VI. Conclusion

Traditionally, the Supreme Court has been hesitant to unequivocally express acceptance of DNA evidence for use in trial. This hesitation stemmed from a lack of satisfying knowledge about the whole procedure and its potential impact in future cases. It is admirable that the Court seemed to have taken measures to remedy this situation. Not only did the Court inquire into the availability of laboratory and testing facilities in the Philippines, the topic of DNA even became the subject of a paper presented during the Third Convention and Seminar of Philippine Judges Association.[67] With the Court's interest in DNA evidence, the ruling in *Vallejo* was an expected occurrence. In 2001, the Court foresaw a future decision which would rule on the admissibility of DNA evidence. Barely a year after, a *per curiam* decision achieved in setting a precedent for the admissibility of DNA evidence without much antagonism and fanfare and without even discussing admissibility standards under the *Frye* or *Daubert* cases.

The use of scientific methods in court has been increasing through the years in a variety of cases. As previously mentioned, blood grouping tests have been employed to establish paternity. Additionally, psychological tests, fingerprinting and polygraph testing have also been utilized. The use of DNA evidence is logically the next step in the collaboration of the courts and science in furtherance of justice.

67. Saturnina C. Halos, *Current Trends in DNA Typing and Applications in the Judicial System*, paper presented at the Third Convention and Seminar of Philippine Judges Association (June 11, 1999).

Airport Searches: An Additional Exception to the Search Warrant Requirement?

*Aimee Bernadette C. Dabu**

* '04 J.D., cand., Ateneo de Manila University School of Law. Editor, *Ateneo Law Journal.*

Cite as 48 Ateneo L.J. 53 (2003).

I. INTRODUCTION

Government is powerful. When unlimited, it becomes tyrannical. The Bill of Rights is a guarantee that there are certain areas of a person's life, liberty, and property which governmental power cannot touch.[1]

The private areas of every individual's life within a civilized society are notably enshrined in the Bill of Rights for the primary aim of their defense and protection against arbitrary and unreasonable government intrusions.

Of relevance to this written work is the guaranty of the most fundamental of all individual rights declared and recognized in the political codes of civilized nations — the right against unreasonable searches and seizures.[2] The 1987 Constitution[3] thus encompasses the ancient tradition that a man's home is his castle, "safe from intrusion even by the king...[and has] received unwavering recognition and acceptance in our case law."[4]

Philippine case law has consistently sustained the view that the modern understanding of this constitutional guaranty is not just restricted to the circumscription of the power of the State over a person's home and possessions. Rather, the Constitution protects the privacy and sanctity of the person himself, and not just the sanctity of his abode. It is a guarantee of the right of the people to be secure *in their persons* against unreasonable searches and seizures.[5] Such is the paramount significance of this constitutional guarantee that is underscored by the exclusionary rule,[6] mandating that

1. JOAQUIN G. BERNAS, S.J., THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER PRIMER 26 (2002).
2. U.S. v. Arceo, 3 Phil. 381, 384 (1904).
3. PHIL. CONST. art. III, § 2:

   The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the persons or things to be seized.
4. People v. Malmstedt, 198 SCRA 401, 422 (Narvasa, J., concurring and dissenting) (1991).
5. PROTECTION OF THE ACCUSED: A HUMAN RIGHT 82-4; *see also* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 147 (1997); Katz v. U.S., 389 U.S. 347, 350-51 (1967) (emphasis supplied).
6. PHIL. CONST. art. III, § 3:

   The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

   Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

property taken by the State in violation of the said right will be deemed inadmissible in evidence for any purpose and in any proceeding.

Nonetheless, clear as the constitutional guaranty may seem, many unresolved issues regarding the Search and Seizure Clause have arisen and still continue to ensue over the years. On this account, "no Philippine Supreme Court decision on search and seizure has ever really attempted a broad-ranged analysis of the clashing interests of law enforcement and individual liberty. Consequently, many interstices and gray areas remain.... Many unresolved problems remain in the area of warrantless searches and seizures."[7]

What is certainly undisputable is the general rule that searches and seizures are unreasonable unless authorized by a validly issued search warrant or warrant of arrest.[8] This notwithstanding, the increasing complexities of the modern world and the growing need for stricter regulation by the State of its citizens sanctioned several exceptions to the guaranties that have been firmly ingrained as sound constitutional principles. Jurisprudence recognizes five generally accepted exceptions to the warrant requirement.[9] These are: (1) search incidental to a lawful arrest;[10] (2) search of moving vehicles;[11] (3) seizure in plain view;[12] (4) customs searches;[13] and (5) waiver of the accused of his right against an unreasonable search and seizure.[14]

American jurisprudence, with the case of *Terry v. Ohio*,[15] added a sixth exception to the list with the introduction of what is now popularly known as the "stop and frisk." Stop and frisk was commonly understood as a street encounter between a private citizen and a police officer, wherein the latter may constitutionally stop a suspicious person on the street and ask him questions or frisk him if he had suspicions that such person was carrying a dangerous weapon. *Terry* delineated specific ground rules for the conduct of a valid stop and frisk. As will be demonstrated later, the doctrine outlined in *Terry v. Ohio* with regard to stop and frisk cases refers to strict conditions and

7. Dr. Antonio Bautista, *The Philippine Law on Search and Seizure: A Restatement*, 51 PHIL. L.J. 236 (1976).
8. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 148 (1997) [hereinafter BERNAS COMMENTARY].
9. *Id.* at 169.
10. Posadas v. Court of Appeals, 188 SCRA 288 (1990).
11. People of the Philippines v. Court of First Instance of Rizal, 101 SCRA 86 (1980).
12. People v. Musa, 217 SCRA 597 (1993).
13. Papa v. Mago, 22 SCRA 857 (1968).
14. People v. Felimon Ramos, 222 SCRA 557 (1999).
15. 392 U.S. 1 (1968).

limitations concerning the manner of conducting a class of valid warrantless searches.

Over the years, the applicability of the *Terry* doctrine has been made to permeate various situations both in American and Philippine jurisprudence which has been justified by the necessity of the times and has led to the writing of this work. The case of *People v. Canton*[16] did not involve a street encounter between a police officer and a suspicious individual for the search of weapons. Rather, what was involved was an airport search conducted by a civilian employee on another civilian for the search of contraband.

From the dissimilar facts of both *Canton* and *Terry*, it may seem difficult, if not impossible, to apply the principle of *stare decisis*. Yet, the Supreme Court has drawn parallelisms between *Canton* and *Terry*, ruling that the questioned search was pursuant to airport security procedure, akin to a "stop and frisk," and was "not confined only to [a] search for weapons under the '*Terry* search' doctrine."[17]

What is questionable is how the Court, in effect, extended the very specific limits enunciated in *Terry* to cover standard airport security procedures and ruled that "this [search involved in the instant case] constitutes *another exception* to the proscription against warrantless searches and seizures."[18]

This paper will attempt to answer the following questions: if indeed the *Terry* doctrine on stop and frisk (which is already considered a recognized exception to a search warrant) can be applied to standard airport security procedures, why did the Court rule that such airport procedures constitute *another exception*? Is *People v. Canton* really a hybrid of stop and frisk? Or is it separate and distinct, constituting the seventh exception added by the Supreme Court to the list? If so, since the other exceptions to the warrant requirement embody strict guidelines, what are the limitations and conditions to the exercise of the *Canton* exception?

II. THE CONTROVERSIAL CASE OF *People v. Canton*

A. *The Facts of the Case*

Susan Canton was charged with the violation of Republic Act No. 6425, otherwise known as the Dangerous Drugs Act of 1972, for being in illegal possession of approximately one kilo of methamphetamine hydrochloride ("shabu") without a corresponding prescription or license.

16. G.R. No. 148825, Dec. 27, 2002.

17. *Id.* at 4.

18. *Id.* at 5 (emphasis supplied).

As a departing airline passenger bound for Saigon, Canton underwent the regular airport inspection in the Ninoy Aquino International Airport. When she passed through the metal detector booth, the alarm sounded. This prompted a civilian employee of the National Action Committee on Hijacking and Terrorism (NACHT), who was also the frisker on duty at the time, to call her attention and ask if she could be searched.

Upon frisking Canton, the employee felt something bulging in her abdominal area. The frisker inserted her hand under Canton's skirt, pinched the package several times and noticed that the package's contents felt like rice granules. With a more thorough search, the frisker further felt similar packages in the front of Canton's genital area and thighs. When asked to yield the packages, Canton refused, explaining that these packages only contained her money.

The frisker reported the incident to her supervisor who instructed the former to call a Customs Examiner and bring Canton into the ladies room for a closer physical examination. While in the ladies room, Canton was instructed to remove her skirt, girdles, and panties, to which she complied. The frisker and Customs Examiner discovered three packages, individually wrapped and sealed in gray packaging tape, and which were voluntarily handed over by Canton. A laboratory examination showed positive results for "shabu."

Charges were filed in the Regional Trial Court of Pasay City, where Canton was found guilty beyond reasonable doubt of violating the Dangerous Drugs Act. A motion for reconsideration was filed which the trial court denied ruling that the specimens seized from the accused were procured during a "routine frisk at the airport and were therefore acquired legitimately pursuant to airport security procedures."[19]

Unsatisfied with the above decision, Canton appealed to the Supreme Court raising the arguments that the trial court erred: (1) in justifying the warrantless search against her based on the alleged existence of probable cause; (2) in holding that the warrantless search was valid being incidental to a lawful arrest since she was caught in flagrante delicto; (3) in ruling that the frisker went beyond the limits of the "Terry search" doctrine;[20] and (4) that the trial court erred in applying the case of People v. Johnson.[21]

19. *Id.* (citing Original Record, 466-71).

20. Referring to the limits for a valid "stop and frisk" as enunciated by the United States Supreme Court *in* Terry v. Ohio.

21. People of the Philippines v. Leila Johnson, 348 SCRA 526 (2000).

The facts and issues of this case are similar to that of *Canton*. Here, the accused was also a departing passenger convicted of illegal possession of prohibited drugs found in her custody in the airport, where she was also subjected to a frisk

B. *The Court's Decision and the Onset of the Controversy*

The Supreme Court affirmed Canton's conviction. Although the Court was in agreement with Canton that the search conducted upon her person was not one incidental to a lawful arrest, it agreed with the trial court in ruling that the search conducted was pursuant to a regular airport security procedure, akin to the "stop and frisk" in the American case of *Terry v. Ohio*. Canton invoked the intricacies of the *Terry* doctrine in her defense, particularly that the "stop and frisk" should have been performed by a police officer and limited to the outer clothing of the suspected person for the discovery of weapons that threatens such officer's safety and security.

However, despite quoting a portion of the *Terry* decision on the limitations involved in a stop and frisk, the Court glossed over the apparent discrepancies in the factual backgrounds of the two cases as raised by the defendant. Instead, it referred to Republic Act No. 6235,[22] which authorizes a search for prohibited materials or substances, in justifying the routine airport security procedure as a valid warrantless search. The Court further upheld the applicability of the case of *People v. Johnson* and ruled that such airport procedures were necessitated by the prevailing danger embraced in air travel.

