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HOW *TARHAQA ALLEN V. NEW YORK CITY POLICE DEPARTMENT* JUMPED THE GUN BY LIMITING PROTECTIVE SEARCHES TO OUTER CLOTHING

ANNE MARIE ESPOSITO[†]

“What does a fatal shoot-out look like? It’s very quick. A man pulls out a gun and shoots another man, dead—before either has time to think, let alone talk, negotiate, argue, confess, pontificate or repent.”¹ It is every police officer’s worst nightmare and rightfully so. Last year, gunshots caused more than one-third of American police officer deaths.² But police officers are not entirely without protection. Since 1968, the Supreme Court has sanctioned protective searches, which allow an officer to conduct an initial search for weapons when dealing with an armed and dangerous suspect.³

Recently, in *Tarhaqa Allen v. N.Y.C. Police Department*,⁴ the Southern District of New York limited protective searches to outer clothing.⁵ Under this holding, an officer is unable to search a bag or backpack within the suspect’s reach, even if the officer believes that the bag contains a deadly weapon.⁶ In *Tarhaqa Allen*, however, the Southern District misinterpreted *Terry v. Ohio*, which merely requires that a protective search be reasonable and not that the search be limited to outer clothing.⁷

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¹ Virginia Heffernan, *Cop Shot*, N.Y. TIMES MEDIUM BLOG (June 29, 2007, 2:22 PM), <http://themedium.blogs.nytimes.com/2007/06/29/cop-shot/>.

² 162 American police officers were killed in 2010 and fifty-nine of those deaths were caused by gunshots. *Honoring Officers Killed in the Year 2010*, THE OFFICE DOWN MEMORIAL PAGE, INC., <http://www.odmp.org/year.php> (last visited Jan. 12, 2011). Forty-seven officers were killed by gunshots in 2009. *Id.*

³ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁴ No. 07 Civ. 8682(RPP), 2010 WL 1790429 (S.D.N.Y. May 5, 2010).

⁵ See *id.* at *7.

⁶ See *id.* (“Officer Gonzalez’s search of Allen’s bag exceeded the scope of *Terry* pat-down which is limited to outer clothing.”).

⁷ See *Terry*, 392 U.S. at 29–30.

The holding in *Tarhaqa Allen* is also inconsistent with the fundamental policy underlying *Terry*: police officer and public protection.⁸ Therefore, a police officer should be permitted to search a bag or backpack, provided the officer: (1) reasonably believes the suspect is armed and dangerous; (2) has reasonable suspicion to stop the suspect; and (3) does not exceed the scope of the search.⁹

In *Tarhaqa Allen*, the plaintiff, Allen, entered a housing development without a key and without signing the guest sheet in the lobby.¹⁰ A sign posted on the building warned trespassers that they would be subject to arrest.¹¹ Three police officers—Officers Gonzalez, Ruiz, and Figuereo—stopped Allen as he attempted to leave the building.¹² Gonzalez asked Allen for identification and discovered that Allen did not live at that address.¹³ Allen explained that he was dropping off a package at his sister-in-law's apartment, 8-B.¹⁴ Figuereo went up to the apartment to verify his story, but Allen's sister-in-law was asleep and did not answer the door.¹⁵ When Figuereo returned, the officers accompanied Allen upstairs and knocked on the door again.¹⁶ Still, no one answered.¹⁷ Gonzalez asked Allen what was in his bag and looked inside it but did not see a weapon.¹⁸ Figuereo patted down Allen's pants, searched his pockets, and removed his keys.¹⁹ At this point, Allen's brother-in-law arrived at the apartment but could not identify Allen.²⁰ Suspicious of Allen's story, Figuereo used Allen's keys to unlock the apartment door.²¹ When the keys worked, Figuereo told Allen that he was free to go.²²

⁸ See *id.* at 29.

⁹ See *id.* at 30–31.

¹⁰ 2010 WL 1790429, at *1.

¹¹ *Id.*

¹² *Id.* at *2.

¹³ *Id.*

¹⁴ *Id.* at *1–2.

