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The Automatic Companion Rule: A Bright Line Standard for the *Terry* Frisk of an Arrestee's Companion

In *United States v. Flett*,¹ the Eighth Circuit held that courts should use a totality of the circumstances test, not an automatic per se rule, when determining whether police may frisk the companion of a suspect arrested pursuant to a valid arrest warrant.² The Eighth Circuit thus refused to join the Fourth,³ Seventh,⁴ and Ninth⁵ Circuits, which have adopted the "automatic companion" rule—a doctrine which allows an automatic frisk for weapons of a companion of an arrestee.⁶ Instead, the court stated that the automatic companion rule is directly opposed to the Supreme Court's direction in *Terry v. Ohio*⁷ and *Ybarra v. Illinois*⁸ that police officers have an "articulable suspicion" that an individual is armed and dangerous before they frisk him.⁹

Part I of this note discusses the Supreme Court's holding in *Terry v. Ohio* and considers whether it can be reconciled with the automatic companion rule. Part II examines the split in the circuits concerning the adoption of the automatic companion rule. Part III focuses on Supreme Court cases that provide guidance as to the adoption of the rule. Finally, Part IV concludes that the courts should adopt the automatic companion rule.

I. *Terry* and the Automatic Companion Rule

The automatic companion rule allows police to conduct a pat-down search for weapons of the companion of an arrestee if the police possess an arrest warrant for the suspect and the companion is capable of inflicting harm on the arresting officer.¹⁰ The court in *Flett* rejected this rule, reasoning that it runs counter to the Supreme Court's holding in

1 806 F.2d 823 (8th Cir. 1986).

2 *Id.* at 827.

3 *United States v. Poms*, 484 F.2d 919 (4th Cir. 1973).

4 *United States v. Simmons*, 567 F.2d 314 (7th Cir. 1977).

5 *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971).

6 *See infra* note 10.

7 392 U.S. 1 (1968). *See also infra* notes 14-22 and accompanying text.

8 444 U.S. 85 (1979). *See also infra* notes 40-44 and accompanying text.

9 806 F.2d at 827. *See also United States v. Bell*, 762 F.2d 495 (6th Cir. 1985) (rejected automatic companion rule), *cert. denied*, 106 S. Ct. 155 (1985).

10 The automatic companion rule was first adopted in *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971).

All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed.

Id. at 1193.

An inherent conflict exists between the terms "automatic" and "capable of inflicting harm." The latter term seems to indicate that the police officer has to meet some type of standard before searching whereas the former term indicates that the search is per se reasonable. Logically, the term "capable of inflicting harm" seems to imply a simple physical ability threshold. No court that has adopted the automatic companion rule has indicated that the officer comply with any standard of suspicion with respect to the companion.

*Terry v. Ohio*¹¹ that any search of an individual must be made pursuant to articulable suspicion.¹²

The fourth amendment prohibits unreasonable searches and seizures.¹³ The warrant clause of the fourth amendment requires that probable cause exist before an officer can obtain a warrant to search either a person or his property. Courts have recognized very few exceptions to the warrant clause of the fourth amendment. The automatic companion rule constitutes one such exception. The Supreme Court enunciated another warrant-clause exception for limited pat-down searches in *Terry v. Ohio*,¹⁴ the "stop and frisk" case.

The Court first noted that the term "stop and frisk" was a misnomer. The stop and frisk involved in *Terry* was a search and seizure within the fourth amendment.¹⁵ The Court held that this search and seizure was

11 See *infra* notes 14-22 and accompanying text.

12 The Eighth Circuit in *Flett* stated that the automatic companion rule "appears to be in direct opposition to the Supreme Court's directions in both *Terry* and *Ybarra* that the officers articulate specific facts justifying the suspicion that an individual is armed and dangerous. We decline to adopt the 'automatic companion' rule." 806 F.2d at 827.

13 The fourth amendment provides:

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

U.S. CONST. amend. IV.

14 392 U.S. 1 (1968). In *Terry*, Officer Martin McFadden, while patrolling downtown Cleveland in plain clothes, spotted two men standing on a corner. Not knowing why he noticed these men, McFadden testified that, after 39 years of experience, he had developed routine habits of observation, and that these two men "didn't look right" to him at the time. He continued observing the men's movements.

