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Constitutional Law--Unreasonable Searches and Seizures--Stop-and-Frisk Statutes [*People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966)]

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CONSTITUTIONAL LAW — UNREASONABLE SEARCHES AND SEIZURES — STOP-AND-FRISK STATUTES

People v. Peters, 18 N.Y.2d 238, 219 N.E.2d 595,
273 N.Y.S.2d 217 (1966).

In the recent case of *People v. Peters*,¹ the New York Court of Appeals had its first opportunity to pass upon the constitutionality of New York's stop-and-frisk statute² which became effective on July 1, 1964. An off-duty policeman heard noises in the hallway of his apartment building early one afternoon. He looked through the peephole in his door and saw two men walking stealthily about the hall. After reporting the incident to the local police by telephone, he returned to the door to see the men going toward the stairway. Getting his gun, he chased the men and collared the defendant, whom he did not recognize as a tenant, on the stairs. The defendant's explanation for his presence in the building was unconvincing, and the policeman led him to the next floor where he frisked him for a weapon by patting his pockets and under his arms. Feeling a hard object which he thought might be a knife, the officer reached into the defendant's right pants pocket and withdrew an opaque plastic envelope. In the envelope, the officer discovered six picks, two Allen wrenches, and a tension

¹ 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).

² The following is the text of the statute:

§ 180-a Temporary questioning of persons in public places; search for weapons.

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. N.Y. CODE CRIM. PROC. § 180-a (Supp. 1964).

The New York statute is based upon the UNIFORM ARREST ACT §§ 2 & 3. The text of that act is reprinted in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942). Three states have adopted the act: DEL. CODE ANN. tit. 11, §§ 1902-03 (1953); N.H. REV. STAT. ANN. §§ 594:2-3 (1955); R.I. GEN. LAWS ANN. §§ 12-7-1 to -2 (1956). A similar provision is included in a very recent draft of a model code by the American Law Institute. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 2.02(2), (5) (Tent. Draft No. 1, 1966). These statutes are basically similar in that, despite the absence of probable cause, they permit a police officer to detain persons whom he suspects have committed a crime. They also permit the officer to "search" the suspect for a weapon, and none of them use the term "frisk."

bar. The local police, who had arrived in response to the officer's call, arrested the defendant and charged him with possession of burglary tools.³

At trial, the defendant's motion to suppress the evidence and dismiss the indictment was denied, and he was convicted on his plea of guilty. The conviction was affirmed by the appellate division, and the defendant appealed by permission.⁴ The court of appeals affirmed the decisions of the lower courts. It held that a policeman, who "reasonably suspects" that he is in danger⁵ while questioning a suspect detained pursuant to the stop-and-frisk law, may frisk the suspect for a weapon. The court further held that if the officer finds an item, the possession of which is unlawful, he may then arrest the suspect, and the evidence so discovered is admissible.⁶

The stopping and questioning of the defendant in *Peters* was found not to constitute an arrest but merely a limited detention for the purpose of inquiry.⁷ It is elementary that a search incident to a lawful arrest is constitutionally valid and that an arrest is lawful if based on probable cause.⁸ According to the court in *Peters*, however, since a stop is not an arrest, it is valid if supported by the "reasonable suspicion" of the officer,⁹ which is the statutory standard.¹⁰ The court explained the difference between "probable cause" and "reasonable suspicion" as follows:

"[P]robable cause" requires satisfactory grounds for *believing* that a crime was committed, while "reasonable suspicion" requires satisfactory grounds for *suspecting* that a crime was committed. The difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk.¹¹

The basic theory supporting the power of the police to stop and

³ 18 N.Y.2d at 241, 219 N.E.2d at 597, 273 N.Y.S.2d at 220 (1966).

⁴ *Id.* at 242, 219 N.E.2d at 597, 273 N.Y.S.2d at 220.

⁵ The court evidently believed that the officer felt endangered even though he took the defendant down a flight of stairs to the next floor before conducting the frisk.

⁶ 18 N.Y.2d at 242-43, 219 N.E.2d at 599, 273 N.Y.S.2d at 223.

⁷ *Id.* at 244, 219 N.E.2d at 598-99, 273 N.Y.S.2d at 222.

⁸ *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

⁹ 18 N.Y.2d at 244, 219 N.E.2d at 599, 273 N.Y.S.2d at 222.

¹⁰ N.Y. CODE CRIM. PROC. § 180-a (Supp. 1964). For text of the statute, see note 2 *supra*.