¹⁵ *Id.* at *2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at *3.

²¹ *Id.*

²² *Id.*

Even though Allen was not arrested, he sued the police department, alleging that the officers violated his Fourth Amendment rights.²³ Specifically, Allen claimed that the officers should not have searched his bag.²⁴ The district court found that police officers can search a suspect for a weapon if the officer reasonably believes that the suspect is armed and dangerous, but the search is limited to outer clothing.²⁵ The court quoted *Terry*, upholding a “carefully limited search of the outer clothing . . . in an attempt to discover weapons.”²⁶ Since Allen’s bag was not outer clothing, the search therefore “exceeded the permissible scope of a *Terry* stop.”²⁷ Nonetheless, the court granted defendant’s summary judgment motion on the grounds of qualified immunity.²⁸

On June 10, 1968, the Supreme Court rendered two leading decisions on this issue: *Terry v. Ohio*²⁹ and *Sibron v. New York*.³⁰ In *Terry*, the Court found a protective search constitutional because the officer patted down the suspect’s outer clothing before he removed a weapon from the suspect’s pockets.³¹ The officers acted with reasonable suspicion and conducted a search “confined in scope [and] . . . reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”³² The Court emphasized that reasonableness in each case would depend on the particular facts but upheld that specific search because it only involved a limited search of outer clothing.³³ On the other hand, in *Sibron*, the Court found a pants pocket search unconstitutional.³⁴ The officers did not have

²³ *Id.* at *4.

²⁴ *See id.* at *2, *7.

²⁵ *Id.* at *7.

²⁶ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)) (internal quotation marks omitted).

²⁷ *Id.*

²⁸ *See id.* at *9.

²⁹ 392 U.S. 1 (1968).

³⁰ 392 U.S. 40 (1968).

³¹ *Terry*, 392 U.S. at 29–30.

³² *Id.* at 29.

³³ *Id.* at 30.

³⁴ *Sibron*, 392 U.S. at 65.

reasonable suspicion to search the suspect,³⁵ and the officer did not conduct a limited pat-down search before thrusting his hand into the suspect's pocket.³⁶

The argument that an investigative stop is limited to outer clothing is relatively new. Only one 2010 Pennsylvania District Court agrees with *Tarhaqa Allen*.³⁷ The Ninth³⁸ and Fourth³⁹ Circuits have both permitted backpack searches during an investigatory stop as long as the officers: (1) had reasonable suspicion to stop the suspect in the first place; (2) "ha[d] reason to believe that the suspect [was] armed and dangerous"; and (3) limited the search in scope to finding a weapon.⁴⁰

Terry held that a pat-down search limited to outer clothing is constitutional, but did not hold that protective searches are *only* limited to outer clothing.⁴¹ In *Terry*, the Supreme Court emphasized that it was only addressing an extremely narrow issue particular to the facts of the case⁴²: "The issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure."⁴³ The Court specifically stated that it was not going to outline the "constitutional limitations" of police conduct.⁴⁴ In the sentence immediately preceding its holding, the Court cautioned

³⁵ *Id.* at 64.

³⁶ *Id.* at 65.

³⁷ See *United States v. Bennett*, No. 08-535, 2010 WL 1427593, at *6 (E.D. Pa. Apr. 8, 2010). The Pennsylvania District Court's decision, however, is misguided. The court relied on the Supreme Court case *Bond v. United States*, 529 U.S. 334, 339 (2000), in finding that the physical manipulation of a bag violated the Fourth Amendment. *Bennett*, 2010 WL 1427593, at *6. *Bond*, however, involved a border search, where the officers were verifying the citizenship status of passengers, and were not conducting a *Terry* stop. See *Bond*, 529 U.S. at 335. Therefore, a different standard applied and different government interests were at stake.

³⁸ See *United States v. Medina*, 130 F. App'x 862, 863–64 (9th Cir. 2005); *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976) (per curiam).

³⁹ See, e.g., *United States v. Mitchell*, No. 09-4481, 2010 WL 2851760, at *5 (4th Cir. July 21, 2010).

