

# **TERRY FRISK UPDATE**

## *The Law, Field Examples and Analysis*

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### **THE “FRISK”**

**Defined:** A limited search for weapons, generally of the outer clothing, but also of those areas which may be within the suspect’s control and pose a danger to the officer / agent.<sup>1</sup> Many law enforcement agencies teach officers to frisk via a “pat down” of the suspect’s outer clothing.

**Legal Basis / Justification for a Frisk:** Reasonable Suspicion that the suspect is armed and dangerous (see the previous article for a discussion of what constitutes “reasonable suspicion”).<sup>2</sup>

**Frisk Indicators:** See the previous article for a discussion of *Reasonable Suspicion Indicators* as they are virtually the same. The key is that the reasonable suspicion support a belief that the suspect is “armed and dangerous.”

**“Stopping” and “Frisking” a Person are two Different Things:** An officer / agent cannot automatically frisk everyone lawfully “stopped” under *Terry*. In addition to reasonable suspicion that criminal activity is afoot, the officer / agent must also be able to articulate reasonable suspicion that the suspect is armed and dangerous. “Officer Safety” alone will not justify a frisk. The officer / agent must articulate “why” officer safety was an issue (exactly what risk / danger to the officer / agent or others existed). The officer must “explain” why there was a

risk to the officer / agent or others. If the explanation is found to be reasonable, the frisk is good.

**All Armed Persons Are Not “Dangerous”:** Not every armed person is automatically a risk to the officer / agent or others. For example, Wildlife Conservation Officers checking “take for the day” in an authorized hunting area are not likely to frisk every hunter they contact because they are all armed with large caliber rifles. Additionally, many citizens are often “armed” with conventional and unconventional weapons such as pocketknives, pens, flashlights, etc. A suspect “stopped” for suspicion of check fraud, will generally not be frisked simply because he or she has a pen in their pocket.<sup>3</sup>

**What Can be Removed/Inspected?** Items the officer / agent recognizes as a weapon (conventional or unconventional) or that could reasonably contain a weapon. The officer / agent must articulate the pertinent facts and the experience, training and knowledge that establish the reasonableness of the conclusion that the item is a weapon or could contain one.

**Field Example:** An officer / agent has valid reasonable suspicion to conduct a stop and frisk. The officer pats the suspect down and feels a small box like item in a pocket. The officer / agent seizes the box which turns out to be a cardboard flip-top box of cigarettes. The officer / agent opens the box up to see if a small knife or derringer handgun is concealed inside.

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<sup>1</sup> *Terry v. Ohio*, 392 US 1 (1968), *Ybarra v. Illinois*, 444 US 85 (1979).

<sup>2</sup> *Id.*

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<sup>3</sup> Note however, since a pen can be used as a weapon, it can support frisk if the person is otherwise acting in a manner that an officer / agent can articulate posed a threat to their safety or others (i.e. threatened to “poke out their eyes with a stick.”)

Upon inspection, the officer / agent sees what is recognized, based on knowledge, training and experience, to be crack cocaine.

**Analysis:** If the officer / agent can articulate, based on knowledge, training and experience, that knives and small single and five shot derringers exist that can fit inside a flip-top cigarette box - the seizure will likely be a good one.

**Plain View Doctrine:** Under the plain view doctrine, if an officer / agent is lawfully present and sees what is immediately apparent as contraband or evidence of a crime, the item may be seized and admitted into evidence against a defendant.<sup>4</sup> If, during a valid stop and frisk, an officer / agent seizes an item that reasonable feels like a weapon (or could contain one) that instead turns out to be contraband or evidence of a crime, that item is admissible.

**Field Example:** During a valid stop and frisk an officer / agent discovers a belt attached, closed, leather knife sheath. The officer / agent opens the sheath up to see if a knife is inside and, instead, sees what appears to be a small bag of marijuana – this is likely a lawful seizure based upon the plain view doctrine.

**Note:** It is important to remember that the purpose of a frisk is to find and seize “weapons” NOT evidence of a crime (contraband).<sup>5</sup> If, while lawfully frisking for a weapon, an officer / agent discovers contraband – it may be seized and used against the defendant. If asked by Defense Counsel, “*When you frisk, one of the reasons you frisk is to detect contraband, right?*” the answer should be “No. I frisk

only to detect weapons. But, if while doing that I lawfully discover contraband, then I will seize it!”