¹¹ 18 N.Y.2d at 246, 219 N.E.2d at 600, 273 N.Y.S.2d at 224. Thus the court distinguishes between a full search and a frisk and states that it is only the frisk which is authorized by the statute. Presumably, the court felt the distinction was necessary because the exclusionary rule announced in *Mapp v. Ohio*, 367 U.S. 643 (1961) applies

question suspects is that the prevention of crime necessitates prompt inquiry into suspicious circumstances and that the denial of the right to stop and frisk would usurp the policeman's power and destroy his effectiveness as a crime preventive force.¹² Thus the right to detain and question suspects is seen as a basic tool in the policeman's crime prevention kit. Some federal cases have hinted that even federal officers must possess the power to stop and question as a necessary part of their investigative repertoire.¹³ However, there has been no Supreme Court decision regarding the admissibility of evidence discovered during a search or frisk incident to a detention not based upon probable cause.¹⁴ The Supreme Court did make one statement, in *Ker v. California*,¹⁵ which is frequently cited and relied upon in the stop-and-frisk cases. In that case, eight justices agreed that

the States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.¹⁶

While detention for questioning is justified as a necessary investigative power, the frisk is upheld upon "grounds of elemental safety."¹⁷ Proponents of the frisk rule point out that the policeman who is questioning a suspect must be permitted to frisk or search him for a weapon. The law must allow the officer to protect him-

where evidence is discovered by a search not based on probable cause. New York has applied the *Mapp* rule many times. *E.g.*, *People v. Caliente*, 12 N.Y.2d 89, 187 N.E.2d 550, 236 N.Y.S.2d 945 (1962); *People v. O'Neill*, 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962); *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

¹² *People v. Rivera*, 14 N.Y.2d 441, 444-45, 201 N.E.2d 32, 34, 252 N.Y.S.2d 458, 461 (1964), *cert. denied*, 379 U.S. 978 (1965).

¹³ See *Rios v. United States*, 364 U.S. 253, 262 (1960); *United States v. Vita*, 294 F.2d 524, 528-32 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962). A federal district court sitting in New York has recognized the validity of a detention based upon reasonable suspicion. *United States ex rel. Alexander v. Fay*, 237 F. Supp. 142 (S.D.N.Y. 1965).

¹⁴ *People v. Peters*, 18 N.Y.2d 238, 249, 219 N.E.2d 595, 601, 273 N.Y.S.2d 217, 226 (1966) (dissenting opinion of Fuld, J.).

¹⁵ 374 U.S. 23 (1963).

¹⁶ *Id.* at 34. The *Peters* court cited *Ker* and argued that since the frisk is reasonable it is therefore constitutionally valid. 18 N.Y.2d at 247, 219 N.E.2d at 600, 273 N.Y.S.2d at 224-25 (1966).

¹⁷ *Id.* at 245, 219 N.E.2d at 599, 273 N.Y.S.2d at 223; *People v. Rivera*, 14 N.Y.2d at 447, 201 N.E.2d at 35, 252 N.Y.S.2d at 463.

self.¹⁸ This argument is quite valid if one assumes the validity and the necessity of the power of the police to stop and question on the basis of reasonable suspicion.

The next step, having shown that the stop and the frisk are permissible, is to declare that therefore the evidence is admissible.¹⁹ This conclusion follows logically from a determination that the frisk was lawful but not necessarily from the underlying purpose of the frisk rule. Assuming that the reason for allowing the frisk is to protect the police officer, would he not be just as well protected if the evidence which he discovers without probable cause were held inadmissible? It would thus seem possible to have the best of both rules and to protect both the safety of the officer and the right of the suspect to be free from searches not based on probable cause.

It has been suggested that in cases where the evidence seized is not a weapon,²⁰ it should not be admissible.²¹ If this approach were used, a suspect would be protected from prosecution for possession of the article seized, but, of course, the officer would have discovered information which would lead him to watch the future activities of the suspect. A stricter approach, for example, one which would allow the frisk but deny the admissibility of any evidence found, including weapons, is no less unsatisfactory. The result obtained would, in effect, be treating the frisk as valid while treating the evidence as though it were the fruit of an unlawful search.

An argument has been offered in support of the right to stop and frisk which adds some weight to the theory that the evidence discovered during a frisk, whether or not it is a weapon, should be admissible. This argument is advanced by Justice Traynor who

¹⁸ Warner, *supra* note 2, at 324-25.

¹⁹ *People v. Peters*, 18 N.Y.2d 238, 246, 219 N.E.2d 595, 599, 273 N.Y.S.2d 217, 223 (1966).

²⁰ *E.g.*, *People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966) (burglary tools); *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (heroin); *People v. Norris*, 46 Misc. 2d 44, 258 N.Y.S.2d 967 (Sup. Ct. 1965) (marijuana cigarettes); *People v. Martin*, 46 Cal 2d 106, 293 P.2d 52 (1956) (marijuana).