⁴⁰ See *Nash v. Vancouver Police Dep't*, No. C10-5055(RBL), 2010 WL 2720842, at *6 (W.D. Wash. July 8, 2010) (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

⁴¹ *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

⁴² See *Terry*, 392 U.S. at 15 (cautioning that it will only address "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest").

⁴³ *Id.* at 12.

⁴⁴ *Id.* at 16 (announcing that it would not "canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him").

that “[e]ach case of this sort will, of course, have to be decided on its own facts.”⁴⁵ Thus, the Court did not intend to establish a bright line rule but instead a more flexible case-by-case standard.

Later Supreme Court cases are consistent with this interpretation. For example, in 1993, the Supreme Court reiterated that protective searches under *Terry* are “limited to that which is necessary for the discovery of weapons” but did not mention the supposed “limited to outer clothing” requirement.⁴⁶ In 2000, the Supreme Court again emphasized that *Terry* requires a protective search to be reasonable but did not state that it must be limited to outer clothing.⁴⁷

Consequently, the court in *Tarhaqa Allen* misinterpreted *Terry*. When the court in *Tarhaqa Allen* quoted *Terry* and stated that an officer can only conduct a “carefully limited search of the outer clothing,”⁴⁸ the court was citing to a holding specific to the facts in *Terry*. The court in *Tarhaqa Allen* should have merely construed *Terry* as an example of a reasonable protective search, not as a bright-line rule foreclosing the constitutionality of all other types of searches.

The language in *Sibron* does not limit protective searches to outer clothing either. In *Sibron*, the Court held that officers who reasonably believe a suspect is armed and dangerous must attempt “an initial limited exploration” of outer clothing such as a pat-down search before reaching into a suspect’s pockets.⁴⁹ The Court in *Sibron* merely addressed the preliminary steps required before a pants pocket search may be conducted and not the boundaries of constitutional police conduct.⁵⁰ In this context, by

⁴⁵ *Id.* at 30.

⁴⁶ *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (“[A] protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly ‘limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.’” (quoting *Terry*, 392 U.S. at 26)).

⁴⁷ *See Illinois v. Wardlow*, 528 U.S. 119, 127 (2000) (Stevens, J., concurring in part) (“We approved as well ‘a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual’” (quoting *Terry*, 392 U.S. at 27)).

⁴⁸ *Tarhaqa Allen v. N.Y.C. Police Dep’t*, No. 07 Civ. 8682, 2010 WL 1790429, at *7 (S.D.N.Y. May 5, 2010) (quoting *Terry*, 392 U.S. at 30) (emphasis added).

⁴⁹ *See Sibron v. New York*, 392 U.S. 40, 65 (1968) (contrasting with the search conducted in *Terry*).

⁵⁰ *See, e.g., Nash v. Vancouver Police Dep’t*, No. C10-5055RBL, 2010 WL 2720842, at *6 (W.D. Wash. July 8, 2010) (“Any limited intrusion designed to

requiring a pat-down search before a pocket search, the limitation on outer clothing prevents officers from immediately searching underneath clothing⁵¹ but not necessarily from searching backpacks or bags.

Moreover, if an officer is allowed to search inside a suspect's pants pockets, a backpack search will not make the search more intrusive. In other contexts such as school searches, a pants pocket search is much more invasive than merely looking at the contents of someone's backpack.⁵² If intrusive pocket searches are permitted under certain circumstances, why would a less intrusive backpack search be completely banned?

Furthermore, limiting protective searches to outer clothing undermines the primary policy for allowing protective searches in the first place: "the protection of the police officer and others nearby."⁵³ Officers cannot provide meaningful protection if they are unable to search backpacks.⁵⁴ A person carrying a weapon in a backpack can cause harm just as easily as a person carrying a

discover guns, knives, clubs or other instruments of assault are permissible." (quoting *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976)).

⁵¹ See *Sibron*, 392 U.S. at 65.