What is ironic about the Court's decision is its response to Canton's argument that the applicable case should have been *Katz v. United States*,[23] which upholds the fundamental importance of prioritizing the protection of the person over the protection of the place. To this, the Court retorted by quoting the maxim *stare decisis et non quieta movere*, which invokes adherence to precedents and mandates to leave undisturbed doctrines already firmly established. The maxim, in essence, holds that "[w]hen the Court has once laid down a principle of law as applicable to a certain state of facts, *it must adhere to that principle and apply it to all future cases where the facts are substantially the same.*"[24]

This ruling, however, begs the question. If the factual milieu of *Katz* was at a disparity to that of the instant case, why was it that the street encounter involved in *Terry* seemed to be in point with a standard airport security procedure? Furthermore, why was it that the *Terry* limits were extended and relaxed to accommodate these airport procedures? Perhaps an examination of the jurisprudence subsequent to *Terry* and an analysis of the conditions of a 'stop and frisk' would aid in answering these questions and those posed earlier.

pursuant to standard airport security procedure. In this case, the Court made an extensive decision allowing searches and seizures of departing passengers in airports; in view of the gravity of public interests such as safety and in light of the increased concern over airplane hijacking and terrorism.

22. An Act Prohibiting Certain Acts Inimical to Civil Aviation, and for Other Purposes, Republic Act No. 6235 (1971). *See infra* note 121 for the text of pertinent provisions of this statute.

23. Katz v. U.S., 389 U.S. 347 (1967).

24. *Canton*, G.R. No. 148825 at 6, *quoting* People v. Aquino, 366 SCRA 266 (2001) (emphasis supplied).

III. An Examination of American Jurisprudence on 'Stop and Frisk'

A. *Stop and Frisk prior to* Terry v. Ohio

The "stop and frisk" doctrine was relatively common in the United States before *Terry v. Ohio*, although the courts had difficulty applying it. Once *Terry* set the ground rules, however, street encounters produced a wealth of criminal constitutional litigation and literally thousands of reported cases. The U.S. Supreme Court seldom moved far from the basic tenets of *Terry*; but some cases did, depending on the their individual factual backgrounds.[25]

Prior to *Terry*, courts justified what was then called "field interrogation" or "investigative detention" as the exercise of common law police power or police conduct not proscribed by the Fourth Amendment if no formal or actual arrest occurred. Such stops were justified under the theory that some criminal activity was probably afoot of which the police should be allowed to inquire. This preventive law enforcement was seen as necessary in effective police work.[26]

B. Terry v. Ohio — *the Introduction of Stop and Frisk*

A detective on patrol observed two strangers repeatedly walking past a store window and returned to a spot where they apparently conferred with a third man who left swiftly. This aroused the suspicion of the officer who followed the two men. To the experienced officer, the behavior of the men indicated that they were sizing up the store for an armed robbery.

The police officer approached the men, identified himself as a policeman and asked them for their names, to which they simply mumbled a reply. Whereupon, the officer spun one of them around, patted down his outside clothing, and found in his overcoat pocket a revolver. He then ordered the other two men to face the wall with their hands raised and patted their outer clothing to which he discovered another revolver.

They were prosecuted for the offense of carrying a concealed weapon, to which they put up the defense of illegal search and seizure. At the trial,

25. 1 John Wesley Hall, Search and Seizure 774 (3d ed. 2000) [hereinafter Hall 1].

26. *Id.* at 776-77, (citing 2 Hawkins, Pleas of the Crown 122, 129 (6d ed. 1777)).

the officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of the men carrying the revolvers until he felt them through their clothing. It also appeared on record that he never placed his hands beneath the outer garments of the third man.

The United States Supreme Court ruled that the warrantless search and seizure was valid under the circumstances. It was held that in such a situation, it is more reasonable for an officer to stop a suspicious individual briefly, in order to determine his identity or maintain the status quo while obtaining more information rather than to simply shrug his shoulders and allow a crime to occur. The Court reasoned:

> [W]e 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.[27]

Significantly, the Court noted that the officer had reasonable grounds to believe that the accused were armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. It was also pointed out that the officer carefully restricted his search to what was appropriate to the discovery of the particular items sought for his own protection.

The Court cautioned, however, that though the search and seizure was considered as valid, each case of the sort, similar to that of *Terry*, would have to be decided on its own facts. In conclusion, the ground rules for a valid stop and frisk were delimited by the Court's following statements:

> We merely hold today that where 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.[28]

27. *Terry*, 392 U.S. at 25 (emphasis supplied).

28. *Id.* at 31 (emphasis supplied).

Before proceeding into a discussion of the limits of a stop and frisk as established by *Terry*, a review of jurisprudence following this landmark case may be pertinent to understanding the current status of the doctrine.

C. *Jurisprudence after* Terry — *Contributions to Stop and Frisk*

The facts and results of *Sibron v. New York*,[29] decided in 1968, was the constitutional counterpoint to *Terry*. In this case, a uniformed patrolman watched Sibron stand on a street corner and converse at various times over the course of eight hours with six to eight people generally known to be addicts. Sibron left the street corner, entered a nearby restaurant, and talked to three more known addicts. Throughout the whole time, the officer was not able to overhear anything nor witnessed any substance pass between Sibron and the addicts. As Sibron ordered something to eat, the patrolman told him to come outside, where the patrolman said: "you know what I am after." Sibron mumbled something and reached into his pocket. The officer thrust his hand into Sibron's pocket and found several packets of heroin.

The Court here found the stop and frisk to be invalid because the officer did not fear that Sibron was armed and apparently was only looking for the narcotics he was carrying. It was held that reaching into Sibron's pockets was an invalid search because it "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the protection of the officer by disarming a potentially dangerous man."[30]

The ruling in *Sibron* showed that *Terry* proved to be one of the most important search and seizure cases ever decided, not only in American jurisprudence, but in Philippine jurisprudence as well. Since *Terry* recognized the element of reasonable suspicion, it permitted all kinds of police-citizen contact. Thus, *Terry's* language on the limits and scope of a search and seizure had become vitally important, and not just in the area of reasonable suspicion, but other areas as well, further developing the limitations and elements of a valid stop and frisk.[31]

This notwithstanding, another contribution of *Terry* and *Sibron* is the granting by the Court of legal existence to the two concepts of "stop" and "frisk." Gone were the days when the procedure of a stop and frisk was known as "field interrogations." The Court in *Terry* and *Sibron* elucidated on

29. 392 U.S. 40 (1968).

30. *Id.* at 65. This was based on the officer's testimony that he never feared that Sibron had a weapon. (*See id.* at 46, n. 4).

31. HALL 1, *supra* note 25, at 781. Hall commented on the importance of the *Terry* doctrine, and also made the observation that *Terry v. Ohio* is cited in roughly half of all American search and seizure cases. (*See id.* at 781, n. 57).

the constitutional severability of a "stop" and a "frisk," maintaining that the purpose of this severability was significant in determining the distinctive parameters of their valid performance.

D. Understanding the Concepts of "Stop" and "Frisk"

A "stop" and a "frisk" are separate constitutional events.[32] A stop was considered to be far less intrusive than a frisk, with the constitutional requirements of the former being considerably less. Thus, a police officer may constitutionally stop a suspicious person on the street even though he has no justification to frisk him. On the other hand, matters may develop during the stop to justify a frisk.[33]

1. The "Stop" — Definition, Scope and Constitutional Limitations

In defining a "stop," the *Terry* Court ruled that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[34] Hence, a stop may be defined as a type of seizure of the person, short of an actual arrest.

Though not every encounter with an officer constitutes a seizure, the Model Code of Pre-Arraignment Procedure may be helpful in defining a stop. Thus, a stop is, "[An] order [to] a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized."[35]

It was further added that in ascertaining the question as to when it is legally permissible to effect a "stop" over a person, the Court in *Terry* ruled that "it is necessary 'first to *focus upon the governmental interest* which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'"[36]

Since a stop consisted in the officer's initial investigative approach of a suspected person, thereby breaching his sense of privacy, the nature and extent of the governmental interest involved had to be considered.

> One general interest is of course that of *effective crime prevention and detection*; it is this interest which underlies the recognition that a police officer may *in appropriate circumstance and in an appropriate manner* approach a person for purposes of investigating possibly criminal behavior *even though there is no probable cause to make an arrest.*[37]

32. *Id.* at 774.

33. *Id.* at 775.

34. *Terry*, 392 U.S. at 16.

35. ALI Model Code of Pre-Arraignment Procedure § 110.2(1) (Official Draft 1975); *see also* HALL 1, *supra* note 25, at 802.

36. *Terry*, 392 U.S. at 21 (emphasis supplied).

What is significant about this portion of the *Terry* decision is not only that the Court sustained that in a stop, no probable cause is required, but that between the private interest of an individual's personal security and the public interest of crime prevention and detection, a balancing test had to be conducted. The Court ruled that "there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[38]

Thus, in balancing the public's interest in crime detection and prevention, and an individual's interest for privacy, the scales of justice leaned more towards the interests of the public. The prime factor, however, which tipped the scales in favor of the public was that a police officer may intrude upon a person's private space with less than probable cause. A stop must be understood to be different from that of an arrest, though both may be equally considered as a seizure of a person — the prerequisite for the conduct of a stop merely being reasonable suspicion, while that of an arrest being probable cause.

> [T]he evidence needed to make the inquiry is not of the same degree of conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed....[39]

As mentioned earlier, a stop is less invasive than a frisk, and even more so, less invasive than that of an actual arrest. Since a stop consists of an officer's initial investigative approach of a suspicious person prompted by the general interest of crime prevention or detection, reasonable suspicion and not probable cause is required in order to effect a valid stop.

The scope of a stop was also clearly defined by *Terry*. According to *Terry*, "the scope of the [seizure] must be 'strictly tied to and justified by the circumstances which rendered its initiation permissible.'"[40] The scope of the stop, therefore, must be limited to its purpose. When the purpose for initiating the stop has been satisfied, reasonable suspicion ceases to exist, and the stop becomes an unlawful detention.[41]

37. *Id.* at 22 (emphasis supplied).

38. *Id.* at 21, (quoting Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967)).

39. People v. Rivera, 14 N. Y. 2d 441, 445, 447, 201 N. E. 2d 32, 34, 35, 252 N.Y.S. 2d 458, 461, 463 (1964), cert. denied, 379 U.S. 978 (1965).

40. *Terry*, 392 U.S. at 19.

41. HALL 1, *supra* note 25, at 820.

Since a stop is conducted for the purposes of questioning a suspect as to his suspicious behavior, simple questions must be addressed to the detainee.[42] Prolonged and detailed questioning could easily turn a stop to an arrest. Hence, once the officer's suspicions have been alleviated, the questioning must cease and the detainee allowed to go his own way.[43]

The allowable duration of how long a stop should take place is also linked with its scope. As mentioned, the stop should be limited to a period reasonably necessary to accomplish the purposes of the officer. In determining what is a reasonable detention, the courts generally consider four factors: the gravity of the offense suspected, the probability of the detainee's implication in the offense suspected, the need for prompt action, and the extent of the intrusion.[44] Hence, similar to what was stated above, once the purpose of the stop has been satisfied, it must be put to an end as there is no longer any reasonable suspicion to detain the suspect any further.