²¹ *People v. Sibron*, *supra* note 20, at 605, 219 N.E.2d at 197, 272 N.Y.S.2d at 376 (1966) (dissenting opinion of Van Voorhis, J.); 50 CORNELL L.Q. 529, 538 (1965). This argument was declared unsound by the United States Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), wherein the Court stated: "Once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone." *Id.* at 769.

states that giving the police officer the right to stop and question would involve

such a minor interference with personal liberty that it would touch the right of privacy only to serve it well. If questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of their personal liberty and reputation. If it revealed probable cause it would do no more than open the way to a valid arrest.²²

Thus, Justice Traynor argues, only the criminal is harmed by permitting detention of suspects, and presumably his argument could be extended to assert that only the criminal is harmed by the frisk. This argument is rather weak in that it gives the guilty person (or one who, although innocent, unwittingly possesses some article unlawfully) a lesser right than that reserved for the innocent.²³ Also, it must be pointed out that although the search of an innocent person would reveal nothing incriminating, it is not at all clear that being detained and questioned by a policeman is only a slight invasion of privacy. It seems likely that a certain stigma could attach to persons who are detained, even though it probably would be less serious than the stigma connected with an arrest. It has been suggested that employers and others who request people to fill out personal history forms may ask whether persons have ever been detained in addition to the usual question regarding arrests.²⁴

Another argument which has been advanced in support of the frisk rule is that since the exclusionary rule announced in *Mapp v. Ohio*²⁵ was established to deter unlawful police conduct, it should not apply to frisks which are, and will continue to be, conducted by police officers for the purpose of self-protection. It is argued that policemen will frisk suspects for weapons as a matter of self-

²² Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 334. A similar statement is found in *United States v. Thomas*, 250 F. Supp. 771, 791 (S.D.N.Y. 1966).

²³ In an analogous vein, the numerous cases holding that an arrest is not justified by what the subsequent search discloses, e.g., *Henry v. United States*, 361 U.S. 98 (1959), or that a search is not justified by what is discovered, e.g., *United States v. Di Re*, 332 U.S. 581 (1948), must implicitly reject the idea that there is a different standard for the guilty than for the innocent. As Judge Fuld points out, "the rights and privileges guaranteed by the Constitution are assured to every individual, to the worst and meanest of men as well as to the best and most upright." *People v. Peters*, 18 N.Y.2d 238, 249, 219 N.E.2d 595, 601, 273 N.Y.S.2d 217, 226 (1966) (dissenting opinion).

²⁴ Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 37 (1957).

²⁵ 367 U.S. 643 (1961). For a discussion of the case, see note 11 *supra*.

protection whether or not the law permits it.²⁶ This amounts to a confession that the law can do nothing about the abuse of police power and constitutes a decision to give up the effort. It seems that the law should not condone unlawful, improper police practices by setting a lesser standard.²⁷

Critics of the stop-and-frisk laws are numerous and vociferous, one of the most persuasive being Judge Fuld who filed a strong dissent in *Peters*.²⁸ Judge Fuld feels and fears that stop-and-frisk laws are simply a means of evading the constitutional prohibition against unreasonable searches and seizures and of emasculating the *Mapp* rule.²⁹ Indeed, the chief drafter of the Uniform Arrest Act has stated that one of the virtues of the statute is that it makes it possible to convict known criminals of carrying concealed weapons even in jurisdictions following the exclusionary rule.³⁰

As long as the officer is searching *for a weapon* rather than contraband, any contraband he discovers is likely to be held admissible. It has been said that "we must be careful to distinguish that the frisk . . . includes only a frisk for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest."³¹ Since there are often only two parties present at the time of a frisk, the officer and the suspect, the question whether the officer was actually searching for a weapon is likely to be determined on the basis of the conflicting testimony of the two parties.³² Other

²⁶ Warner, *supra* note 2, at 325; 50 CORNELL L.Q. 529, 537 (1965).

²⁷ See Foote, *supra* note 24, at 43, where it is suggested that setting more lenient standards might not make police compliance with the law more likely.

²⁸ 18 N.Y.2d at 248-49, 219 N.E.2d at 601-02, 273 N.Y.S.2d at 225-26 (1966) (dissenting opinion).

²⁹ *People v. Rivera*, 14 N.Y.2d 441, 448, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 464 (1964) (dissenting opinion), *cert. denied*, 379 U.S. 978 (1965).