Officer McFadden suspected that the two men were "casing a job, a stick-up." After the two suspects joined another man, Officer McFadden approached the three men and identified himself as a police officer. When McFadden asked for their names, the three men just "mumbled something." McFadden immediately grabbed one of the men and patted down the outside of his clothing. McFadden felt a pistol and removed it. He proceeded to pat down the other two men and found a revolver on one of them. *Id.* at 5-7.

15 It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." *Id.* at 16. Note that the Court held that this intrusion was "something less than a 'full' search, even though it remains a serious intrusion." *Id.* at 26. The Court allowed a pat-down search to proceed without a warrant by recognizing the "distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons" and that a limited pat-down search must "be strictly circumscribed by the exigencies which justify its initiation." *Id.* at 25-26.

Justice Harlan, in his concurrence, insisted that the Court had missed a step in its reasoning. Harlan contended that in order to frisk someone, the officer must first have the constitutional right to forcibly stop someone. *Id.* at 32 (Harlan, J., concurring). The constitutionality of the stop depends upon its reasonableness. Harlan concluded that once a reasonable stop occurs, "the right to frisk must be immediate and automatic . . . There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Id.* at 33.

The Court has struggled with the question of when a seizure actually takes place. In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Court, in examining the approach and questioning of an airline passenger in a terminal, split several ways on the issue of whether or not a seizure had occurred. Justice Stewart, joined by Justice Rehnquist, concluded that no seizure took place. The test applied by Stewart would find that a seizure has taken place only if a "reasonable person would have believed that he was not free to leave." *Id.* at 554. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, did not reach the "extremely close" issue of whether a seizure occurred. Rather, they assumed that a seizure had occurred, and found it to be reasonable under the

valid without a warrant,¹⁶ and was valid even on a showing of less than probable cause.¹⁷ To satisfy the fourth amendment, the police officer must "be able to point to specific and articulable facts" that warranted the intrusion.¹⁸

The underlying rationale of *Terry* is relevant to the automatic companion rule. The *Terry* Court first considered the application of the exclusionary rule.¹⁹ The Court stated that the major thrust of the exclusionary rule is to deter unlawful police conduct.²⁰ The Court noted that the exclusionary rule has its limitations. The exclusionary rule is no deterrent when an officer has another motive aside from arrest; in *Terry*, the other motive was safety.²¹ The officer who fears for his safety is not concerned with the admissibility of evidence found pursuant to a pat-down search. Instead, the officer is protecting himself and those around him by conducting a pat-down search for weapons.²²

circumstances. *Id.* at 565 (Powell, J., concurring). Justice White, joined by Justices Brennan, Marshall and Stevens, disagreed with Justice Stewart's reasoning but did not resolve the initial seizure issue because it was not properly raised in the lower courts. *Id.* at 568-70 (White, J., dissenting).

16 The Court noted that the police conduct involved here was "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" and that it historically has never been, nor could it be, subject to the warrant clause of the fourth amendment. 392 U.S. at 20.

17 The Court held:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

18 *Id.* at 21.

19 The exclusionary rule excludes evidence which is the product of an illegal search or seizure. It was first adopted by the federal courts in *Weeks v. United States*, 232 U.S. 383 (1914), and was later held to apply to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

20 "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." 392 U.S. at 12. See also LaFave, *The Fourth Amendment in a Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982). LaFave cites *Elkins v. United States*, 364 U.S. 206, 217 (1960), which states 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." LaFave, *supra*, at 317. But see Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, where Professor Allen concludes that "the case for the rule as an effective deterrent of police misbehavior has proved, at best, to be an uneasy one." *Id.* at 537. See generally Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

21 The exclusionary rule is

powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal. . . . [A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.

392 U.S. at 14-15.

22 When a police officer is carrying out the governmental interest of investigating crime, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American

Similarly, the motive behind the automatic frisk of an arrestee's companion is also safety. Thus, any objection to the automatic companion rule based on unreasonably seized evidence becomes irrelevant. The officer's frisk of the companion is a defensive measure, designed to protect; it is not an offensive move directed toward prosecution. The Court in *Terry* recognized this conflict and fashioned a warrant-clause exception because of it. The companion frisk is another such exception.