2. The "Frisk" — Definition, Scope and Constitutional Limitations

A "frisk" of a suspected individual is one of the classes of warrantless searches. According to *Terry*, a frisk consists of a "pat down" of a suspicious person's outer clothing for the search of weapons.

> The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He *did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons*, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden *confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons.* He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.[45]

From this portion of the *Terry* decision, a shift in the Court's analysis may be observed. This is where the constitutional severability of a stop and frisk comes into play. Though a police officer may perform a valid stop, there may not be grounds for the effective and permissible conduct of a frisk, especially since the latter is considered more intrusive.

42. *Id.* at 824 (citing United States v. O'Connor, (1981, CA9 Nev) 658 F2d 688, 691; People v. Gonzales (1985, 1ST Dist) 164 Cal App 3d 1194, 211 Cal Rptr 74, 75; O'Donnel v. State (1991) 200 Ga App 829, 409 SE2d 579).

43. ALI Model Code of Pre-Arraignment Procedure, § 110.2(1).

44. HALL 1, *supra* note 25, at 820.

45. *Terry*, 392 U.S. at 30 (emphasis supplied).

Once a valid stop has been executed, the governmental interest which permits the greater intrusion of a frisk is no longer the general interest of preventing or detecting the commission of a crime. Rather, the focus during a frisk shifts to that of the personal protection of the officer making the stop. Hence, in determining whether the officer in *Terry* was justified in the invasion of Terry's person by searching him for weapons, the Court ruled:

> We are now concerned with more than the governmental interest in investigating crime; in addition, 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.*[46]

Aside from the change from the more public and governmental interest of crime prevention and detection to the more private and personal interest of the officer in his own protection and security, *Terry* also requires that a frisk be accompanied by reasonable suspicion.[47] The reasonable suspicion in a frisk, however, differs from that of a stop. In the latter, there should be reasonable suspicion that a crime is afoot, while in the former, an officer must have reason to believe that the suspect stopped has a weapon on his person.[48]

This notwithstanding, what should be remembered is that in conducting the frisk of a suspicious person, *Terry* requires that the officer be equipped with reasonable suspicion based on "specific, articulable facts [which] must be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[49] Anything less than this form of reasonable suspicion would "invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."[50]

Coming from this direction, the Court went on further to rule that since the reasonable suspicion involved in a frisk was restricted to a reasonable belief that the suspect was armed, so must the search of his person be

46. *Id.* at 24.

47. Ybarra v. Illinois, 444 U.S. 85 (1979) (quoting *Terry*, 392 U.S. at 22).

48. *Terry*, 392 U.S. at 23-24. *See also* HALL 1, *supra* note 25, at 835, (quoting People v. Clements (1982, 1ST Dept) 88 App Div 2d 541, 450 NYS2d 326, 327-28, app dismd 58 NY2d 821, 459 NYS2d 269, 445 NE2d 652), which provided:

"When an officer sees that a detainee's coat pocket is weighed down, he is warranted in touching it and conducting a frisk."

49. *Terry*, 392 U.S. at 22, *referring* to Carroll v. United States, 267 U.S. 132 (1925); Beck v. Ohio, 379 U.S. 89, 96-97 (1964).

50. *Id.* at 22.

likewise limited in scope.[51] Hence, a frisk should consist of a pat down of outer clothing merely for the search of dangerous weapons that might prove detrimental to the officer's safety.

> Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. The *sole justification* of the search in the present situation is the protection of the police officer and others nearby, and it *must therefore 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.*[52]

The necessity of this requirement for a limited search of a suspect was affirmed in the later case of *Ybarra v. Illinois*,[53] where the Court ruled that a "narrow scope" of reasonable suspicion also called for a corresponding "narrow scope" of the warrantless search:

> The *Terry* case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted.
>
> 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 premises where an authorized narcotics search is taking place.[54]

Terry v. Ohio, with the help of *Sibron v. New York* and other subsequent cases, provided the building blocks in the constitutional field of stop and frisk. The foundation behind the *Terry* doctrine, however, witnessed various modifications in terms of relaxing certain qualifying factors to fit particular situations.

51. *Id.* at 29. *See Sibron*, 392 U.S. at 24, where Justice Harlan's concurring opinion recognized that although the officer's right to frisk was practically "automatic" where the crime suspected was one of violence involving a weapon, a nonviolent crime created no reasonable apprehension for the officer's safety unless other circumstances indicated the suspect was armed. *See also* State v. Broadnax, 29 Wash App 443, 628 P2d 1332, revd 98 Wash 2d 289, 654 P2d 96 (1981) where it was held by the State Supreme Court that the object cannot be removed unless it felt like a weapon.

52. *Terry*, 392 U.S. at 30, *referring to* Preston v. United States, 376 U.S. 364, 367 (1964) (emphasis supplied).

53. 444 U.S. 85 (1979).

54. *Id.* at 93-94.

In fact, the 1994 case of *United States v. Tilmon*[55] recognized that "[i]n the recent past, the 'permissible reasons for a stop and search and the permissible scope of the intrusion [under the *Terry* doctrine] have expanded beyond their original contours.'" [56] This expansion and mitigation of limitations of the *Terry* doctrine may be witnessed in the following cases.

E. After Terry *and* Sibron — *the Doctrine Relaxed*

1. Reasonable Suspicion Relaxed: the Presence of the Informant

In *Adams v. Williams*,[57] the Court upheld a stop and frisk conducted by a patrolman over Williams who was sitting in his car in a high-crime area. In this case, the officer tapped on Williams' car window and asked him to open the door. Instead, Williams rolled down his window at which instance the officer reached in and removed a gun from Williams' waist. The latter was arrested, and a search revealed that he possessed heroin.

The Court herein advanced a novel theory of an "automatic right to frisk," which authorized the warrantless search in this case. This was because the officer's stop and frisk was predicated on the presence of a known informant's statement to the officer that the defendant was in possession of a weapon and narcotics. Hence, *Adams* relaxed the *Terry* requirements for a valid stop and frisk – that there be reasonable suspicion to conduct the stop and the frisk, and a limited search only for weapons – and advanced the seemingly debatable theory of an "automatic right to frisk," justified by the presence of reliable information from an informant about the presence of weapons and narcotics.

Here, the Court ruled that the informant's tip provided the necessary reasonable suspicion to conduct a *Terry* stop and frisk, even though the tip did not meet the constitutional criteria for a full search. The defendant's presence in the high-crime area reportedly with narcotics and a gun constituted sufficient grounds for both a stop and frisk for the gun.[58]

The use of anonymous tips or tips from known informants, which were sustained by the U.S. Supreme Court in previous cases in the context of providing adequate probable cause,[59] were also extended to apply to *Terry*

55. 19 F.3d 1221 (1994, CA7 Wis).

56. *Id.* at 1224-25, *quoting* United States v. Chaidez, 919 F.2d 1193, 1198 (7th Cir. 1990).

57. 407 U.S. 143 (1972).

58. *Id.* at 147-48.

59. *See* Illinois v. Gates, 462 U.S. 213 (1983).

stops. In the 1990 case of *Alabama v. White*,[60] an anonymous tip was corroborated by the informant's accurate prediction of what the defendant would do.

Hence, like in *Adams*, the requirement of reasonable suspicion in *White* was met "automatically" with the presence of information from an anonymous tipper. Since the Court in the context of probable cause considered these tips as adequate, so too was this reasoning extended to apply to the *Terry* stop requirement of reasonable suspicion.

Significantly, the Court went on further to rule that lesser reliability for the tips or information was required for reasonable suspicion than that needed for probable cause.[61]

2. The Extension of the Doctrine to Immigration Border Searches

The situational street encounter in *Terry* and *Sibron* was extended to a border stop and frisk conducted by immigration officers in the case of *United States v. Brignoni-Ponce*,[62] decided in 1975.

Though the *Terry* limits were extended to immigration searches, the Court explained that the existence of reasonable suspicion that a vehicle contained aliens illegally entering the border was indispensable in order to stop the vehicle and to ask questions to its occupants. Random stops not based on this reasonable suspicion were proscribed, and any form of detention or search beyond mere questioning required more than reasonable suspicion — probable cause, or consent from the occupants, was necessary.[63]

3. Traffic Stops and the *Terry* Doctrine

The Court in 1977 in the case of *Pennsylvania v. Mimms*,[64] on the other hand, had to tackle the question of the validity of two cases of stop and frisk in one incident – the second stop and frisk being dependent on the validity of the first.

In this case, an officer stopped Mimms for a traffic offense and asked the latter to step out of his car as part of the initial stop procedure, which is what he routinely does for his personal safety and not because of any suspicious conduct by the driver. When Mimms alighted, the officer noticed a bulge

60. 496 U.S. 325 (1990).

61. *Id.* at 329.

62. 422 U.S. 873 (1975).

63. *Id.* at 881-82. *See* HALL 1, *supra* note 25, at 782.

64. 434 U.S. 106 (1977).

under the defendant's coat which appeared to be a gun. This induced the officer to frisk Mimms, who then discovered a weapon.

The Court was presented with the question as to whether or not the order to step out of the car after it was lawfully detained was reasonable. The second stop and frisk (after Mimms stepped out of the car) was upheld under the rationale that since Mimms was already stopped, it was not a serious further intrusion to have him get out of his car.[65]

Like *Terry*, the *Mimms* Court used the balancing-of-interests test. What may have been perceived as a second intrusion upon Mimms' personal security was argued by the Court to be warranted because when balanced against the governmental interest of the officer's need to know what he was dealing with. Mimms' individual interest for privacy was outweighed.[66]

What is important to note in *Mimms* is the Court's ruling that one lawful stop may lead to a slightly more intrusive, albeit legitimate, stop which provided reasonable suspicion to conduct a frisk and reveal the possession of a weapon. Here, each step was considered to be reasonable, based on the previous step.[67]

In the 1984 case of *Berkemer v. McCarty*,[68] the Court ruled with regard to traffic stops that the latter was more akin to a *Terry* stop than to a formal arrest. Thus, for purposes of merely conducting roadside questioning, informing the motorist of his *Miranda* rights was not necessary. If the officer, however, instructs the motorist to get into a police car, or takes him into custody, then the *Miranda* rights become applicable, as the "seizure" would amount to an arrest.[69]

In 1997, the U.S. Supreme Court extended the application of the *Terry* doctrine to passengers as well as to drivers. In *Maryland v. Wilson*,[70] occupants of a car were acting furtively when the officer was following them. When Wilson, one of the occupants, was instructed to step out of the car, a quantity of cocaine fell to the ground.[71] The Court concluded that it was reasonable under the balancing-of-interests test to order passengers out of a vehicle during a valid traffic stop: "On the public side of the balance, the

65. *Id.* at 110-12.

66. *Id.*

67. HALL 1, *supra* note 25, at 783.

68. 468 U.S. 420 (1984).