³⁰ Warner, *supra* note 2, at 325-26. The *Mapp* rule has already been considerably eroded by the frisk cases. A gun discovered in a man's briefcase during a frisk was held admissible in a prosecution for carrying a concealed weapon, even though the policemen could have protected themselves by simply keeping the briefcase out of the reach of the suspect. *People v. Pugach*, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S. 2d 833, *cert. denied*, 380 U.S. 936 (1964), *appeal dismissed and cert. denied*, 382 U.S. 20 (1965), *appeal dismissed for want of a substantial federal question*, 383 U.S. 575 (1966). In *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966), a search rather than a frisk was upheld. The court did not admit that it was a search which was upheld, but there was no patting of the defendant's exterior clothing before heroin was discovered in his pocket. The Supreme Court could reverse this decision without reaching the question of the validity of the frisk by holding that the search in *Sibron* was not of the type authorized by the New York statute.

³¹ *State v. Terry*, 5 Ohio App. 2d 122, 130, 214 N.E.2d 114, 120 (1966).

³² *E.g.*, *People v. Norris*, 46 Misc. 2d 44, 258 N.Y.S.2d 967 (Sup. Ct. 1965). The only witness who testified as to the circumstances surrounding the frisk was the police

things being equal, it is probable that the officer's testimony will be considered more reliable. In addition, it would be naive to think that the availability of the frisk for a weapon would not lead to a strong emphasis in police training on the importance of the frisk as a self-protective measure with the perhaps subconscious hope that it would turn up evidence which could be used to convict criminals. Thus, it would seem likely that the frisk would become an extremely popular police practice,³³ one which is peculiarly subject to abuse by over-zealous policemen.

Police detention, questioning, and frisking based only on reasonable suspicion may be a major source of friction between the police, who represent society and its rules of conduct, and members of minority groups, such as Negroes and teenagers, who are least able to assert their constitutional rights.³⁴ It seems probable that a police officer who customarily abuses his right to stop and frisk would be less likely to mistreat a well-dressed member of the upper or middle classes than a Negro or teenager, who he knows is less able and less likely to seek redress for an invasion of his constitutional rights.

Attorneys for Peters have filed a jurisdictional statement to the United States Supreme Court. Because the Court has never passed upon the validity of either a common law or statutory stop-and-frisk rule, the future of this case will be watched with interest by both prosecutors and defense counsel. If the Court affirms *Peters*³⁵

officer who conducted it. Needless to say the court accepted his testimony that he thought the defendant might be carrying a weapon. Obviously the testimony of the officer is likely to be uncontradicted in all those cases where the defendant exercises his constitutional privilege to remain silent.

³³ *But see* Warner, *supra* note 2, at 324, where it was argued, more than twenty years ago, that good police practice necessitates a frisk prior to the commencement of questioning of a suspect.

³⁴ See Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

³⁵ It seems unlikely that the Court would affirm *Peters* because of the fourth amendment objections discussed herein. Two of the Court's recent decisions indicate a less obvious but quite cogent objection which would probably be applied to the stop-and-frisk rule. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court set forth a comprehensive code covering custodial interrogation and the admissibility of statements made by an accused in such a situation. The Court indicated that the rules applied "when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning." *Id.* at 478. *Miranda* admittedly is based on the fifth amendment privilege against self-incrimination, but the reasoning underlying the decision seems equally applicable to the stop-and-frisk situation, because the suspect who is stopped and frisked would almost certainly be held to have been in custody. In addition, in *Schmerber v. California*, 384 U.S. 757 (1966), decided soon after *Miranda*, the Court upheld the admissibility of blood test evidence taken from an accused who was in custody despite his refusal to submit to the test. The Court dis-

or merely denies certiorari, it seems probable that other states will follow New York's lead and pass similar statutes or adopt the frisk rule by judicial decision.³⁶ The frisk rule is undeniably a limitation on *Mapp v. Ohio*,³⁷ and if the Supreme Court upholds the rule's constitutionality or remains neutral, prosecutors and police commissioners in other jurisdictions will be in a better position to bring about its adoption.

Effective law enforcement and the protection of police officers performing this task are important objectives in our society, but they do not outweigh the individual's right of privacy.³⁸ It is submitted that the stop-and-frisk concept as interpreted by the New York Court of Appeals will constitute a positive threat to the individual's right of privacy unless effective rules for the prevention of its abuse are developed.

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tinguished between "testimonial" and "physical" evidence for the purposes of the privilege against self-incrimination. While the gun in *Peters* is "physical" evidence like the blood sample in *Schmerber*, the Court made it clear that even physical evidence could not be taken from an accused unless the search was supported by probable cause. *Id.* at 768.

³⁶ An Ohio court followed the latter course in *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966). A Pennsylvania court relying upon *Terry* and other cases also adopted the frisk rule. *Commonwealth v. Hicks*, 223 A.2d 873 (Pa. Super. Ct. 1966). *But see* *United States v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966), where a federal court sitting in Pennsylvania rejected the frisk rule.

³⁷ 367 U.S. 643 (1961). For a discussion of the case, see note 11 *supra*.

³⁸ *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).