of the amendment—to insure that such judgments by police officers are subject to review and control by the judiciary.[37] Although the requirement of prior judicial approval of a search may be bypassed in certain situations, Marshall argued that those searches should not be excused from a later judicial determination as to their reasonableness.[38] He also took exception to the majority's willingness to accept the police department order that a full search is to be conducted during an in-custody arrest. To accept that approach, he remarked, would be to accept that which the Supreme Court had specifically rejected in *Sibron*.[39]

Marshall also challenged the practical application of the majority's rejection of a case-by-case adjudication. Although Officer Jenks was required by police department regulations to make an in-custody arrest for traffic violations such as Robinson's,[40] in most jurisdictions it is within the discretion of the officer to either make an arrest or to merely issue a citation. Since the granting of such discretionary powers also provides an opportunity for an officer to use a traffic arrest as a pretext for conducting a search,[41] a case-by-case determination would provide a safeguard against potential abuse. Marshall reasoned that situations may now occur under the majority's approach where the legitimacy of the basis for arrest itself may be subject to judicial review, but the reasonableness of the officer's search for weapons may not.

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37. *Id.* at 241-42. *See* Johnson v. United States, 330 U.S. 10, 13-14 (1943).

38. 414 U.S. at 243.

39. The Court in *Sibron* concluded:

> Our constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the search and seizures which underlies these two convictions.

392 U.S. at 62.

40. D.C. Metropolitan Police Department General Order 3, April 24, 1959, required Officer Jenks to arrest and take custody of Robinson.

41. *See, e.g.*, Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968).

Subject to a handfull of well-delineated exceptions, the Supreme Court has held that searches conducted without prior approval by a judicial officer are per se unreasonable under the fourth amendment.[42] In *Amos v. United States*,[43] the Supreme Court allowed valid consent as a proper waiver of one's fourth amendment rights. The Court held in *Warden v. Hayden*[44] that neither a warrantless entry into a home nor the ensuing search for a suspect and weapons was invalid when the police had been in "hot pursuit" of the suspect. *Carroll v. United States*[45] provided another exception to the warrant requirement permitting a warrantless search of an automobile on the grounds that it could be removed from the jurisdiction before a warrant could be obtained. A search of a person and place incident to a lawful arrest is a further exception.[46]

Whether the arrest itself or the actual presence of evidence of the crime is the traditional basis for an officer's right to search,[47] the arrest alone does not permit the officer to determine the type or extent of the search.[48] As held by the Court in *Terry*, the reasonableness of such a search is still dependent upon whether the search was justified when made and whether its scope was properly limited by the circumstances.[49] When a person has been arrested for a crime for which there exists either evidence or instrumentalities of the crime, there is reason to believe that the arrestee will have them on his person. It is far more difficult to show reasonableness when, as

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42. Katz v. United States, 389 U.S. 347 (1967).

43. 255 U.S. 313 (1921).

44. 387 U.S. 294 (1967).

45. 267 U.S. 132 (1925).

46. *See* note 20 *supra*.

47. Early legal commentators, discussing the seizure of evidence pursuant to an in-custody arrest remarked that:

> [I]f by hue and cry a man was captured when he was still in seisin of his crime—if was still holding the gorey knife or driving away the stolen beasts—he could not be heard to say that he was innocent . . . .

2 F. POLLOCK & F. MAITLAND, THE HISTORY OF COMMON LAW 577 (1895). This passage has prompted some to believe that it was the actual presence of evidence of the crime rather than the arrest itself which provided a proper basis for seizure; *see* Note, *Searches of the Person Incident to Arrest*, 69 COLUM. L. REV. 866 (1969). Courts in this country have chosen instead to interpret these words as supporting an incidental search pursuant to arrest. *See, e.g.*, People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923). Such an interpretation is contradicted by both 10 HALSBURY'S THE LAWS OF ENGLAND 356 (3rd ed. V. Simonds 1955) and early English case law; *see* Dillon v. O'Brien, 16 Cox Crim. Cas. 245 (1887); Leigh v. Cole, 6 Cox Crim. Cas. 29 (1853).

48. United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972).

49. 392 U.S. at 19-20.

in *Robinson*, there is no direct relationship between the criminal behavior (a traffic violation) and the articles seized pursuant to that arrest (heroin).

The Supreme Court first spoke of the permissibility of warrantless searches incident to a valid arrest by way of dictum in *Weeks v. United States*.[50] There, the permissible scope was defined as the arrestee's person. The Court later extended the breadth of the search to cover articles located within the person's control.[51] Shortly thereafter, though again by way of dictum, the Court in *Agnello v. United States*[52] further extended the scope to include the place of arrest. In the years following that decision, the Supreme Court intermittently both widened and narrowed this scope.[53]

The approach to this problem suggested and adopted by the court of appeals and the dissenting Supreme Court justices would restrict the scope of a search to that necessary for protective or evidentiary purposes. In so doing, the *Terry* guidelines for "stop and frisk" would be applied to those searches arising from and incident to an arrest where no further evidentiary purpose exists. In such cases, removal of an object from the pocket of an arrestee could only follow an officer's detection of the object's presence by means of a pat-down. Further, there must be a reasonable basis for believing that the object is indeed a weapon.