II. Conflict in the Circuits

Five circuits have applied *Terry's* analysis in considering the adoption of the automatic companion rule. The Eighth Circuit applied the *Terry* analysis in the *Flett* opinion.²³ In *Flett*, the Minnesota Bureau of Criminal Apprehension (BCA) requested and received an arrest warrant for Steve Jacobson, a member of a local gang known as the Sons of Silence.²⁴ When the BCA officer entered Jacobson's home to arrest him, the defendant, a friend of Jacobson's, and the defendant's wife were present.²⁵ Almost immediately upon entry, Deputy Adams of the BCA asked the defendant to stand and conducted a pat-down search.²⁶ The pat-down search of the defendant uncovered a buck knife and a derringer pistol.²⁷

The Eighth Circuit, in upholding the search on *Terry* grounds, rejected the automatic companion rule.²⁸ The court relied on *Ybarra v. Illinois*,²⁹ which stressed the narrow scope of the *Terry* exception.³⁰ The court stressed that both *Ybarra* and *Terry* required articulable suspicion that the person to be frisked was dangerous.³¹

The *Flett* court adopted the reasoning of the Sixth Circuit in *United States v. Bell*.³² In *Bell*, the appellate court also rejected the automatic companion rule and likewise stressed the narrow scope of the *Terry* exception.³³ The court feared that the automatic companion rule would encourage guilt by association as a rule.³⁴

criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

Id. at 23.

²³ 806 F.2d 823 (8th Cir. 1986).

²⁴ The police knew "that in general the members of the Sons of Silence had access to and had used weapons in the past." *Id.* at 824.

²⁵ Conflicting evidence existed concerning whether the officers demanded to be let in or whether Jacobson consented. The court considered the entry valid due to consent. *Id.* at 825.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* But see *United States v. Clark*, 754 F.2d 789, 792 (8th Cir. 1985) (citing *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971), the court asserted that officers have "a right to protect themselves from the use of any firearms that might be available.")

²⁹ 444 U.S. 85 (1979).

³⁰ See *infra* note 42 and accompanying text.

³¹ See *supra* note 17 and *infra* note 42.

³² 762 F.2d 495 (6th Cir. 1985).

³³ "An automatic companion rule is inconsistent with the Supreme Court's observation that it 'has been careful to maintain [the] narrow scope' of *Terry's* exception to the warrant requirement." *Id.* at 499 (quoting *Dunaway v. New York*, 442 U.S. 200 (1979)).

³⁴ "[W]e do not believe that the *Terry* requirement of reasonable suspicion under the circumstances has been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates." *Id.*

The Fourth, Seventh, and Ninth Circuits adopted the automatic companion rule in *United States v. Poms*, *United States v. Simmons*, and *United States v. Berryhill*, respectively.³⁵ The Ninth Circuit was the first to adopt the automatic companion rule. The underlying rationale of the court's decision was twofold: Safety of the officer and the assertion that common sense would allow an officer to pat-down a companion of an arrestee.³⁶ The courts in *Poms* and *Simmons* accepted the reasoning of *Berryhill* and adopted the automatic companion rule.³⁷

III. Supreme Court Guidance

While the Supreme Court has never directly addressed the constitutionality of an automatic companion rule,³⁸ the circuits have relied upon several Supreme Court cases to support the rejection of the automatic companion rule. Other Supreme Court cases have articulated reasoning which should affect the validity of the automatic companion rule.

The *Flett* court held that the automatic companion rule is in "direct opposition to the Supreme Court's directions in . . . *Ybarra* that the officers articulate specific facts justifying the suspicion that an individual is armed and dangerous."³⁹ In *Ybarra v. Illinois*,⁴⁰ the Court found the cursory pat-down of all customers of a tavern unconstitutional, even though the police had a search warrant for the tavern and for its bartender.⁴¹ The Court rejected the state's assertion that the pat-downs were valid *Terry* searches. The Court stressed the narrow scope of *Terry* and held that simple presence on the premises—even premises for which authorities possess a search warrant—is not enough for a *Terry* search.⁴² The

35 See *supra* notes 3-5 and accompanying text.

36 The court in *Berryhill* stated:

We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest. It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance.

