FRISKING THE COMPANION OF AN ARRESTEE: THE "AUTOMATIC COMPANION" RULE

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The Fourth Amendment to the United States Constitution prohibits "unreasonable" searches and seizures. What constitutes an "unreasonable" search or seizure has been a source of great controversy. "Much of the modern debate over the meaning of the Fourth Amendment has focused on the relationship between the reasonableness requirement and the warrant requirement."[1] Specifically, "the central question has been whether and under what circumstances are the police entitled to conduct 'reasonable' searches without first securing a warrant?"[2] For instance, when law enforcement officers arrest X, what actions may the officers take with regards to Y, a companion of X who was present with X at the time of the arrest? May they automatically conduct a "frisk" of Y for weapons? Or must they first have reasonable suspicion to believe that Y is presently armed and dangerous before they may conduct a "frisk?" Some, but not all, federal courts have adopted the "automatic companion" rule, which grants a law enforcement officer the authority to lawfully conduct a "frisk" for weapons on any person who is accompanying an arrestee at the time of the arrest.[3] The purpose of this article is to present both sides of the "automatic companion" debate so that law enforcement officers have an understanding of why the rule has been adopted, or rejected, by various federal courts. Any discussion of the "automatic companion" rule must necessarily begin with a review of the Supreme Court's decision in *Terry v. Ohio*.[4]

TERRY V. OHIO

In *Terry*, the Supreme Court carved out an exception to the Fourth Amendment's probable cause and warrant requirements to conduct a search. Instead, the Court held, a law enforcement officer could perform a "stop and frisk" of a suspect if the officer had reasonable suspicion that (1) criminal activity was afoot and (2) the suspect might be armed and presently dangerous. The facts of *Terry* are well-known to virtually every law enforcement officer. Nonetheless, aspects of the Supreme Court's opinion bear repeating here, as they are key to understanding the "automatic companion" debate. Beginning its analysis, the Court noted that "[s]treet encounters between citizens and police officers are incredibly rich in diversity."[5] Because of this diversity, police conduct during these encounters requires "necessarily swift action, predicated upon the on-the-spot observations of the officer on the beat-[conduct] which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."[6]

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[1] *Ybarra v. Illinois*, 444 U.S. 85, 100 (1979)(Rehnquist, J., dissenting)

[2] *Id.*

[3] Whether the arrest is conducted with or without a warrant does not appear to be controlling when determining the applicability of the "automatic companion" rule. Additionally, "though a majority of the cases have involved a full-fledged arrest of the other person, essentially the same analysis is appropriate as to the companion of a person stopped for investigation or subjected to a non-custodial arrest." 4 Wayne R. LaFave, *Search and Seizure* §9.4(a) at 261 n. 85 (3rd ed. 1996)

[4] 392 U.S. 1 (1968)

[5] *Id.* at 13

[6] *Id.* at 20

Instead, the standard in evaluating police conduct in these situations is the Fourth Amendment's general "reasonableness" requirement. In determining whether the police conduct was "reasonable," a court must balance the individual's right to be free from arbitrary governmental interference with both the necessity of detecting and preventing crime, as well as "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."[7] The Supreme Court realized that the public's interest in protecting police officers from hidden dangers was compelling.

> American 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. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives. In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.[8]

The officer need not be absolutely certain that the suspect is armed. Instead, "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[9] In determining whether a law enforcement officer acted reasonably, "due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[10]

YBARRA V. ILLINOIS[11]

The Supreme Court has never directly addressed the constitutionality of the "automatic companion" rule.[12] Regardless, some peripheral guidance on the issue may be found in the Supreme Court's decision in *Ybarra*, a ruling that "arguably invalidated the 'automatic companion' rule."[13] In *Ybarra*, police officers in Aurora, Illinois, executed a search warrant at a local tavern for evidence of narcotics possession. The

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[7] *Id.* at 23

[8] *Id.* at 23-24

[9] *Id.* at 27 (emphasis added)

[10] *Id*. (citation omitted)

[11] *Supra*, note 1

[12] *United States v. Flett*, 806 F.2d 823, 826 (8th Cir. 1986)