**“Plain Feel” Doctrine:** If while conducting a valid stop and frisk for a weapon, an officer / agent feels what is “immediately recognized” as contraband, the contraband may be lawfully seized. The incriminating nature of the contraband must be “immediately apparent.” If an officer / agent must “manipulate” the item to figure out it is contraband – it is not lawfully seized.

**Field Examples:**

**Good Seizure:** During a valid stop and frisk, the officer / agent feels in the front pants pocket of the suspect what the officer / agent immediately recognizes as a small quantity of bagged marijuana. The officer / agent seizes the item by pulling it out of the suspect’s pocket and upon inspection and field testing, determines the item is a small bag of marijuana unlawfully possessed.

**Analysis:** This is a good seizure since the officer immediately recognized the item upon first touch as contraband.

**Bad Seizure:** Same as above except upon performing the frisk, the officer / agent feels in the suspect’s front pants pocket and “thinks”, but is not sure, the item is bagged marijuana. The officer / agent squeezes and manipulates the item through the pockets with his fingers until convinced it “feels” like bagged marijuana, and then seizes the item which turns out to be bagged marijuana unlawfully possessed.

**Analysis:** This is a bad seizure since the officer / agent did not “immediately”

<sup>4</sup> *Horton v. California*, 496 US 128 (1990)

<sup>5</sup> *Adams, Warden v. Williams*, 407 US 143 (1972)

recognize the item as contraband upon touch.

**Frisking the “Lunging Area”:** An officer / agent, with lawful authority to conduct a stop and frisk, may frisk not only the person of the suspect for weapons, but also any “lunging area” from which the suspect could obtain a weapon. This will include such nearby areas as a newspaper on the ground, a trash barrel, a jacket in the back seat of a car, under the car seats (if the suspect was originally sitting in the car).<sup>6</sup>

**Frisking Containers:** An officer / agent who finds a closed container within lunging distance of a suspect who is being lawfully stopped and frisked, may open the container to see if it contains a weapon if: a) in light of the officer’s experience and training the item could contain a weapon, and b) the container is NOT locked.<sup>7</sup>

**Field Example and Analysis:** During a lawful “moving” terry stop an officer / agent directs the driver out of the vehicle and conducts a lawful frisk. In this case, the officer / agent may “frisk” under the front driver’s seat, a jacket in the back passenger compartment and inside the unlocked center console for weapons since all of these areas are within the lunging distance of the suspect (when he was in the car) and the “containers” were not locked.

**Use of Force Issues:** Since a *Terry* stop is an “involuntary” detention, reasonable force may be used to execute the stop and, if justified, the frisk.<sup>8</sup> This usually

amounts to forcibly stopping a fleeing suspect and using reasonable force to overcome resistance to a lawful frisk. The force used must be reasonable under the circumstances. The US Supreme Court has used language such as “*some degree of physical coercion*” in describing permissible use of force to execute a *Terry* stop.<sup>9</sup> This article is not intended to review “use of force issues” in detail. Refer to your agency guidelines on the use force as they will be applicable in executing *Terry* stops. Keep in mind that pointing a service pistol at a suspect can be considered the use of force and that this has been found by the U.S. Supreme Court as being justified in the execution of a *Terry* stop of a suspected violent felon.<sup>10</sup>

#### **Additional Points:**

**Ordering Driver Out of a Vehicle:** A driver may be directed out of a car lawfully stopped by the police for a moving violation or on a “Moving *Terry* Stop” with no additional justification.<sup>11</sup> The U.S. Supreme Court made this decision primarily based on “officer safety.” This is a tactical decision for the officer / agent. Some officers like the idea of ordering a driver out of a car for officer safety and control of the suspect. It may also be easier to see items in plain view, handguns concealed on the driver’s person, and to watch for contraband falling onto the roadway as the driver steps out.