445 F.2d at 1193.

Note that *Terry* would seem to reject the "such a limited intrusion" language of *Berryhill* by calling the pat-down a "severe . . . intrusion upon cherished personal security . . ." 392 U.S. at 24-25 (emphasis added). The Court continued: "It is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person . . ." 392 U.S. at 16-17.

37 For a more detailed look into the facts and the history of these cases, see Comment, *United States v. Bell: Rejecting Guilt by Association in Search and Seizure Cases*, 61 NOTRE DAME L. REV. 258 (1986).

38 "The Supreme Court has never directly addressed the applicability of the *Terry* exception to a search of the companion of an arrestee." *United States v. Flett*, 806 F.2d 823, 826 (8th Cir. 1986).

39 *Id.* at 827.

40 444 U.S. 85 (1979).

41 In *Ybarra*, the police obtained a search warrant for the premises of a tavern and a search warrant for its bartender. Upon entering the tavern, the police advised everyone that they were going to conduct a cursory pat-down of all customers for weapons. When the police patted down the defendant *Ybarra*, a customer in the tavern, they felt "a cigarette pack with objects in it." The officer continued his search of the other customers and then returned to the defendant. The officer frisked the defendant again, removed the cigarette pack, and found six tinfoil packets containing heroin. *Id.* at 87-89.

42 The Court stated:

police officer must have independent articulable suspicion for every person that is frisked.⁴³

Ybarra's own language, however, removes it from the automatic companion controversy. The Court spoke in terms of people who "happen to be on the premises" and "generalized searches," and thus was not concerned with the search of a "companion." A companion is a person who accompanies another; a person who is an associate or comrade.⁴⁴ Certainly patrons in a bar are not necessarily associates or comrades. *Ybarra* dealt with people who were completely independent of the person being searched. This type of search does not fall under the automatic companion rule.

The *Ybarra* case also relies on *United States v. Di Re*⁴⁵ in its analysis. In *Di Re*, the Court refused to uphold the search of the defendant *Di Re*, who was seated in the car next to the validly arrested suspect.⁴⁶ The Court reasoned that a person, by mere presence in the car of an arrested suspect, does not lose immunities from a personal search to which he otherwise would be entitled.⁴⁷ *Di Re* is not relevant to the automatic companion rule for two reasons. First, no warrant existed for the initially arrested suspect; for the automatic companion rule to apply, the authorities must obtain an arrest warrant for the original suspect.⁴⁸ Second, *Di Re* dealt with a *thorough search* of the companion for evidence;⁴⁹ the automatic companion rule simply allows a cursory pat-down of a person for weapons for the officer's safety.⁵⁰

The rationale of several Supreme Court cases, though not dealing with the automatic companion rule directly, helps to determine the constitutional validity of the automatic companion rule. In *Chimel v. California*,⁵¹ the Supreme Court held that even pursuant to a valid arrest, a

Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons. The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person *happens to be on the premises* where an authorized search is taking place.

Id. at 93-94 (emphasis added).

43 *Id.* at 94.

44 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 461 (1966).

45 332 U.S. 581 (1948).

46 In *Di Re*, police officers validly arrested the driver of an automobile. They took the defendant, a passenger in the car, into custody, and frisked him. At the police station, an officer searched the defendant and found counterfeit gasoline and fuel oil ration coupons on his person. After two hours of questioning, the police booked and thoroughly searched him. The officer found one hundred counterfeit inventory gasoline ration coupons on his body, hidden in an envelope. *Id.* at 583.

47 *Id.* at 587.

48 *Id.* at 582-83. It is not clear from the language in *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971), that the automatic companion rule only applies to a companion of a person arrested pursuant to a valid arrest warrant. See *supra* note 10. This note deals only with the warrant situation.

49 332 U.S. at 583.