69. *Id.* at 434, 436-37. *See also* HALL 1, *supra* note 25, at 792.

70. 519 U.S. 408 (1997).

71. *Id.* at 410.

same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."[72]

Since the passengers of the car were already stopped with the car, the Court ruled that there was no substantial change in circumstances for them. Moreover, if they were kept outside of the car, this would deny access to potential weapons which may be within the vehicle.

IV. The Development of the *Terry* Doctrine Under Philippine Jurisprudence

With the decision of *Terry v. Ohio*, came a greater examination in Philippine jurisprudence of the concept of "stop and frisk" While *Terry* made a distinction between an "arrest" and "seizure," there was still some doubt about their relationship to the doctrine of "stop and frisk," as well as the particular minimum constitutional requirements for the latter.

At the time of *Terry*, both Philippine statutory law and the 1973 and 1987 Constitutions spoke of the concepts of "seizure" and "arrest," but while an arrest was necessarily understood to be a seizure, not every seizure was considered as an arrest.[73] The landmark case of *Terry* made the distinction clear. While an arrest was defined in the Rules of Court,[74] a seizure short of an arrest was recognized under the *Terry* doctrine of stop and frisk.

Philippine law took the stop and frisk under *Terry* to mean a situation whose object might only be to determine the identity of a suspicious individual, or to maintain the status quo momentarily while the police officer sought to obtain more information.[75] Despite this grasp of the purpose of a stop and frisk, Philippine jurisprudence from the time of *Terry* until the present is still rather lacking on the subject of the scope, limitations and conditions of the doctrine relevant to the Philippine legal framework. What is certain, however, is that as cases involving stop and frisk situations similar to that of *Terry* surfaced in Philippine jurisprudence, the stop and frisk doctrine started to establish a stronger foundation.

72. *Id.* at 413.

73. Bernas Commentary, *supra* note 8, at 182.

74. Revised Rules of Court, Rule 113, § 1 (2001), which provides:

> Definition of an arrest. — Arrest is the taking of a person into custody in order that he may be bound to answer for the commission of an offense.

75. Bernas Commentary, *supra* note 8, at 182, (citing *Terry*, 392 U.S. 1). *See* Posadas v. CA, n. 76.

A. *Cases Applying the* Terry *Doctrine*

1. *Posadas v. Court of Appeals* — The Initial Confusion

The 1990 case of *Posadas v. Court of Appeals*,[76] was one of the principal cases that discussed and applied the *Terry* doctrine.

In this case, two patrolmen of the Integrated National Police (INP) assigned with the Intelligence Task Force were conducting a surveillance at about 10 o'clock in the morning. During their surveillance, they spotted Posadas carrying a "*buri*" bag and also noticed him to be acting suspiciously. When they approached him and identified themselves as members of the INP, the defendant attempted to flee, but his attempt to get away was thwarted by the officers. A search of his person yielded a revolver, a smoke grenade and ammunition, without the necessary license for their possession.

The main thrust of Posadas' appeal to the Supreme Court was directed against the validity of the warrantless search of his person.

The argument raised by the Solicitor General was that there was a search incidental to a lawful arrest since the defendant was caught in *flagrante delicto*. Though some doubt existed at the time as to the distinction between "stop and frisk" and a warrantless search incidental to a lawful arrest, the Court disagreed and clarified the difference using the facts of the case:

> At the time the peace officers in this case identified themselves and apprehended the petitioner as he attempted to flee they did not know that he had committed, or was actually committing the offense of illegal possession of firearms and ammunitions. They just suspected that he was hiding something in the buri bag. They did not know what its contents were. The said circumstances did not justify an arrest without a warrant.[77]

From this portion of the decision, it may seem that the Court made a finding that the stop of Posadas was valid because they possessed reasonable suspicion aroused by the defendant's suspicious acts, especially his attempt to flee when approached. Yet, later in the decision, the Court upheld the warrantless search of Posadas not because of the presence of reasonable suspicion, but strangely enough because of the presence of probable cause. After comparing the search in the case to that of those conducted in military checkpoints, the Court went on to say the following:

> Thus, as between a warrantless search and seizure conducted at military or police checkpoints and the search thereat in the case at bar, there is no question that, indeed, the latter is more reasonable considering that unlike in the former, *it was effected on the basis of a probable cause.* The *probable cause is that when the petitioner acted suspiciously and attempted to flee* with the buri

76. Posadas v. Court of Appeals, 188 SCRA 288 (1990).

77. *Id.* at 292.

bag there was *a probable cause that he was concealing something illegal* in the bag and it was the right and duty of the police officers to inspect the same.[78]

What is peculiar about the *Posadas* decision is that in resolving the question of whether the constitutional guarantee against warrantless searches was violated, the Court ruled that "the assailed search and seizure may still be justified as akin to a 'stop and frisk' situation"[79] under *Terry v. Ohio*, and may therefore be sustained as a recognized exception to the warrant requirement. Though the Court seemed to have adopted the rationale of the *Terry* ruling, it departed from the portion of the decision which clearly provided that reasonable suspicion, and not probable cause, was indispensable to a stop and frisk.

On the basis of the text of the 1987 Constitution, it can be said that what is required is that a seizure be reasonable, and not necessarily that it be grounded on probable cause. Since the essence of probable cause is the possibility of an inference of probable guilt, in a stop and frisk situation, there may as yet be no question of probable guilt because there may not even be any crime, but merely a situation calling for investigation,[80] as in this case.

While the Philippine Supreme Court need not strictly adhere to the judgment of a foreign court such as the U.S. Supreme Court, it is worth noting that the factual background of *Posadas* is almost on all fours with that of *Terry*. Both involved street encounters, experienced police officers on surveillance, suspicious behavior by the defendant, and the discovery of weapons. What may be derived from the *Posadas* decision, therefore, is that though the Court recognizes the nature and purpose of the *Terry* stop and frisk, Philippine jurisprudence may independently advance its own corresponding limitations and conditions relevant to the Philippine setting and its own legal principles.

2. *Manalili v. Court of Appeals* — Defining and Qualifying Terry

One case that deals with the question of the limitations to a stop and frisk is the 1997 case of *Manalili v. Court of Appeals*.[81] In this case, policemen from

78. *Id.* at 293 (emphasis supplied).

79. *Id.* at 294, quoting the disquisition provided by the Solicitor General in order to justify the warrantless search of the buri bag by likening the same to a *Terry* stop and frisk. The Supreme Court used this disquisition in sustaining the search of Posadas as falling under the constitutionally recognized exceptions.

80. BERNAS COMMENTARY, *supra* note 8, at 182 (citing McCarthy v. De Arnit, 99 Pa. 63 (1881), *quoted in* Carrol v. United States, 267 U.S. 132, 161 (1925), to define probable cause as a reasonable ground for belief of guilt).

81. 280 SCRA 400 (1997).

the Anti-Narcotics Unit of the Kalookan City Police Station were conducting a surveillance in front of a cemetery. The surveillance herein was being made because of information received that drug addicts were roaming the surveyed area.

When in the cemetery, the officers chanced upon a male person "who appeared high on drugs," as he was "observed to have reddish eyes and to be walking in a swaying manner."[82] When this person tried to avoid the policemen, the latter approached him, introduced themselves as police officers, and asked him what he was holding in his hands. The suspect tried to resist. When asked to show them what were in his hands, the suspect showed his wallet to which the officer found marijuana residue.

One of the defenses raised by Manalili was the inadmissibility of the evidence against him as the same was allegedly the product of an illegal search.

The Court addressed the issue by directly upholding the search as being akin to a *Terry* stop and frisk. It also provided the first Philippine definition of the legal concept of "stop and frisk" as being "the vernacular designation of the right of a police officer to stop a citizen on the street, interrogate him, and pat him for weapon(s)."[83]

Adhering to the purpose for such an action, a discussion of the importance of balancing the various interest involved – the governmental interest of crime prevention and the immediate personal interest of protection of the officer – was made in order to demonstrate that such a warrantless search was justified by the circumstances and necessitated by the compelling interests.

Nevertheless, the Court made a qualification to the *Terry* ruling on warrantless searches in the form of stop and frisk. It ruled that though the U.S. Court in *Terry* upheld the stop and frisk as justified by the interests involved, the general rule under Philippine jurisprudence that a search and seizure must be validated by a previously secured judicial warrant should not be abandoned. The Court maintained that "the police must, whenever practicable, obtain advance Judicial approval of searches and seizures through the warrant procedure, excused only by exigent circumstances."[84]

Hence, only the exigency of the situation excused the absence of a warrant, even if what was involved was a stop and frisk. Again, what is strikingly inexplicable about this ruling is that although the Court recognized the *Terry* stop as an exception to the warrant requirement, it still ruled that

82. *Id.* at 405-06.

83. *Id.* at 411.

84. *Id.* at 412.

in circumstances where exigency was not a factor, a warrant should still be procured.

Although the Court did not rule on the *Posadas* decision regarding probable cause, it did make the finding that the officers in *Manalili* had sufficient reason to stop the defendant in order to investigate him, prompted by his suspicious behavior,[85] as well as the information of the presence of drug addicts in the surveyed area. Without going into details regarding reasonable suspicion or the possible significance of the tip from an informant, the Court upheld the search on the basis of the defendant's effective waiver of the inadmissibility of the evidence as he failed to raise the issue or to object thereto during the trial.

What may be observed from *Manalili*, however, is the application by the Court of the *Terry* doctrine not only to the search of dangerous weapons, but also to narcotics. This observation will be of significance in the discussion of the next Philippine stop and frisk case.

3. *Malacat v. Court of Appeals* — its Contributions to the Philippine Case Law on Stop and Frisk

Decided only two months after *Manalili* was the case of *Malacat v. Court of Appeals*.[86] In this case, a police surveillance team, dispatched on reports of a possible bombing in Quiapo, observed a group of men with "their eyes moving very fast" and looking at every approaching person. The officers positioned themselves at strategic points and observed the men for about thirty minutes. They approached some of the men, who then fled in different directions. As the policemen gave chase, one officer caught up with and apprehended Malacat. Upon searching him, the officer found a fragmentation grenade tucked in his waist.

Once again, there was confusion as to the distinctions between a search incidental to a lawful arrest and the search involved in a stop and frisk. The Court clarified the distinction:

> In a search incidental to a lawful arrest, as the precedent arrest determines the validity of the incidental search, the legality of the arrest is questioned in a large majority of these cases, e.g., whether an arrest was merely used as a pretext for conducting a search. In this instance, the law requires that *there first be a lawful arrest before a search can be made — the process cannot be reversed.*[87]

85. The defendant was wobbling like a drunk and he had red eyes. Also, the officers were experienced members of the Anti-Narcotics Unit of their police station, and therefore knew that the defendant's behavior was characteristic of persons "high" on drugs. *See id.* at 414-15.

86. 283 SCRA 159 (1997).

The Court reversed the lower court decisions and ruled that in the case of Malacat, there could have been no valid *in flagrante delicto* or even a hot pursuit arrest preceding the search. This was because there was a lack of personal knowledge on the part of the arresting officer or an overt physical act on the part of Malacat indicating that a crime had just been committed, was being committed, or was going to be committed.