[13] Case Comment, *Criminal Law - United States v. Bell: Rejecting Guilt by Association in Search and Seizure Cases*, 61 NOTRE DAME L. REV. 258, 263 (1986)

warrant authorized the officers to search the tavern and the person of a bartender named "Greg." Upon serving the warrant, the officers found a number of individuals present in the tavern (approximately 9-13). Everyone present was subjected to a *Terry* frisk for weapons, including an individual named Ventura Ybarra. This frisk was based upon an Illinois statute that authorized a search of any person found in the place at the time a search warrant was being executed. Ybarra was frisked twice by police officers, who ultimately found heroin on his person. The Supreme Court held that the search of Ybarra violated both the Fourth and Fourteenth Amendments. Specifically, the Court noted that "[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a pat-down of a person for weapons."[14] Further, the Court reasoned that

> [n]othing 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 narcotics search is taking place.[15]

[14] *Ybarra*, 444 U.S. at 92

[15] *Id.* at 94

On its face, *Ybarra* would seem to resolve the "automatic companion" debate by requiring in each instance that a law enforcement officer possess reasonable suspicion that the person to be frisked is armed and presently dangerous. However, this is not necessarily the case.

THE "AUTOMATIC COMPANION" RULE

As noted, the Supreme Court has never directly addressed the applicability of the *Terry* exception to the search of a companion of an arrestee. While some guidance on this issue may be found in select Supreme Court decisions, such as *Terry* and *Ybarra*, a lack of clear direction has resulted in a split among the United States Circuit Courts of Appeal over the constitutionality of the "automatic companion" rule.

A. Circuits Adopting the "Automatic Companion" Rule

Currently, three circuits (the Fourth, Seventh, and Ninth) have adopted a bright-line rule allowing law enforcement officers to "frisk" the companion of an arrestee.[16] These circuits have relied primarily upon a law enforcement officer's need to protect himself, as well as innocent bystanders, from the potential dangers that arise

[16] In addition, it appears that the 2nd and 5th Circuits, while not explicitly adopting the "automatic companion" rule have, nonetheless, implicitly adopted its principles. *See United States v. Vigo*, 487 F.2d 295 (2nd Cir. 1973); *United States v. Barlin*, 686 F.2d 81 (2nd Cir. 1982); *United States v. Tharpe*, 536 F.2d 1098 (5th Cir. 1976), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987); and *United States v. Sink*, 586 F.2d 1041 (5th Cir. 1978). Further, various states have adopted the "automatic companion" rule.

during the arrest of a suspect.[17] In *United States v. Berryhill*,[18] the Ninth Circuit, relying on the decision in *Terry*, became the first court to recognize the "automatic companion" rule.

> 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 companion 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 a defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of an 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.[19]

In *United States v. Poms*,[20] the Fourth Circuit endorsed the decision in *Berryhill*, remarking that they saw "... no reason why officers may not ... engage in a limited search for weapons of a known companion of an arrestee, especially one reported to be armed at all times, who walks in on the original arrest by sheer happenstance."[21] A similar result was reached by the Seventh Circuit in *United States v. Simmons.*[22]

While *Berryhill*, *Poms*, and *Simmons* were all decided in the years prior to *Ybarra*, the circumstances in *Ybarra* are far enough removed from those in which the "automatic companion" rule would apply so as to leave open the question of the rule's constitutionality. It can be argued that the plain language of *Ybarra*

> ... removes it from the automatic companion controversy. The Court spoke 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. 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.[23]

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[17] *Terry*, 392 U.S. at 24 n.21 ("The easy availability of firearms to potential criminals in this country is well known ... [and] is relevant to an assessment of the need for some form of self-protective search power").

[18] 445 F.2d 1189 (9th Cir. 1971)

[19] *Id.* at 1193

[20] 484 F.2d 919 (4th Cir. 1973)(per curiam)

[21] *Id.* at 922

[22] 567 F.2d 314 (7th Cir. 1977)

[23] Note, *The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's*

B. Circuits Rejecting the Automatic Companion Rule

Two circuits (the Sixth and Eighth) have rejected the "automatic companion" rule, based upon the Supreme Court's rulings in both *Terry* and *Ybarra* regarding individualized "reasonable suspicion." These circuits utilize a "totality of the circumstances" test in determining whether the companion of an arrestee may be subjected to a *Terry* frisk.