50 See *supra* note 10.

51 395 U.S. 752 (1969). In *Chimel*, three police officers arrived at defendant's home with an arrest warrant. The defendant was not home but his wife allowed the officers to enter and wait. When the defendant arrived, the police officers arrested him and asked for permission to look around. The defendant objected, but the officers advised him that they could conduct a search pursuant to the lawful arrest. The officers searched the house, including furniture drawers in the master bedroom and the sewing room. The officers found fruits of the burglary for which the defendant was arrested. *Id.* at 753-54.

search of the arrestee's entire house cannot be constitutionally justified.⁵² The Court held that, after a valid arrest, the police can search the suspect and also search the "area within his immediate control."⁵³ This has become known as the "wing span" rule.⁵⁴

It is clear that the overriding justification for a *Chimel* search is safety.⁵⁵ The police are allowed to search an area for which they have *no warrant* because of safety concerns for the police officer.⁵⁶ The wingspan rule, in allowing warrantless searches, recognizes that safety concerns may override the fourth amendment concerns of freedom from personal intrusion.⁵⁷

In *United States v. Robinson*,⁵⁸ the Supreme Court held that the search of a person incident to a valid arrest is *per se* reasonable.⁵⁹ The Court, as it did in *Chimel*, stressed the safety factor. The Court noted that the nature of the crime is immaterial; all arrests are potentially dangerous.⁶⁰

52 *Id.* at 768.

53 The Court reasoned that:

[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.

Id. at 763.

54 *See, e.g., United States v. Porter*, 738 F.2d 622 (4th Cir. 1984), *cert. denied*, 469 U.S. 983 (1984).

55 The Court noted that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." 395 U.S. at 763. *See Joseph, The Protective Sweep Doctrine: Protecting Arresting Officers From Attack by Persons Other than the Arrestee*, 33 CATH. U.L. REV. 95 (1983), which discusses the protective sweep doctrine. The protective sweep doctrine would allow police officers to conduct a limited search of a premises for other persons to assure the officer's safety following a lawful arrest. Professor Joseph believes that *Chimel* does not preclude this type of search. Joseph concludes that "*Chimel* indicates that the major reason for upholding such a search is the Court's strong concern for the safety of the arresting officers" and the decision "suggests a willingness on the part of the Court to consider a broader right to search when it is conducted as a precaution for the safety of the arresting officers." *Id.* at 100.

56 Joseph, *supra* note 55, at 100. The distinction between searching objects and persons is not apparent. *See S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE* (1980), where the author concludes:

[T]he [Fourth] Amendment covers searches and seizures of "persons, houses, papers, and effects," and draws no apparent line between persons and objects. That no distinction was intended is a proposition that finds some support also in the final six words of the amendment. Yet, the cases reveal important differences between the treatment of arrests of people and concomitant searches on the one hand, and searches and seizures of places and things on the other hand. Surprisingly, the person often gets less protection than his property.

Id. at 33.

57 The Court did address the defendant's argument that police can search a person's home simply by "arranging to arrest suspects at home rather than elsewhere." The Court refused to acknowledge that the officer used this strategy in this case. 395 U.S. at 767.

58 414 U.S. 218 (1973). In *Robinson*, a police officer arrested the defendant for "operating [a vehicle] after revocation [of his license] and obtaining a permit by misrepresentation." The officer proceeded to fully search the defendant and found, crumpled in a cigarette pack, 14 gelatin capsules of heroin. *Id.* at 220-23.

59 The Court held that if the initial intrusion, the arrest, is lawful, "a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search . . ." *Id.* at 235.

60 The Court refused to accept that "persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes." *Id.* at 234.

The Court hinted that safety may be the key reason for any search.⁶¹ *Robinson* dealt with the search of an individual; *Chimel* dealt with the search of the area within reach of the validly arrested suspect. In both cases, the Court allowed the searches in order to protect the arresting officer(s).⁶² The automatic companion rule accomplishes the same purpose. When a person is validly arrested, the officer should be allowed, for his own safety, to perform a limited pat-down of a companion.

In *Michigan v. Summers*,⁶³ the Supreme Court held that police officers can detain persons on the premises while a search pursuant to a warrant is executed.⁶⁴ The Court again stressed safety when it stated that the "execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence [T]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."⁶⁵ The police in this case had no evidence against the detained people, yet the Court held that a search warrant was enough to detain them. In the automatic companion case the officer would also minimize "the risk of harm to both police and occupants" by taking "unquestioned command of the situation."⁶⁶

IV. Adoption of the Automatic Companion Rule

Various Supreme Court cases thus support the adoption of the automatic companion rule by emphasizing the same underlying rationale: Safety.⁶⁷ This is the first of three reasons supporting the adoption of the automatic companion rule. A police officer's need for clear guidance and common sense also call for the adoption of the rule.