Considering that the warrantless arrest was invalid, the search conducted upon Malacat could not have been a valid search incidental to a lawful arrest. Moreover, it was ruled out that the search in *Malacat* could be considered a stop and frisk, and thus excused from the warrant requirement. The Court remarked that "there was nothing in [Malacat's] behavior or conduct which could have reasonably elicited even mere suspicion other than that his eyes were 'moving very fast....' There was no ground at all to suspect that Malacat was armed with a deadly weapon."[88]

The Court made many contributions to the Philippine jurisprudential field of stop and frisk. First, the Court finally set right the ongoing confusion brought about by *Posadas* regarding whether probable cause is needed in stop and frisk. It ruled:

> [W]hile *probable cause is not required to conduct a "stop and frisk,"* [the *Terry* Court] nevertheless holds that mere suspicion or a hunch will not validate a "stop and frisk." A *genuine reason must exist*, in light of the police officer's experience and surrounding conditions, to warrant the belief that the person detained has weapons concealed about him.[89]

As a result, Philippine jurisprudence adopted the *Terry* standard of reasonable suspicion predicated on a genuine reason to believe that a suspect

87. *Id.* at 175. The Court, in this instance, made reference to REX D. DAVIS, FEDERAL SEARCHES AND SEIZURES 96-98, 120 (1964) and People v. Malmstedt, 198 SCRA 401, 422 (1991) (Narvasa, C.J., concurring and dissenting) (emphasis supplied).

88. *Id.* at 178.

89. *Id.* at 176-77 (emphasis supplied). *See also id.* at n. 40, where it was stated that: "[t]hus, it may be said that a brief on-the-street seizure does not require as much evidence of probable cause as one which involves taking the individual to the station, as the former is relatively short, less conspicuous, less humiliating," *citing* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, §9.1 (d), at 342 (2d ed. 1987). It was also mentioned that: "[I]t is necessary to determine if 'stop and frisk' may be distinguished from arrest and search, knowing that the justification of stopping and frisking is less than the probable cause to arrest and search," (citing 1 JOSEPH A. VARON, SEARCHES, SEIZURES AND IMMUNITIES 81, 84 (2d ed. 1974)).

possesses a concealed weapon. In the case of *Malacat*, however, the officers did not have any reasonable suspicion to conduct a search on the defendant. According to the Court, there was nothing in Malacat's behavior or conduct which could have reasonably elicited even mere suspicion other than the fact that his eyes were "moving very fast," which was doubtful since the officers were nowhere near the defendant. Moreover, it was revealed on the cross-examination of the arresting officer that the group of men were merely standing in the corner and not creating any commotion or trouble.

The Court also made the finding that there was no ground at all to believe that the defendant was armed with a deadly weapon. From the distance of the frisking officer, and also admitted by him at trial, no weapon or even a bulge indicating its presence was visible to him. Hence, when the officers approached the accused and his companions, they were not yet aware that a hand grenade was tucked inside his waistline.

Of significance is the second contribution of the *Malacat* decision, wherein the Court acknowledged and adopted the *Terry* standard that the allowable scope of a stop and frisk was only limited to a protective search of outer clothing for weapons.[90]

This would either exhibit even greater confusion on the part of the Supreme Court as to the *Terry* standards, or a disregard of the earlier decision of *Manalili v. CA*, which involved marijuana and no dangerous weapons, but was upheld by the Court as a valid stop and frisk. The question now raised is whether or not stop and frisk under Philippine law, should in fact be only limited to a search for weapons.

Even American jurisprudence on this matter appears to be uncertain. After the Court in *Sibron* ruled that a search incidental to an investigatory stop should be limited only to a protective search for weapons, and that a search for narcotics would render the search illegal, cases succeeding this ruling seemed to suggest otherwise. The U.S. Supreme Court on numerous occasions has upheld the validity of stop and frisk cases which not only involved dangerous weapons, but also narcotics.

90. *Malacat*, 283 SCRA at 176, referring to *Terry*, 392 U.S. at 11, which states "the Court noted that the 'sole justification' for a stop and frisk was the 'protection of the police officer and others nearby;' while the scope of the search conducted in the case was limited to patting down the outer clothing of petitioner and his companions, the police officer did not place his hands in their pockets nor under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. This did not constitute a general exploratory search." *See also Id.* at n. 39, making reference to MICHELLE G. HERMANN, SEARCH AND SEIZURE CHECKLISTS 202 (1994): "Nothing in *Terry* can be understood to allow a generalized cursory search for weapons or, indeed, any search whatever for anything but weapons," (quoting *Ybarra*, 444 U.S. at 93-94).

The only conclusion that may be inferred is that the *Sibron* ruling that stop and frisk should only be limited to weapons is not a hard and fast rule. To illustrate, it may be seen in the case of *United States v. Brignoni-Ponce* that the *Terry* standard has also been applied to border control searches for illegal aliens conducted by immigration officers.

A possible rationale for the relaxing of this limitation may be that since what is intrinsically at stake in stop and frisk cases is the governmental interest of crime prevention and detection, the frisk may embrace all forms of crime paraphernalia, such as weapons, prohibited drugs and even illegal aliens in order to better detect and prevent crime altogether.

4. A Summary of the Conditions, Limitations and Scope of Stop and Frisk under Philippine Law

a. The Balancing Rule

What is certain in Philippine law is that police officers do not have blanket authority to stop, question and search a person.

An investigatory stop under *Terry*, as distinguished from a warrantless arrest under the Rules of Court,[91] need not be based on probable cause but on lesser evidence. In cases involving a stop and frisk, the Court need not apply the Probable Cause Rule under the Warrant Clause of the Constitution; rather, what should be applied is the Balancing Test Rule.[92]

For stop and frisk cases, what is required is a balancing of interests between the need to protect the State's societal interest against crimes and the relatively limited invasion of the citizen's privacy. Even in the Philippines, the need for such investigatory stop and frisk for self-protection is imperative in the interest of effective crime prevention and detection over and above an individual's need for respect of his personal space.

91. Revised Rules of Criminal Procedure, Rule 113, § 5 (2001) provides:

Sec. 5 - Arrest, without warrant; when lawful.

A peace officer or a private person may, without a warrant, arrest a person:

(a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped.

92. OSCAR M. HERRERA, A HANDBOOK ON ARREST, SEARCH AND SEIZURE AND CUSTODIAL INVESTIGATION 238-39 (1994).

b. Reasonable Suspicion

In addition to a general justification for a stop and frisk, there must also be a specific factual justification based on what the officer sees and experiences. The police officer must be able to point to specific articulable facts which, taken together with logical inferences from those facts, reasonably warrant intrusion.[93] These specific articulable facts must be able to indicate to an officer that criminal activity is afoot and that persons with whom he is dealing with might be armed and presently dangerous.

The reasonable suspicion here must be such that whenever a police officer stops a citizen, he must be prepared to justify the stopping by specific facts. Although these facts do not need to be raised to the level of probable cause, or a reasonable belief that a crime has been committed, they must be sufficient enough to arouse the officer's curiosity and specific enough that he can testify about them.[94]

c. The Scope of Stop and Frisk

Similar to the limitations under American jurisprudence, the investigatory stop must be brief. Otherwise, if such stop continues indefinitely, it becomes an arrest, and unless based on probable cause, it becomes illegal. The stop herein must be confined to its purpose, which is finding out whether or not a crime has been committed and to identify the person guilty thereof. [95]

From this, it may be seen that in the development of Philippine law on stop and frisk, the Court has waveringly adopted some American doctrines on the matter. The majority of Philippine cases on stop and frisk, however, have only comprised of street encounters between citizens and the police. Perhaps in the future, the Philippine Court, like the U.S. Court, will be able to extend the *Terry* doctrine to cases involving informants and adopt the principles in *Adams v. Williams* and *Alabama v. White*, or apply the same to traffic stops like in *Pennsylvania v. Mimms* and *Maryland v. Wilson*. In the meantime, with regard to the pressing question about the application of *Terry* to airport searches, Philippine law is again rather wanting.

V. The *Terry* Doctrine Applied to Airport Searches

Of more relevance to this essay is the application and development of the *Terry* doctrine to airport searches, and the eventual relaxing of its limits.

93. *Id.* at 239, indicating the application of the *United States v. Sokolow*, *infra* n. 105, doctrine of determining reasonable suspicion by referring to the totality of circumstances involved.

94. *Id.*

95. *Id.* at 240.

In the United States, as well as in the Philippines, air travel has become a staple of modern existence. Not only has it been a means to journey from one place on the globe to another, it has also been a medium for the perpetration of crime. As one author wrote:

> Air travel is used by the criminal element as well. It enables drug couriers to swiftly distribute their wares across the country or from foreign countries to here; it also unique opportunities for terrorists, hijackers, and other disgruntled or unbalanced people to reek havoc and kill en masse.[96]

In view of this reality, airports are common place for searches and seizures. Since the September 11 airline hijackings, the level of airport security has been heightened like never before. With the risk of mass murder by terrorists becoming very real and proven by unfortunate experience, limited intrusions on the personal security and privacy of airline passengers have been justified.

For those who value their safety and security, increased airport security checks may be heeded as imperative, and hence unintrusive. Yet, the field of airport stop and frisk as a class of warrantless searches is relatively new, with its specific requirements and limitations still in its developmental stage. While the currently ominous times seem to demand and even warrant a relaxing of basic constitutional privileges, it should not be forgotten that even airport searches must also have its limits.

In discerning the possible limitations and conditions to a valid airport search in the Philippine setting, as well as in trying to answer whether or not the stop and frisk in *People v. Canton* is a hybrid of the *Terry* stop and frisk, or the seventh exception to warrantless searches, an examination of American and Philippine jurisprudence on airport searches is key.

A survey of Philippine jurisprudence shows, however, that in the past, the Court has very seldom, if at all, dealt with constitutional issues concerning airport searches. American jurisprudence, on the other hand, provides quite an assortment of cases dealing with airport searches that it is possible to ascertain the status of the law on airport stop and frisk. Though American airport searches proceed from a different backdrop, the rulings by the United States Supreme Court may help in determining whether or not airport searches are either a hybrid of the *Terry* stop and frisk, or in a league of its own.

A. Airport Searches Under American Jurisprudence

1. The "Drug Courier Profile"

96. 2 John Wesley Hall, Search and Seizure 306 (2000) [hereinafter Hall 2].

As mentioned, American airport searches hail from a different backdrop. In the United States, drug enforcement officers are usually stationed at all large and medium-sized airports to look for suspicious persons fitting a so-called "drug courier profile."[97] A survey of airport search cases under American jurisprudence, wherein the *Terry* doctrine was applied, therefore reveals that such warrantless searches were mainly based on reasonable suspicion initiated by suspicious individuals fitting drug courier profiles.