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<sup>6</sup> *Michigan v. Long*, 463 US 1032 (1983)

<sup>7</sup> *Id.*

<sup>8</sup> *Graham v. Conner*, 490 US 386 (1989) at Headnote 9: *The right of law enforcement officers*

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*to make an arrest or investigatory stop of an individual, as a “reasonable” seizure under the Federal Constitution’s Fourth Amendment, necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect such arrest or stop.*

<sup>9</sup> *Id.*

<sup>10</sup> *New York v. Earl*, 431 US 943 (1977)

<sup>11</sup> *Pennsylvania v. Mimms*, 434 US 106 (1977)

**Ordering Passenger Out of a Vehicle:** In addition to the driver, the passengers of a vehicle lawfully stopped may be directed out of a vehicle by an officer / agent for officer safety.<sup>12</sup> The same points outlined above apply.

**Running From Police as Grounds to Stop:** Running from the sight of a police officer / agent is a factor that may be considered in determining whether or not *Reasonable Suspicion* to stop exists but may not “by itself” justify a stop and frisk.<sup>13</sup> There must be some other *Reasonable Suspicion Indicators* to support the stop in addition to running from the police.

**Field Example:**

**Bad Stop:** Two uniformed officers are driving down a city street in a jurisdiction with very strict handgun licensing regulations. Concealed handgun permits are rarely granted. The officers see two males, approximate age 20 – 25 years old look in the direction of the marked squad car, turn and run at full speed in the opposite direction. The officers have no other *Reasonable Suspicion Indicators*. The officers pick one of the targets, chase him down, tackle him and perform a frisk, finding an unlicensed handgun.

**Analysis:** This is a bad stop since the only “unusual” thing the officers noticed was running from the police and nothing more.

**Good Stop:** Same fact pattern as above except that before the suspects run away, the officers see one of them place their hand inside their waist jacket, on the strong side where belt attached holsters are

commonly located, and make motions as if they are about to draw a handgun. The two then look in the direction of the squad car, then run in the opposite direction at full speed. The officers chase only the target who appeared to reach into his waistband, tackle him and perform a frisk, finding an unlicensed handgun.

**Analysis:** This is a good stop as the officers had more than just “running from the police” as a *Reasonable Suspicion Indicator*. In this case the officers saw what indicated to an experienced officer that the target may have been armed with a concealed firearm. That, coupled with running from the police added up to good *Reasonable Suspicion* to perform the stop and frisk.

**Anonymous Tips as Grounds to Stop:** An anonymous tip alone, even if detailed, cannot form *Reasonable Suspicion* to conduct a stop and frisk. The officer / agent must add personal observations to corroborate and / or add to information received from the anonymous source.<sup>14</sup>

**Bad Stop:** Police dispatch receives an anonymous 911 call that a white male, approximately 40 years old, wearing tan trousers and a blue polo shirt is standing on the corner of 4<sup>th</sup> Avenue and 71<sup>st</sup> street and is armed with a silver revolver concealed in an ankle holster. The patrol jurisdiction has strict licensing requirements and rarely issues concealed handgun permits. A two officer patrol unit arrives at 4<sup>th</sup> Avenue and 71<sup>st</sup> street within two minutes of the dispatch broadcast. They see a male while fitting that description and immediately perform a stop and frisk, finding an unlawfully concealed handgun.

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<sup>12</sup> *Maryland v. Wilson*, 519 US 408 (1997)

<sup>13</sup> *US v. Wardlow*, 528 US 119 (2000)

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<sup>14</sup> *Florida v. J.L.*, 529 US 266 (2000)

**Analysis:** This is a bad stop and frisk as the officers relied solely on the anonymous tip.

**Good Stop:** Same as above but in this case, once on the scene, the officers spot what appears to be a “bulge” at the left ankle of the target, under his pants cuff. This indicates to an experienced officer that an ankle holster may be present. The officers then immediately perform a stop and frisk and find an unlicensed handgun.

**Analysis:** This is a good stop since the officers added personal observation that corroborated and added to the information contained in the anonymous tip.

**Note:** If sufficiently detailed information is received from an identified and reliable person (not an anonymous source), it may form *Reasonable Suspicion*.<sup>15</sup>

**Evidence Suppression / Court Testimony Tactics:** *Reasonable Suspicion* forms the legal basis to conduct a *Terry* stop. If a defense attorney can convince a Judge, in an Evidence Suppression Hearing that an officer / agent lacked sufficient *Reasonable Suspicion* to perform a stop and / or frisk, any evidence found as a result of the stop / frisk will be suppressed. Since it is often the weapons or contraband found on a frisk that form the basis of an arrest, losing the evidence will obviously create a significant risk of having the entire case dismissed for lack of evidence.