A. Safety of Police Officers, Citizens, and Bystanders

If safety is the underlying rationale of the automatic companion rule, a police officer who arrests a suspect should be allowed to frisk his companion.⁶⁸ A recent study⁶⁹ emphasized the dangers of arresting suspects.

61 The Court further noted the safety aspects by stating that "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id.* at 234.

62 "The *Robinson* and *Chimel* cases, taken together, indicate that a concern for an officer's safety as he makes a lawful custodial arrest justifies a narrowly defined search." Joseph, *supra* note 55, at 101-02.

63 452 U.S. 692 (1981).

64 *Id.* at 704-05. The Court stressed that the people who were allowed to leave would likely flee. *Id.* at 702.

65 *Id.* at 702-03.

66 The risk of harm to everyone involved will be decreased by the automatic companion rule. *See infra* notes 68-75 and accompanying text.

67 The circuits adopting the automatic companion rule have not relied on any of these Supreme Court cases. The sole Supreme Court case relied on in adopting the automatic companion rule is *Terry v. Ohio*. *See* *United States v. Simmons*, 567 F.2d 314, 318-20 (7th Cir. 1977), *United States v. Poms*, 484 F.2d 919, 920-21 (4th Cir. 1973), and *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971).

68 *See Berryhill*, 445 F.2d at 1193.

69 S. CHAPMAN, *COPS, KILLERS AND STAYING ALIVE: THE MURDER OF POLICE OFFICERS IN AMERICA* (1986). Chapman compared the murder of police officers in Oklahoma with national statistics, which he derived from two sources, the FBI's Uniform Crime Reports and Law Enforcement Officers Killed and Assaulted.

Approximately twenty-three percent of all law enforcement officers killed during the years 1965-84 were killed while attempting arrests.⁷⁰ This statistic substantiates Justice Rehnquist's concern regarding the inherent dangers of an arrest expressed in his *Robinson* opinion.⁷¹

In police-citizen encounters, there are dangers for citizens as well as police. In a 1981 study of Chicago police shootings,⁷² the authors found that "a sizeable number of shootings by police officers seem to be avoidable."⁷³ The study revealed that ten percent of all shootings were accidental; three percent by stray bullet; and one percent because of mistaken identity. Therefore, fourteen percent of all shootings by police officers can be considered accidental.⁷⁴ The automatic companion rule would serve to reduce these shootings,⁷⁵ as well as police deaths.

B. "Bright Line" Guidance

The Supreme Court recognized the need for guidance in the area of search and seizure by enunciating a "bright line" standard in *New York v. Belton*.⁷⁶ The Court reasoned that bright line standards will enhance fourth amendment protections, not hinder them.⁷⁷ Commentators in the

70 S. CHAPMAN, *supra* note 69, at 9. This figure excludes arrests for burglaries and robberies. Those arrests are grouped into categories of being killed "while burglaries and robberies are in progress" and "while pursuing robbery suspects." These categories are not relevant to the issue. The 23% figure does not reveal who killed the police officer. Chapman's study also reveals that of the fifteen police officers killed in Oklahoma during the years 1950-84 while attempting arrests, 11 of the slain officers were "in the presence of at least one other officer and, in some cases, many others." *Id.* at 11. This indicates that arrests are extremely dangerous regardless of the number of law enforcement officers present.

71 See *supra* notes 60-61 and accompanying text. The Supreme Court in *Terry* also recognized the dangers of dealing with criminals in the United States by emphasizing the easy access to firearms in this country and stated that "this fact is relevant to an assessment of the need for some form of self-protective search power." 392 U.S. at 24 n.21.

72 Geller & Karales, *Split-Second Decision, Shootings of and by Chicago Police*, 12 CRIM. JUST. NEWSL. 3 (June 8, 1981). The study utilizes shootings data for the years 1974-78 which include the files of the internal investigative department of the Chicago Police Department. The authors write that this is "the first time a major American police department has voluntarily opened its internal investigative files on police-involved shootings to persons outside the official law enforcement system." *Id.*

73 The authors cite as reasons for accidental shootings "poor gun handling habits (carrying cocked revolvers, . . . etc.) . . . and civilian conduct which does not immediately jeopardize the lives of officers or the public (nonviolent flight being a prime example)." *Id.* at 4.