In the case of *United States v. Place*,[98] the Court explained the purpose behind drug courier profile operations in airports:

> Because of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels.[99]

It appears from this portion of the *Place* decision that the manner of conducting an airport search is much like the manner of conducting a *Terry* stop and frisk, in the sense that reasonable suspicion is also first required before an investigative stop may be commenced. Despite the semblance in elements and limitations, these searches must still be tested against the standards of *Terry* in order to determine whether or not they are in fact a genus of the *Terry* stop and frisk.

2. A Review of American Airport Search Cases

97. The "drug courier profile" was developed in 1974 to aid narcotics officers in identifying drug smugglers based on circumstantial facts which could just as easily be innocent conduct. Once the suspected drug courier is identified, the officer approaches him or her to ask questions and see if the suspected courier will consent to a search of his or her belongings. If the officer has reasonable suspicion, the suspected drug courier can be asked to come to a separate room for questioning. If the officer lacks reasonable suspicion, the encounter must be initiated and continued by consent. *See id.* at 307, (citing Becton, *The Drug Courier Profile: All Seems Infected that Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye*, 65 N.C. L. REV. 417 (1987); Constantino, Cannavao & Goldstein, *Drug Courier Profiles and Airport Stops: Is the Sky the Limit?*, 3 W. NEW ENG. L. REV. 175 (1980); Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49 (1981)).

Hall makes a critical observation that drug courier profiles are anything but objective since they are so nebulous and contradictory that it is "chameleon-like" and can adapt to any particular set of observations. (*See* HALL 2, at 313).

98. 426 U.S. 696 (1983).

99. *Id.* at 704.

In the 1980 case of *United States v. Mendenhall*,[100] the Court was faced with the question of whether or not a stop in fact occurred.

In *Mendenhall*, a person fitting a drug courier profile was confronted by Drug Enforcement Administration (DEA) agents and asked to accompany them to their office. The defendant complied and was brought into a private room. Once in the office, Mendenhall was asked to consent to a search of her person and her handbag, and was moreover advised of her right to decline. Following further assurance from Mendenhall that she consented to be searched, an officer searched her person by requesting the defendant to disrobe. This led to the discovery of two packages which appeared to contain heroin and which she voluntarily handed to the officer.

The Court, in a divided decision, ruled that no stop occurred since there was no seizure of the defendant's person since she consented to going to the DEA office to be searched. Some Justices perceived the incident as consensual and not tantamount to a seizure of Mendenhall's person, she not being illegally detained as she consented to the detention and accompanying search. [101]

This case was later compared to the 1983 case of *Florida v. Royer*,[102] another airport stop case initiated by a suspect matching a drug courier profile. Here, Royer fit the drug courier profile. He was approached by DEA agents, his airline ticket and identification were taken, and was asked to accompany them to a private room, to which he assented. While in the room, they waited for the defendant's luggage to arrive and was asked to consent to a search of his suitcase. Saying nothing, he produced the key and marijuana was found inside.[103]

The comparison between the two cases was due to the ruling by the Court in *Royer*. Although the majority found the stop to be proper under the *Terry* and *Mendenhall* rulings, since reasonable suspicion existed to believe that drugs were present, they ruled that the otherwise lawful stop eventually became an unlawful detention as it was unaccompanied by probable cause.

The majority opinion of the Court concluded that the stop turned from consensual to custodial when Royer's airline ticket and identification were seized as he was asked by the agents to accompany them to another room. Justice Powell gave a crucial concurring opinion regarding airport stops and the importance of the suspect's consent with the following:

100. 446 U.S. 544 (1980).

101. *Id.* at 555.

102. 460 U.S. 491 (1983).

103. *Id.* at 493-95.

> The case before us differs [from *Mendenhall*] in important respects. Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them. In *Mendenhall*, no luggage was involved, the ticket and identification were immediately returned, and *the officers were careful to advise that the suspect could decline to be searched.* Here, the officers had seized Royer's luggage and made no effort to advise him that he need not consent to the search.[104]

What may then be inferred is that in an airport stop and frisk, the consent of the suspect for his person and things to be searched is indispensable, and must also be preceded by reasonable suspicion, as provided by a match with the drug courier profile. From *Royer*, it seems that a person suspected to be carrying weapons or narcotics must have the liberty to leave the airport, as well as be advised that he may refuse to be searched by authorities.

Another airport stop case which aided in the evolution of the *Terry* doctrine to airport searches, was the 1989 case of *United States v. Sokolow.*[105] Here, the Court held that the conduct of the accused prior to the stop resulted in arousing reasonable suspicion in the officers.[106] Taken individually, the defendant's actions would not amount to suspicious behavior. Yet, when taken together, the Court ruled that they amounted to reasonable suspicion under what may be considered as a "totality of circumstances test."[107]

3. Understanding the Concept of Relaxed Reasonable Suspicion

Similar to the *Terry* stop and frisk, airport searches also require reasonable suspicion. This is more or less furnished by suspects in the U.S. matching drug courier profiles. To reiterate, a *Terry* stop consists of an investigative

104. *Royer*, 460 U.S. at 508 (Powell, J., concurring) (emphasis supplied).

105. 490 U.S. 1 (1989).

106. *Id.* at 3:

> When respondent was stopped, the agents knew, *inter alia*, that (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a roundtrip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

107. *See* HALL 1, *supra* note 25, at 796; and *Sokolow*, 490 U.S. at 9-10, which quoted *Terry*, 392 U.S at 22 ("*Terry* involved 'a series of acts, each of them perhaps innocent if viewed separately, but which taken together warrant further investigation.'").

approach of a suspicious individual for questioning until the suspecting officer's doubts are resolved. This stop, just like an airport stop, must be attended by reasonable suspicion.[108]

A stop under a drug courier profile, especially when reasonable suspicion is lacking, cannot result in a detention and possible search, such that it becomes a seizure that is constitutionally proscribed. Only when an officer conducting an airport stop has reasonable suspicion, may he perform a *Terry* stop and conduct questioning.[109] The manner by which a possible airport stop may be conducted is described in the following:

> The encounter could start as a mere consensual conversation with a traveler. In that conversation, the traveler may, on request, show the officer his or her airplane tickets and identification. These documents and answers to questions may arouse the officer's suspicions, and the officer may ask the traveler to go with the officer to an office. At that point the officer may still lack reasonable suspicion, but the traveler may consent to the procedure. If, however, the officer has reasonable suspicion, the stop, depending on its intensity and duration, may be reasonable under *Terry*.[110]

Of importance to note here is that the commencement of questioning a traveler will not automatically mean that a stop has occurred. Not unless the traveler feels restrained or unable to go about his business will a stop be considered to have been performed by an officer.[111]

One observation that can be made is that the reasonable suspicion under drug courier profiles may be compared to reasonable suspicion derived from tips of anonymous and known informants. In *Adams v. Williams*, the Court ruled that the information derived from a known informer provided the necessary reasonable suspicion for the commencement of a stop. The relaxing of the *Terry* standards led to the theory of an "automatic right to frisk" a suspect under *Williams*, later affirmed by *Alabama v. White*, where information from informants and tippers were adequate enough to furnish reasonable suspicion to conduct a stop and frisk.

In the case of drug courier profiles, certain individuals are only approached by officers if they matched the criteria in the profile, such as appearance, age, travel itinerary, amount of baggage etc. Also, the reasonable

108. *Royer*, 460 U.S. 491 (1983); Florida v. Rodriguez, 469 U.S. 1 (1984); *Sokolow*, 450 F2d 324 (1971, CA5 Fla).

109. HALL 2, *supra* note 96, at 311 (citing *Sokolow* and *Royer*).

110. *Id.* referring to *Mendenhall* and *Sokolow*.

111. *See Mendenhall*, 446 U.S. at 554-55.

suspicion of an experienced officer may be aroused if the suspect acts nervously or too calmly.[112]

Significantly, in *United States v. Sokolow*, the Court ruled that fitting various parts of a profile can add up to reasonable suspicion to trained officers who take into consideration the totality of the circumstances. Is the Court then further extending the *Terry* standards of reasonable suspicion, which was relaxed to apply to informants and tippers, to likewise be extended and relaxed to accommodate drug courier profiles in airport searches? It may seem so.

What is questionable here is that the *Sokolow* ruling, in relaxing the *Terry* standard, "flies in the face of settled law"[113] that reasonable suspicion must be based on "specific articulable facts" that can be objectively evaluated. It may be argued by those who object to drug courier profiles that these profiles are not grounded on specific articulable facts, but quite possibly on hunches based on what is observed by officers whose objectivity cannot be assured.

Yet, though a drug courier profile does not provide a clear-cut objective measure for reasonable suspicion, it should be remembered that reasonable suspicion cannot be based on the same stringent criteria as that of probable cause.[114] The Court in *White* in fact ruled that in the case of informants and tippers, less reliability on the veracity of the information supplied may be sufficient for reasonable suspicion, though the same cannot be said of probable cause.[115]

Hence, one cannot deny the fact that more lenient standards are used to ascertain the presence of reasonable suspicion. The current status of U.S. law seems to suggest that the standard for reasonable suspicion in carrying out airport security checks is that an individual matches a drug courier profile, thus warranting an airport stop, or even a frisk.

B. *Airport Searches Under Philippine Jurisprudence*

1. *People v. Johnson* and the Implied Consent to be Searched

112. HALL 2, *supra* note 96, at 313, (citing United States v. Himmelwright, 551 F2d 991 (1977, CA5 Fla), cert. denied 434 U.S. 902.

113. HALL 2, *supra* note 96, at 312.

114. *Rivera*, 14 N. Y. 2d 441, 445, 447, 201 N. E. 2d 32, 34, 35, 252 N. Y. S. 2d 458, 461, 463 (1964), cert. denied, 379 U.S. 978 (1965).

115. *Alabama*, 496 U.S. at 325 (1990).

Aside from *People v. Canton*, only one case, *People v. Johnson*,[116] tackles the issue of stop and frisk in airports. The ruling in *Johnson* was cited in *Canton*, and was invaluable in the disposition of the latter.

In this case, Johnson was a departing airline passenger scheduled to fly back to the United States. There was a lady frisker on duty, whose function was to frisk departing passengers, employees, and crew to check for weapons, bombs, prohibited drugs, contraband goods, and explosives. When she frisked Johnson, she felt something hard on her abdominal area. Upon inquiry, Johnson explained that she needed to wear two panty girdles as she had just underwent an operation as a result of "an ectopic pregnancy." Johnson was then taken to the nearest women's room for inspection. She was asked by the frisker to bring out what was under her girdle. Johnson then brought out three plastic packs which was discovered to contain "shabu."

Johnson argued that the arrest and incidental search was in gross violation of her constitutional rights, and therefore the evidence seized was inadmissible against her. The Court ruled against her defense saying that her arrest was lawful, and that the "shabu" seized from her was procured during a routine airport frisk, thus, legitimately acquired pursuant to airport security procedure.