> These courts acknowledge the safety concerns aired by the Supreme Court in *Terry*. However, they focus more on the Court's call for specific, factual justification of a frisk based on reasonable suspicion, by requiring that a frisk of an arrestee's companion be based on specific, articulable facts known to the officer at the time of the search. The circumstances examined by these courts to determine if reasonable suspicion exists include companionship, but are not limited to it.[24]

In *United States v. Bell*,[25] the Sixth Circuit refused the government's invitation to adopt the "automatic companion" rule, noting "serious reservations about the constitutionality of such a result under existing precedent."[26] Addressing a very real concern about the scope of the rule, the court did not believe "... that the *Terry* requirement of reasonable suspicion ... [had] been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates."[27] Further, the court found the rule to be "... 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."[28] Instead, "the fundamental inquiry in determining whether evidence is admissible is whether, in light of the 'totality of the circumstances' surrounding the seizure, it was reasonable for law enforcement personnel to proceed as they did."[29] While the single fact of companionship does not, standing alone, justify a frisk, "... it is not irrelevant to the mix that should be considered in determining whether the agent's actions were justified."[30]

Similarly, in *United States v. Flett*,[31] the Eighth Circuit refused to adopt the "automatic companion" rule, citing both *Terry* and *Ybarra* in support of its decision. The Eighth Circuit, recognizing that the Sixth Circuit had "explicitly rejected [the] 'automatic companion' rule in *Bell*,"[32] endorsed the *Bell* court's rationale in so doing. Commenting on the "automatic companion" rule, the court asserted that it "... [appeared] to be in direct opposition to the Supreme Court's

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Companion, 62 NOTRE DAME L. REV. 751, 756 (1987)

[24] Note, *The Automatic Companion Rule: An Appropriate Standard to Justify the Terry Frisk of an Arrestee's Companion?*, 56 FORDHAM L. REV. 917, 924-925 (citations omitted)

[25] 762 F.2d 495 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 155 (1985)

[26] *Id.* at 498

[27] *Id.* at 499 (citation omitted)

[28] *Id.* [citing *Dunaway v. New York*, 442 U.S. 200, 210 (1979)]

[29] *Id.* [citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)]

[30] *Id.* at 500

[31] *Supra*, note 12

[32] *Id.* at 827

directions in both *Terry* and *Ybarra* that the officers articulate specific facts justifying the suspicion that an individual is armed and dangerous."[33]

However, even some who argue against application of the "automatic companion" rule seem to recognize the limited usefulness of *Ybarra* in considering its application.

> While the reasoning of *Ybarra* argues against applying an automatic companion rule, the holding actually referred to quite different circumstances than existed in *Berryhill*, *Poms*, *Simmons*, and *Bell*. The Court in *Ybarra* determined whether law enforcement officials have the right to search an individual solely because the individual is on the premises for which the police have a valid search warrant. Whereas, in *Berryhill*, *Poms*, *Simmons*, and *Bell*, the person searched was associated with the person arrested rather than simply being incidentally on the premises. Thus, *Ybarra's* impact on the automatic companion rule is minimal.[34]

CONCLUSION

Currently, three Federal Circuit Courts of Appeal allow law enforcement officers to automatically frisk the companion of an arrestee who is present at the time of the arrest. These circuits believe that the societal interest in protecting law enforcement officers from hidden weapons that could be carried by companions of an arrestee outweighs the minimal intrusion suffered by the individual during a brief pat-down for weapons. Alternatively, two Federal Circuit Courts of Appeal have rejected the "automatic companion" rule, requiring instead that law enforcement officers have reasonable suspicion to believe the companion of the arrestee is armed and presently dangerous. For these two circuits, the issue of companionship is but one factor to consider when looking at the totality of the circumstances surrounding the frisk.

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[33] *Id.*

[34] *Supra,* note 13 at 263