**Articulate!:** The definition most often used for *Reasonable Suspicion* includes the phrase “Articulable facts....” An officer / agent must be able to “articulate” factors that lead the officer / agent to conclude that *Reasonable Suspicion*

existed to support the stop and / or frisk. The officer / agent must, through use of words, make the Judge “see, hear, smell and feel” what the officer / agent did. The officer / agent must paint a verbal picture that makes the Judge “see” the situation through the eyes of an experienced police officer. To an average citizen, a bulge at the lower left ankle, under a pants cuff, may mean nothing. To an experienced police officer it indicates an ankle holster, perhaps because he or she has worn an ankle holster in the past and knows from personal experience the “print” it demonstrates. Or, perhaps the officer / agent has seen other officers, both on and off duty, use them and knows how they appear.

**Quantify Your “Experience”:** If relying on the “plain feel” doctrine, where the officer / agent performed a stop and frisk for a weapon but discovered powdered cocaine in a pocket, the officer / agent must be able to justify how they are qualified to “immediately” recognize powdered cocaine through at suspect’s pants. You can be sure the defense attorney will make this an issue. The court must be convinced that the officer / agent has the training and or experience to back up the “immediate recognition.” Here is an example of what has worked in the past<sup>16</sup>:

*“I have personally frisked at least one hundred (100) suspects, both during Terry Stops and searches incident to arrest and discovered powdered cocaine in small plastic bags in trousers pockets. In*

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<sup>16</sup> Author’s personal experience in New York and Indiana criminal courts

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<sup>15</sup> *Adams, Warden v. Williams*, 407 US 143 (1972)

*addition, during in-service field training for our officers in “drug recognition, I routinely “frisk” other officers who have placed cocaine in their trouser pockets. I have done this at least once a month in the past year. I have also handled at least 25 bags of cocaine in its powdery form seized from automobiles, and this has added to my familiarity with how it feels to the touch I have received formal training on how powdery cocaine feels to the touch at my police academy and while on active duty in the Air Force, using actual powdered cocaine.”*

**Note:** Obviously, an officer / agent must testify truthfully about their experience and training in detecting contraband by feel. The above is intended to serve only as a guide on what has worked in the past.

**Officer Safety Alone Will Not Justify a Frisk:** Assuming that a Judge finds proper *Reasonable Suspicion* to support a *Terry* stop, a weapon seized can still be suppressed (lost) if a defense attorney can convince a Judge that there was no *Reasonable Suspicion* that the suspect was “*armed and dangerous.*” Therefore, when an officer / agent answers the question *Why did you conduct the frisk?* by simply saying “*Officer safety*” and nothing more – there is a great likelihood that the evidence will be lost.

**Field Example:**

**Question:** *Why did you frisk the suspect?*

**Bad Answer:** *Officer safety*

**Good Answer:** *I was in fear for my safety because I was patrolling in a one-officer*

*patrol unit, it was 4:30 a.m., the driver had no driver’s license or vehicle registration, the car’s rear window was broken and I feared the car may have been recently stolen. I know that car thieves use burglar’s tools to steal cars and these tools can be used as a weapon against me. Auto theft is a felony offense and in my experience, the stop and / or arrest of a felon by a one officer patrol unit often results in an assault against the officer. I was concerned with officer safety.*

**Important Note:** All Federal Law Enforcement Officers must check their agency regulations on policy and guidance regarding application of the *Terry* stop legal concepts. This article reviews U.S. Supreme Court rulings on the subject, not individual officer / agent / agency arrest or investigative authority or policy. Most Federal Law Enforcement Officers while on-duty and conducting official duties will have “police” authority as outlined in the preceding reviews. Some Federal Law Enforcement Officers have been granted “peace officer” type status (on and / or off-duty) by state, county or local police authority / statute. It is the individual responsibility of the officer / agent to coordinate with his or her agency to determine if and when he or she has “police” authority regarding *Terry* stop legal and operational concept.