A portion of the Court's decision in *Johnson* was cited in *Canton* and elucidates on the nature of airport searches, its importance and purpose. According to the Court, people who engage in air travel should anticipate a lack of privacy, and accept airport searches as reasonably necessary when poised against the public interest of airline security, thus:

> Persons may lose the protection of the search and seizure clause *by exposure of their persons or property to the public in a manner reflecting a lack of subjective expectation of privacy*, which expectation society is prepared to recognize as reasonable. *Such recognition is implicit in airport security procedures.* With increased concern over airplane hijacking and terrorism has come increased security at the nation's airports.[117]

Aside from the public interest of increased security and safety of airline passengers and crew, the Court also indirectly noted the importance of reasonable suspicion which is usually provoked by x-ray scans and metal detectors which alert airport personnel of the presence of weapons or contraband.

> Passengers attempting to board an aircraft routinely pass through metal detectors; their carry-on baggage as well as checked luggage are routinely subjected to x-ray scans. Should these procedures suggest the presence of

116. 348 SCRA 526 (2000).

117. *Id.* at 534 (emphasis supplied).

> suspicious objects, physical searches are conducted to determine what the objects are.[118]

More importantly, passengers must routinely undergo airport searches and must be aware that their persons and belongings may be subjected to airport stop and frisks. When done so, the Court ruled that such passengers should not consider their constitutional rights as being transgressed.

In light of the conflicting public interests of airport safety and security, and that of the privacy interests of the individual, the public should be aware that their privacy expectations can unavoidably be abridged. The public should, therefore, perceive this abridgement as nothing less than reasonable, under the particular circumstances of air travel and its attendant hazards.

> There is little question that such searches are reasonable, given their minimal intrusiveness, the gravity of the safety interests involved, and the reduced privacy expectations associated with airline travel. Indeed, travelers are often notified through airport public address systems, signs, and notices in their airline tickets that they are subject to search and, if any prohibited materials or substances are found, such would be subject to seizure. *These announcements place passengers on notice that ordinary constitutional protections against warrantless searches and seizures do not apply to routine airport procedures.*[119]

Without specifically identifying the search conducted on *Johnson* as a *Terry* stop and frisk, what becomes clear from the case is that the Court gives airport searches a standing different from that of other warrantless searches and seizures. The current six exceptions to the search warrant requirement, including that of stop and frisk, possess their own individual constitutional limitations. Under *Johnson*, not even these limitations can be invoked in a routine airport procedure.

From *People v. Johnson*, one gets the impression that airport searches are *sui generis*, such that ordinary constitutional protections, including those relating to stop and frisk, will not apply. By choosing to travel by air, persons lose the protection of the search and seizure clause by exposing themselves and their property in a manner reflecting a lack of subjective expectation of privacy. The public recognizes that such surrender of privacy expectations is necessary, and this recognition is unquestionably implied in airport security procedures.

By exposing themselves to metal detectors, x-ray machines and friskers, travelers give an implied consent to be searched. The *Mendenhall* and *Royer* rulings, on the other hand, provided that the consent of a suspected traveler must be first acquired before his person and belongings may be subjected to a

118. *Id.*

119. *Id.* (emphasis supplied).

search more intense compared to the use of metal detectors, x-rays, or frisking. On this account, while it is implied that a traveler consents to the less intrusive search from friskers, metal detectors and x-rays, their express consent is necessary for the more intrusive search of their bodies and property, such as those performed in *Royer*, *Mendenhall*, *Johnson* and even *Canton*.

But the question that now surfaces is what happens if a traveler refuses to have his person or property searched by airport security? And, does the *Canton* Court sustain *Johnson* by also elevating airport searches to another level and breed of warrantless searches? These answers may be found in the decision of *People v. Canton*.

2. *People v. Canton* — the Departure from Terry

The Court in *Canton* picked up from where *Johnson* left off. The decision is replete with numerous indications where the Court demonstrates the *sui generis* nature of airport searches.

a. The Difference in Compelling Interests

Although at the outset, parallelisms were drawn between the stop and frisk in *Terry v. Ohio* and the airport search in the instant case, the Court explicitly ruled that exceptional differences exist between the two. One of those differences is that unlike in the *Terry* search, the scope of the search involved in an airport security procedure is "not confined only to [a] search for weapons."[120] This is because the compelling interest involved in conducting airport searches and screenings is not only the prevention of possible hijacking and terrorist activities, but also to control the transportation of contraband into or out of the country.

It should be noted that unlike the *Terry* searches, airport searches have only one compelling interest at stake. There is no immediate personal interest of any individual or officer concerned, nor any compelling need for the protection of a limited number of individuals in close proximity to the suspect. What is involved is a compelling government interest of global proportions. As air travel crosses borders and affects the welfare of other nations, ensuring safety and security is of paramount importance. Herein lies one of the differences between airport searches and the *Terry* stop and frisk. The government interest involved in the former far surpasses the governmental interest involved in the latter.

In order to guarantee the safety of the passengers and crew against international crimes such as hijacking and terrorism, persons and belongings

120. *Canton*, G.R. No. 148825 at 4.

may be searched for dangerous weapons. Moreover, to further ensure safety against other crimes such as drug trafficking and smuggling of contraband into other countries, drugs and other criminal paraphernalia may also be seized.

b. The Qualifying Factor of R.A. No. 6235

An additional difference between *Terry* searches and airport searches is that the latter is sanctioned by statute, while that of the former has its basis in jurisprudence. At first, this may not seem like a very considerable difference. Yet, the Court gave outright justification for the search in *Canton* by referring to the statute, without even going into the intricacies of a *Terry* search. This statute is Republic Act No. 6235 (R.A. No. 6235).[121]

121. Pertinent provisions of the law are reproduced for reference to the compelling government interest the law seeks to protect – prevention of crimes such as hijacking, terrorism and trafficking of contraband:

Republic Act No. 6235

An Act Prohibiting Certain Acts Inimical to Civil Aviation, and for Other Purposes.

SECTION 3. It shall be unlawful for any person, natural or juridical, to ship, load, or carry in any passenger aircraft operating as a public utility in the Philippines, any explosive, flammable, corrosive, or poisonous substance or material.

SECTION 4. The shipping, loading, or carrying of any substance or material mentioned in the preceding section in any cargo aircraft operating as a public utility within the Philippines shall be in accordance with regulations issued by the Civil Aeronautics Administration.

SECTION 5. As used in this Act —

"Explosive" shall mean any substance, either solid or liquid, mixture or single compound, which by chemical reaction liberates heat and gas at high speed and causes tremendous pressure resulting in explosion. The term shall include but not limited to dynamites, firecrackers, blasting caps, black powders, bursters, percussions, cartridges and other explosive materials, except bullets for firearms.

"Flammable" is any substance or material that is highly combustible and self-igniting by chemical reaction and shall include but not limited to acrolein, allene, aluminum dyethyl monochloride, and other aluminum compounds, ammonium chlorate and other ammonium mixtures and other similar substances or materials.

"Corrosive" is any substance or material, either liquid, solid or gaseous, which through chemical reaction wears away, impairs or consumes any object. It shall include but not limited to alkaline battery fluid packed with empty storage battery, allyl chloroformate, allytrichlorosilane, ammonium dinitro-orthocresolate and other similar materials and substances.

R.A. No. 6235, in effect, removes airport searches from the field of *Terry* stops and frisks. Of significance is the text of section 9, which provides:

> Every ticket issued to a passenger by the airline or air carrier concerned shall contain among others the following condition printed thereon: "Holder hereof and his hand-carried luggage(s) are subject to search for, and seizure of, prohibited materials or substances. Holder hereof refusing to be searched shall not be allowed to board the aircraft," which shall constitute a part of the contract between the passenger and the air carrier.

"Poisonous" is any substance or materials, except medicinal drug, either liquid, solid or gaseous, which through chemical reactions kills, injures or impairs a living organismn or person, and shall include but not limited to allyl isothiocyanate, ammunition (chemical, non-explosive but containing Class a, B or poison), aniline oil, arsine, bromobenzyle cyanide, bromoacetone and other similar substances or materials.

SECTION 6. Any violation of Section three hereof shall be punishable by an imprisonment of at least five years but not more than ten years or by a fine of not less than ten thousand pesos but not more than twenty thousand pesos: Provided, That if the violation is committed by a juridical person, the penalty shall be imposed on the manager, representative, director, agent or employee who violated or caused, directed, cooperated or participated in the violation thereof: Provided further, That in case the violation is committed in the interest of a corporation legally doing business in the Philippines, the penalty shall be imposed on its resident agent, manager, representative or director responsible for such violation and in addition thereto, the license of said corporation to do business in the Philippines shall be revoked.

Any violation of Section four hereof shall be an offense punishable with the minimum of the penalty provided in the next preceding paragraph.

SECTION 7. For any death or injury to persons or damage to property resulting from a violation of Sections three and four hereof, the person responsible therefor may be held liable with the applicable provisions of the Revised Penal Code.

SECTION 8. Aircraft companies which operate as public utilities or operators of aircraft which are for hire are authorized to open and investigate suspicious packages and cargoes in the presence of the owner or shipper, or his authorized representatives if present; in order to help the authorities in the enforcement of the provisions of this Act: Provided, That if the owner, shipper or his representative refuses to have the same opened and inspected, the airline or air carrier is authorized to refuse the loading thereof.

SECTION 9. Every ticket issued to a passenger by the airline or air carrier concerned shall contain among others the following condition printed thereon: "Holder hereof and his hand-carried luggage(s) are subject to search for, and seizure of, prohibited materials or substances. Holder hereof refusing to be searched shall not be allowed to board the aircraft," which shall constitute a part of the contract between the passenger and the air carrier.

In order to meet the compelling government interest involved, airport security procedures condition the privilege of air travel upon compliance by the traveler to have himself and his belongings searched or seized by airport personnel.

Moreover, unlike the *Terry* limit, there is no provision in the law which states that those who may conduct the search and seizure should only be police officers. Civilian employees may conduct airport searches by frisking travelers and even performing seizures of substances if the need arises. Again, these substances, as provided by the law, need not only be dangerous weapons, but any "prohibited materials or substances."

c. The Significance of Consent and Refusal

Another main difference between airport searches and the *Terry* searches lies in the weight given to a suspect's consent or refusal. From the examination of the *Terry* stop and frisk, both under American and Philippine law, there has never been a case which allows for a suspect to refuse to be stopped or frisked by an officer. In the case of airport searches, however, jurisprudence reveals the importance of the consent of the traveler, whether implied for less intrusive searches, or express for more in depth physical searches.[122]

It is worthy to note that R.A. No. 6235 places a limit on the extent of the consent given. Section 9 only allows the consent to extend to the person of the traveler, as well as his hand-carried luggage. What is clear, therefore, is that there is no implied consent to have checked-in luggage subjected to a search aside from the usual x-ray and customs inspections. A traveler only consents to have his person and carry-on luggage exposed to airport searches.

This does not mean though that checked-in luggage can never be physically searched. If a picture on the x-ray machine reveals the presence of an object which looks like a weapon or contraband, reasonable suspicion is aroused, and the airport personnel may conduct a search of the checked-in luggage.[123]

Another important contribution of R.A. No. 6235 is how it characterizes the consent of the traveler to being in the nature of a contractual consent. Since the airline ticket represents the meeting of the minds between the passenger and the airline company, refusal by the

122. It should be noted that both Johnson and Canton were first asked if they could be searched after reasonable suspicion was aroused in the airport security personnel. Both defendants consented to be brought to a private room for the conduct of an in depth physical search, both also voluntarily removed the contraband on their bodies and handed it to the personnel.