⁵² See *H.Y. v. Russell Cnty. Bd. of Educ.*, 490 F. Supp. 2d 1174, 1186 (M.D. Ala. 2007) ("[Placing a hand in the Plaintiffs' pockets is] clearly more intrusive than . . . merely looking through Plaintiffs' book bags and purses or viewing the contents of their pockets.").

⁵³ *Terry*, 392 U.S. at 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby . . .").

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry*'s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern.

Florida v. J.L., 529 U.S. 266, 272 (2000); see also *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (recognizing that "[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence" (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)) (internal quotation marks omitted)).

⁵⁴ "[S]uspects may injure officers and others by virtue of their access to weapons even though they may not have a weapon on their person . . ." *United States v. Medina*, 130 F. App'x 862, 864 (9th Cir. 2005) (noting that a suspect can reach a weapon in a fanny pack). Some courts even argue that pat-down searches themselves are inadequate to protect police officers and the public in certain circumstances. See *Nash*, 2010 WL 2720842, at *7 (finding that an officer probably will not find bullets or a knife hidden in a pocket or sock and allowing a suspect to leave the stop with bullets to load into a nearby gun would certainly pose a threat to people in the area).

weapon on their person.⁵⁵ An unrestrained suspect could just as quickly grab a weapon from a backpack within his immediate reach as he could grab a weapon from his pocket.⁵⁶ Therefore, allowing police officers to search an easily accessible backpack is consistent with the policy underlying *Terry*.⁵⁷

Finally, permitting backpack searches will not allow officers to exercise unfettered discretion. First, the search must be narrowly tailored to achieve the purpose of finding weapons and cannot be an exploratory search for contraband.⁵⁸ For example, in *Johnson v. County of Nassau*, a Fourth Amendment claim survived a motion to dismiss where the officers, in search of a gun, removed a book from plaintiff's backpack and flipped through its pages.⁵⁹ Similarly, where the backpack had been taken away from a suspect and placed outside the suspect's reach, courts have found that a backpack search is outside the scope of *Terry*.⁶⁰ Second, the officer must have reasonable suspicion for the initial stop.⁶¹ In other words, "the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion."⁶² Third, the officer must also "have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior."⁶³ Therefore, there are still several limitations in place.

⁵⁵ See *Medina*, 130 F. App'x at 864.

⁵⁶ See *id.*

⁵⁷ See *id.* ("Because suspects may injure officers and others by virtue of their access to weapons even though they may not have a weapon on their person, the physical scope of a *Terry* protective search is not limited to the detainee's person.").

⁵⁸ See *Terry*, 392 U.S. at 29–30 (finding the search must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" and may not be a general exploratory search for contraband).

⁵⁹ *Johnson v. Cnty. of Nassau*, 09-CV-4746(JS)(MLO), 2010 WL 3852032, at *2 (E.D.N.Y. Sept. 27, 2010) ("Taking these allegations together, it is plausible to infer that the officers were not searching for weapons when they searched Plaintiff's bag and started 'leafing' through the pages of Plaintiff's books.").

⁶⁰ Compare *United States v. Pardue*, 385 F.3d 101, 105 (1st Cir. 2004) (finding that "by the time [the officer] searched the backpack, it had already been taken away from [the suspect] and there was no apparent risk that [the suspect] could have obtained a weapon"), with *Medina*, 130 F. App'x at 864 (finding a fanny pack is more easily accessible to the suspect).

⁶¹ See *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

⁶² *Terry*, 392 U.S. at 21.

⁶³ *Id.* at 28.

A police officer's most prominent duty is the protection of the public. But this protection is meaningless if courts continue to restrict an officer's conduct during protective searches. Prohibiting officers from searching backpacks puts the officer and the public at risk, especially when dealing with an armed and dangerous suspect. Limiting protective searches to outer clothing undermines the fundamental policy of *Terry* and runs contrary to the Court's requirement that each case be analyzed on its specific facts. The only way police officers will be able to effectively protect the public and themselves is if they are fully able to exercise the protection provided for them under the Constitution.