74 No data is available as to how many of the 14% were companions of an arrestee.

75 It is a fair assumption that an officer's apprehension during an arrest/search situation caused some of these accidental shootings.

76 453 U.S. 454 (1981). The Court in *Belton* held that when the occupants of an automobile are validly arrested, police can search the passenger compartment of the vehicle and search inside any containers found within the passenger compartment. *Id.* at 459-61.

77 The Court stated:

[A]s one commentator has pointed out, the protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

Id. at 458 (quoting LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142). The Court quoted LaFave extensively:

A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

field continually have called for bright line decisions.⁷⁸ Bright line standards should only be adopted in limited situations.⁷⁹ The limited pat-down search of an arrestee's companion is one of those situations.⁸⁰

The doctrine would provide police officers with a bright line rule as to when they *could* search companions. The automatic companion rule, even though a bright line rule (which historically decreases a police officer's discretion), would allow police officers some discretion. An officer would not have to frisk every companion—but he would have that option. He could protect his life by using his own discretion.⁸¹

453 U.S. at 458 (citation omitted).

See also *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (The Court noted that "a single, familiar standard is essential to guide police officers . . ."); Oberly, *The Policeman's Duty and the Law Pertaining to Citizen Encounters*, 8 PEPPERDINE L. REV. 653 (1981). Oberly writes:

Police officers throughout the United States have continuing contact with citizens in a wide variety of circumstances, many of which are specifically associated with crime prevention In this regard, it is of little assistance to decide narrow issues, which may stir spirited debate among legal scholars, when the crime rate has soared since *Terry* was decided and shows no sign of abatement.

Id. at 681. Oberly also recognizes the need for police to take charge of a situation. "[T]he officer should be permitted to temporarily freeze the situation for a short period of time to make the necessary investigation of the suspect . . ." *Id.* at 685.

⁷⁸ See Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973). The author posits that for the exclusionary rule to succeed, the law cannot be "tentative, flexible and self-consciously oriented to facts." *Id.* at 365. Instead, the constitutional prohibition "must be clear, unambiguous, not susceptible to quibbles or easy avoidance, and easily understandable by the persons sought to be deterred." *Id.* at 333.

⁷⁹ Professor LaFave outlined four criteria that should be examined when considering the adoption of a bright line rule:

- (1) Does it have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary?
- (2) Does it produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle was practicable?
- (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable?
- (4) Is it not readily subject to manipulation and abuse?

LaFave, *supra* note 20, at 325-26 (emphasis in original).

⁸⁰ The automatic companion rule passes as a bright line rule under these criteria. It certainly has clear and certain boundaries: The limited pat-down search of an arrestee's companion is such a boundary. See *id.* at 326 (using the *Bellon* decision as an example of a bright line rule that does not meet the first criteria). The automatic companion rule would produce results similar to a case-by-case adjudication. This is evidenced by the fact that in both cases rejecting the automatic companion rule, *Bell* and *Flett*, the search was upheld on *Terry* grounds. The case-by-case approach presently used has proved unworkable. See LaFave, *supra* note 20, at 329 (The *Robinson* bright line makes sense "because the only alternative is to impose on the police the burden of making exceedingly difficult case-by-case judgments, risking harm to themselves . . ."). The absence of an automatic companion rule imposes just such a burden. The fourth criteria is met because the threat of abuse and manipulation is absent due to the fact that the suspect is arrested pursuant to a valid arrest warrant obtained from a magistrate. See *infra* notes 88-89 and accompanying text.