123. *See generally* HALL 2, *supra* note at 96, at 318-19.

passenger to comply with the terms of the contract will entitle the airline to rescind the contract and to refuse the traveler to board the plane.

One of those terms is that the traveler exposes himself and his carry-on luggage to an airport search, pursuant to airport security procedure. Once again, this contractual stipulation is mandated by statute, placing the airline company and the passenger under the ambit of R.A. No. 6235.[124] In *Terry*, there is no such right of refusal given to a suspect. In fact, a refusal to be searched or even an attempt to flee will only arouse greater suspicion in the mind of the officer and even stronger grounds to conduct the search.

d. The Common Factor of Reasonable Suspicion

What is apparent from the *Canton* case is that the Court made clear the indefinite line between an airport search, and the *Terry* stop and frisk. Despite the underlying differences between them, one factor that binds the two together is the need for reasonable suspicion to conduct a more intrusive physical search on the traveler and his property. The Court ruled:

> In this case, after the metal detector alarmed [Canton] consented to be frisked, which resulted in the discovery of packages on her body. It was too late in the day for her to refuse to be further searched because the discovery of the packages whose contents felt like rice granules, coupled by her apprehensiveness and her obviously false statement that the packages contained only money, *aroused the suspicion of the frisker* that [Canton] was hiding something illegal.[125]

It should be remembered that an individual's privacy interest, though subordinate in this case to that of the government's, is involved and must still be granted the respect demanded by the Constitution. Thus, the fundamental protection given by the basic constitutional guarantee against unreasonable searches and seizures is that between the traveler and the airport personnel stands the indispensable requirement of reasonable suspicion in order to safeguard citizens against arbitrary and unreasonable airport searches.

e. Airport Searches — a hybrid or *sui generis*?

Inasmuch as airport searches occupy a standing of their own, an analysis of the *Canton* decision and the accompanying statute fairly brings about a conclusion that airport searches may be considered an additional exception to the search warrant requirement. When the Court declared that an airport

124. This right of refusal is also seen in Section 8 of R.A. No. 6235, which applies to suspicious packages or cargo transported by aircraft companies.

125. *Canton*, G.R. No. 148825 at 5 (emphasis supplied).

security procedure "constitutes another exception to the proscription against warrantless searches and seizures," the Court provided a seventh exception.

Though it may seem contradictory to say that airport searches are *sui generis*, yet also a hybrid of the *Terry* stop and frisk, an examination of its nature will reveal this fact.

Airport searches may be considered a hybrid of the *Terry* stop and frisk in a sense that despite sharing some similarities, airport searches are a class of searches developed from the ever continuing extension and evolution of the *Terry* doctrine to diverse situations. Airport searches are *sui generis* in that they may be considered as initially originated from *Terry*, yet evolved to such an extent that the current circumstances demand that basic *Terry* limits and conditions can no longer be applied. Being in a class of its own, airport searches admit of a distinct scope and limitations associated with its unique nature. They are summarized in the following segment.

VI. Airport Searches: Their Nature, Limits and Scope

A. The Nature of the Airport Search and seizure

Airport security searches are a hybrid of stop and frisk and also of administrative searches. They are administrative searches when they are passively initiated, and stop and frisk when suspicion is created and they are actively concluded by governmental action.[126] By their purpose of being administratively created to serve the compelling public interest of preventing crimes such as hijacking, drug trafficking and terrorism, airport searches somewhat resemble stop and frisk.

Yet, by their nature, airport searches are far less intrusive than a stop and frisk on the street, since there is "no opprobrium attached to such procedures because such 'searches' are not inconvenient and they are experienced by the entire airplane-riding public."[127] Also, when balanced against the compelling government interest involved in airport security procedures, such searches are clearly reasonable under the Constitution.[128]

B. Scope of an Airport Stop and Search

The scope of airport searches is somewhat akin to that of the *Terry* stop. In *Terry*, the Court ruled that "[t]he scope of [a stop] must be 'strictly tied to and justified by' the circumstances which rendered its initiation

126. Hall 2, *supra* note at 96, at 317.

127. *Id.* at 318.

128. *Id.*

permissible."[129] If an airport encounter shows that there is no objective reason to believe that the traveler is a suspect, he must be permitted to go his own way. Otherwise, a continuous stop will result in a detention to which probable cause or consent is required.[130]

In the case of an airport stop, even though reasonable suspicion may be present to justify its commencement, probing detailed questioning that lengthens the stop beyond a simple interrogation can turn it into a *de facto* arrest.[131] Moreover, the use of force by the officer, in the form of the latter drawing his gun, or restraining a suspect or witness usually turns any stop into an arrest.[132]

As regards who may conduct an airport stop and search, this may be performed by airport security personnel who need not be police officers. This is because R.A. No. 6235, the basis for conducting airport searches, does not require that only police officers conduct such procedures.

The scope of the airport search is intimately dependent on the nature of the stop and the extent of the suspicious traveler's consent. Though there is an implied consent of the traveler to subject his person and property to an airport search, such consent is qualified by R.A. No. 6235. Thus, a traveler contractually consents to have his person and carry-on luggage subjected to x-rays, friskers and metal detectors – a "search" considered to be not so intrusive. With regard to checked-in luggage, his express consent is necessary for a closer, more intrusive search. Moreover, in relation to checked-in luggage, which may include cargo, the same must be opened and investigated in the presence of the owner, shipper, or authorized representative.[133]

C. Limitations — Reasonable Suspicion, Probable Cause, and the Consent Theory.

In determining the limitations of a valid airport stop and frisk, what is certain is that reasonable suspicion, or in its absence, probable cause is indispensable. This is because, in the absence of reasonable suspicion, the stop becomes a detention which must be attended by probable cause to be considered valid. In the absence of both reasonable suspicion and probable cause however, it is necessary that the consent of the suspect be obtained. It is therefore entirely possible that a stop based on bare suspicion, short of reasonable suspicion,

129. *Terry*, 392 U.S. at 19.

130. Hall 2, at 314, (citing United States v. Obasa, 15 F3d 603, 606-607 (1994, CA6 Ky)); *Brignoni-Ponce*, 422 U.S. at 881-82.

131. *Royer*, 460 U.S. at 501-02.

132. Hall 2, *supra* note at 96, at 314.

133. *See* R.A. No. 6235, § 8.

may be sustained by the consent of the suspect, even though contraband is ultimately found.[134]

From what was intimated above, the key to first conducting a stop, either a *Terry* stop or airport stop, is the primary requisite of reasonable suspicion that a crime is afoot. In the United States, reasonable suspicion may be derived from the objective observations by trained police officers who also happen to be part of a drug courier profile operation.[135] In the Philippines, reasonable suspicion may be considered to be spurred by a suspicious image on the x-ray machine, or the alarm of the walk-through magnetometer.[136]

Airline passengers are warned that the screening of their persons and carry-on luggage will occur. Anyone who enters the confines of an airport is virtually charged with knowledge that screening is required. Consequently, many cases in the United States have approved of airport screening under a "consent theory."[137]

In the case of *Mendenhall*, the Court upheld the stop and frisk because of the consent of the suspect to the search and upon a showing that she was at liberty to refuse the search or even answer the questions. The Court recognized that a detention based solely on consent or reasonable suspicion could lead to either a consent search, which provides probable cause for arrest, or probable cause for a search and an arrest.[138]

What can be understood with the importance of consent to be searched, is that in the absence of reasonable suspicion, the airport stop may become constitutionally invalid. It must be remembered, however, that one of the exceptions to the warrant requirement is a waiver by the defendant of his constitutional privilege against unreasonable searches and seizures. [139] Therefore, by waiving or consenting to have his person and belongings

134. HALL 2, *supra* note at 96, at 315 (citing *Mendenhall*, 446 U.S. at 565).

135. *Id.* at 312.

136. *Id.* at 318. In *Canton*, the reasonable suspicion of the airport personnel was aroused by the alarm of the metal detector. In *Johnson*, reasonable suspicion resulted from the routine frisking of passengers and the detection of substances tucked in the clothing of the defendant.

137. *Id.* at 319 (citing United States v. Williams, 516 F2d 11 (1975, CA2 NY); United States v. De Angelo, 584 F2d 46 (1978); United States v. Wehrli, 637 F2d 408 (1981); United States v. Winstanley, 359 F Supp 146 (1973, ED La); United States v. Doran, 482 F2d 929 (1973, CA9 Cal); United States v. Pulido-Baquerizo, 800 F2d 899 (1986, CA9 Cal) (consent by x-ray); United States v. Herzburn, 723 F2d 773 (1984, CA11 Fla); United States v. Lopez-Pages, 767 F2d 776 (1985, Ca11 Fla); People v. Heimel, 812 P2d 1177 (1991, Colo)).

138. *Id.* at 315.

139. *Ramos*, 222 SCRA at 557.

subjected to an "unreasonable airport search" (since reasonable suspicion is lacking) such unreasonable search becomes a reasonable one because the suspect has given his consent to the same.

VII. CONCLUSION

The search and seizure clause of the Constitution granted society protection against intrusions by the government over their persons, homes and effects. Although there is no provision in the Constitution expressly recognizing an individual's right to privacy, this clause forms part of the foundation which acknowledges and grants individuals a constitutional right to privacy.

Aside from the Constitution, statutes enacted by the Legislature have also gone far to substantiate that indeed a constitutional right to privacy exists. It should be remembered however, that these constitutional rights are creatures of the majority - theirs to give, and theirs to take away. Therefore, "[t]he ultimate authority of such rights must yield more readily to other asserted interests of government than would rights ascribed to the Constitution itself."[140]

It is for this reason that our nation's constitutional history has witnessed compelling government interests demanding a ceding by the public of their basic constitutional rights. A look at the annals of the law on searches and seizures reveals that statute and jurisprudence over the years have provided for certain exceptions to the warrant requirement necessitated not only by the changing times, but also by the primordial need for the protection of society as a whole.

At present, the Philippine government, along with the rest of the world, is faced with the compelling government interest of ensuring the security of air transportation. Commercial air travel, once considered as a luxury, has now become a staple of modern existence. The twentieth century brought a more efficient, swift and convenient means of travel with the introduction of the airplane. It is difficult to imagine life without it. However:

> [a]long with the good comes the bad. While airline travel provides unparalleled speed, comfort and convenience to travelers who must cross vast distances in a short time, it also gives terrorists and other criminals a unique opportunity to inflict death and destruction.[141]

The intrinsic dangers associated with air travel presented an urgent need for the law to embrace an additional exception (the seventh exception) to the search warrant requirement. This exception is that of airport searches, similar in a lot of ways to the *Terry* stop and frisk, and is embodied in Republic Act No. 6235, a statute enacted by the Legislature.

140. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1311 (1988).

141. U.S. v. $124,570 U.S. Currency CA9 Cal, F2d 1240 (1989), at 1242-43.