Those opposed to this view will argue that such a restrictive scope

50. 232 U.S. 383 (1914). In *Weeks*, the defendant sought and obtained the return of personal possessions police officers had removed from his home following an arrest at his place of employment. The search was made without a warrant and without the defendant's consent.

51. Carroll v. United States, 267 U.S. 132 (1925) (upheld search which produced contraband liquor found while the defendant was operating his automobile).

52. 269 U.S. 20 (1925). The defendant was arrested several blocks from his home. Narcotic agents conducted a warrantless search of the defendant's home. The Court, citing *Carroll* and *Weeks*, upheld the search at the place of arrest but refused to extent its validity to a site other than that of the arrest.

53. Among those cases broadening the permissible scope are United States v. Rabinowitz, 339 U.S. 56 (1950) ("reasonableness" used to determine permissible scope); Harris v. United States, 331 U.S. 145 (1947) (permissible scope extended from articles within physical control to those within constructive possession); Marron v. United States, 275 U.S. 192 (1927) (search of arrestee's premises and seizure of items not mentioned in warrant upheld).

Those which narrowed the scope include Chimel v. California, 395 U.S. 752 (1969) (physical area subject to search restricted to that within arrestee's "immediate control"); Trupiano v. United States, 334 U.S. 699 (1948) (lawful arrest alone does not provide basis for warrantless search); United States v. Lefkowitz, 285 U.S. 452 (1932) (exploratory search and seizure of articles disallowed where arrest was merely pretext for search); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1930) (seizure of articles not visible, accessible, or within offender's immediate custody held beyond permissible scope).

of search is unresponsive to the police officer's need for protection while making an arrest. Such an argument, however, is no more valid here than it is in "stop and frisk" situations where the officer is also restricted in his search. Admittedly, in those instances where the arrestee is placed in custody, the possibility of an attempted assault upon the officer exists for a more prolonged period of time than it would where an officer is merely conducting a "stop and frisk."[54] Even so, a properly conducted frisk[55] should detect virtually all concealed weapons.[56] Since total protection can only be guaranteed by a complete sacrifice of the arrestee's fourth amendment rights, the reasonableness of the intrusion is subject to a balancing between a citizen's right to be free from unreasonable searches and the police officer's safety in the performance of his duty.

CONCLUSION

Prior to the Supreme Court's decision in *Robinson*, the vast majority of courts which had concerned themselves with the problem had specifically held that, absent "special circumstances,"[57] the

54. A person taken into custody may feel more threatened and might resort to force or violence.

> The critical factor in these or similar situations is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer "if" in fact the person is armed.

People v. Superior Court, 7 Cal. 3d 186, 214, 496 P.2d 1205, 1225, 101 Cal. Rptr. 837, 857 (1972) (concurring opinion).

55. Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968), *quoting* Priar & Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481 (1954):

> "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet."

56. Ronald Newhouser, an expert in clandestine weaponry and supervisor of the National Bomb Data Center, testified for the government at the remand hearing. Newhouser removed from his person 25 concealed weapons that could incapacitate, yet he conceded that a properly conducted frisk would have detected virtually all of those weapons.

57. The most frequent example of "special circumstances" are those instances where new information becomes available after the vehicle has been stopped for a motor vehicle violation. In Brown v. United States, 365 F.2d 976 (D.C. Cir. 1966), Judge (now Chief Justice) Burger upheld a warrantless search of a vehicle subsequent to the driver's arrest for driving with an expired inspection sticker and without a tag light. The court, unanimous in its opinion, chose not to justify the search as incident to the arrest. It held instead that there was probable cause to arrest the driver for robbery. During the questioning, but prior to the search, the police officer's partner heard over the squad car's radio that a person fitting the driver's general description and driving a similar vehicle had recently committed a robbery. The search was characterized as evidentiary and upheld.

lawful arrest for violation of a motor vehicle regulation did not provide the officer with the right to search either the person or vehicle incident to the arrest.[58]

The majority, by denying appellate review of the reasonableness of the search and upholding the arresting officer's judgment, has abruptly retreated from the Court's longstanding policy of employing a case-by-case adjudication as to the reasonableness of a search and seizure. The majority's desire to hold the arrest itself as the ultimate justification for the search is to provide an arresting officer with unrestricted discretion. The potential effect can best be described by Justice Frankfurter's dissent in *United States v. Rabinowitz*.[59] Fearful of the majority's broadened scope of a permissible incidental search, Frankfurter cautioned that such an approach could make "arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest."[60] The *Robinson* decision represents a giant step toward realization of those fears.

William L. Steiner

58. *See* United States v. Robinson, 471 F.2d 1082, 1104 n.39 (D.C. Cir. 1972).
59. 339 U.S. 56 (1950).
60. *Id.* at 80.