⁸¹ See generally Pepinsky, *Better Living Through Police Discretion*, 47 LAW & CONTEMP. PROBS. 249 (1984). Pepinsky finds that "discretion is a desirable part of policing." *Id.* The author also finds that "non-discretionary . . . law enforcement is inherently unjust." *Id.* at 266. See also Moore & Multz, *Arrest, Stop, and Frisk*, 9 COLO. LAW. 646 (1980). The authors explain that the standard "articulable suspicion" was never meant to hinder police conduct in tight situations where discretion would most often be used:

The root function of the "articulable suspicions" requirement has not been to hamstring officers facing dangerous street situations. Rather it has been to establish a basis for post-hoc judicial review to insure that the weapons frisk is not used as a substitute for a search incident to an arrest or as a means of evading normal warrant and probable cause requirements of the state and federal constitutions.

Further guidance has been provided by the Model Rules of Stop and Frisk, prepared by the Project on Law Enforcement Policy and Rulemaking, College of Law, Arizona State University in 1974.⁸² In addressing the question of when a police officer has reasonable suspicion for a frisk, the Model Rules adopted the following:

The following list contains some factors which—*alone* or in combination—may be sufficient to create reasonable suspicion for a frisk:

...

G) Companions. Has the officer detained a number of people at the same time? Has a frisk of a companion of the suspect revealed a weapon? Does the officer have assistance immediately available to handle the number of persons he has stopped?⁸³

Though the Model Rules, by speaking in terms of reasonable suspicion, do not explicitly support an automatic companion rule, it is clear that the Model Rules state that a guilty original suspect may be enough to create reasonable suspicion of the companion. In the automatic companion case, the reasonable suspicion is supplied by the fact that police have probable cause that the suspect has committed a crime and is accompanied by a potentially dangerous companion. The Model Rules would support a frisk of companions in most situations.

C. *Common Sense*

Common sense also dictates adoption of the automatic companion rule.⁸⁴ *Terry*, in its holding, focused on the fact that the exclusionary rule's purpose is deterrence; it should not be used "in futile protest against practices which it can never be used effectively to control."⁸⁵ The Court recognized that the exclusionary rule will not serve its purpose if the police "have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."⁸⁶ That other goal, in *Terry* and in a search involving an arrestee's companion, is safety.⁸⁷ In an automatic companion case, the police want custody of the suspect who is named in the arrest warrant. They do not want the companion, but they do want to preserve their safety and that of others in the vicinity. Logically, then, they will "forgo successful prosecution" to preserve this safety and proceed to search the companion. According to *Terry* reasoning, such conduct would not be deterred by prohibiting an automatic search of a companion.

Id. Employment of the automatic companion rule does not provide an officer with the possibility of evading "normal warrant and probable cause requirements." He must first arrest the suspect pursuant to a valid arrest warrant before he can search the companion.

82 Reprinted in Oberly, *supra* note 77, at 658.

83 *Id.* at 690-91 (emphasis added).

84 See *supra* note 36.

85 See *supra* note 21.

86 *Id.*

87 See *supra* notes 20-22 & 68-75 and accompanying text.

Those opposed to the automatic companion rule voice the concern that police officers may abuse the privilege.⁸⁸ This argument fails to acknowledge the fact that the police already have an arrest warrant. They have obtained a determination of probable cause by a "neutral and detached magistrate."⁸⁹ Police officers are not permitted to frisk just anyone in this situation—it must be a companion of a suspect arrested pursuant to a valid arrest warrant.

V. Conclusion

The Supreme Court has never directly addressed the automatic companion rule. However, the underlying rationale of cases related to the issue is clear: To protect the police officer as much as possible. Common sense and the need for a "bright line" standard also call for the adoption of the rule. Historically,

[w]hen the level of intrusion into a citizen's privacy is substantially less than that involved in an arrest or similar seizure, and where the need to make the intrusion is based on an important state interest, the Court, in the past, has upheld such intrusions as reasonable under the Fourth Amendment.⁹⁰

Terry recognized that a limited pat-down is less intrusive than a full search and the important state interest of safety is evident when dealing with an arrestee's companion. The automatic companion rule clearly falls into the same category of other warrant clause exceptions and should be adopted.

John J. O'Shea

⁸⁸ See *Terry*, 392 U.S. at 35 (Douglas, J., dissenting). Justice Douglas feared that decisions like *Terry* would "give the police greater power than a magistrate" and result in a "long step down the totalitarian path." *Id.* at 38.

⁸⁹ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

⁹⁰ *Joseph*, *supra* note 55, at 103.