f. works that are protected by virtue of and in accordance with any international convention or other international agreement to which the Philippines is a party such as the Berne Convention and the provisions of the TRIPS Agreement.[34]

34. Damages

No damages may be recovered for copyright infringement after four years from the time the cause of action arose.[35]

CONCLUSION

The foregoing is an overview of the more important areas of the Code as it relates to copyright. Our legislators saw a need to modernize our intellectual property laws. This has been achieved as the Code provisions on copyright now take into account technological developments such as multimedia works, digitization rights, the internet and other wire and non-wire modes of transmitting or communicating works to the public.

The remedies available to the copyright owner and the penalties that may be imposed on the infringer have also been significantly improved. It is hoped that the provisions of the Code, which take effect on 1 January 1998, will improve the ability of both domestic and international copyright owners to bring effective enforcement action to protect their creations in the Philippines.

[34] *Id.* § 221.

[35] *Id.* § 225.

THE MALMSTEDT AND CUIZON SURVEYS REVISITED: REFUTING EXIGENT CIRCUMSTANCES AS AN EMERGING NORM IN WARRANTLESS ARRESTS AND SEARCHES*

ANTONIO M. ELICAÑO**

INTRODUCTION

The proscription against warrantless arrests and searches in Article III, Section 2 of the 1987 Constitution,[1] embodies the value afforded by the State to the privacy of home and person.[2] With its origins in the opposition against prior state censorship (in the form of a press licensing system) during the days of the Star Chamber,[3] the kernel of this liberty has been expressed as:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter — but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenement.[4]

* The article won the *Chief Justice Andres B. Narvasa Award* in the 1996 Supreme Court Association of Lawyer Employees (SCALE) Legal Writing Contest.

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[1] While the provision prohibits "unreasonable" searches and seizures, there is no debate that the word "unreasonable" refers to arrests and/or searches and seizures without warrant. 1 JOAQUIN BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 85-86 (1987), (hereinafter 1 BERNAS); and OSCAR HERRERA, A HANDBOOK ON ARREST, SEARCH AND SEIZURE AND CUSTODIAL INVESTIGATION 4-5 (1994).
Further, the provision itself has two components: the first part, consisting of a declaration of the right, is known as the "warrantless clause;" while the second half, enumerating the requisites for issuance of a warrant, is properly termed the "warrant clause." *Id.* at 5, *citing* LAFAVE, *infra*.

[2] ENRIQUE FERNANDO, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINE 653 (2d 1977). The protection afforded is by way of the exclusionary rule laid down in §3(2), art. III of the Constitution.

[3] *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 13-48 (1966), for a discussion on the historical development of the Fourth Amendment to the United States Constitution.

[4] REX D. DAVIS, FEDERAL SEARCHES AND SEIZURES 4 (1964).

The prohibition is not absolute, however, and the recognized valid warrantless arrests are enumerated in Rule 113, Section 5 of the Rules of Court,[5] while jurisprudence supplies the allowable warrantless searches and seizures:

They are: (1) search incidental to a lawful arrest, (2) search of moving vehicles, (3) seizure in plain view, (4) customs searches, and (5) [waiver or consent searches].[6]

To these, the author wishes to add the category of "stop-and-frisk" searches, as devised by the United States Supreme Court in *Terry v. Ohio*,[7] which shall be discussed in detail further in this comment.

On 18 April 1996, the Third Division of the Supreme Court promulgated *People v. Cuizon*,[8] and the *ponencia* opened with:

> In deciding the case at bench, the Court reiterates doctrines on illegal searches and seizures, and the requirements for a valid warrantless search incident to a valid warrantless arrest. While the Court appreciates and encourages pro-active law enforcement, it nonetheless upholds the sacredness [*sic*] of constitutional rights and repeats the familiar maxim, "the end never justifies the means."

Cuizon involved a prosecution against Antolin Cuizon, Steve Pua and Paul Lee for violation of Section 15 of Republic Act No. 6425.[9] In acquitting Cuizon, affirming Pua's conviction and remanding the case against Lee, the Court revisited the survey of jurisprudence[10] in Mr. Chief Justice Andres Narvasa's separate opinion in *People v. Malmstedt*[11] regarding warrantless arrests and searches, and took pains to distinguish past decisions from its present ruling.

This comment focuses not on the outcome of *Cuizon*, rather, the disturbing implications of the survey, *viz.*, what may be misconstrued as judicial imprimatur that

[5] The provision reads, in part:
§ 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.
For brevity, paragraph "a" shall be referred to as the "*in flagrante delicto*" clause; paragraph "b," the "hot pursuit" clause; and though not touched upon in this comment, paragraph "c," the "escapee" clause.

[6] People v. Fernandez, 239 SCRA 174, 182-183 (1994).

[7] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 3d 889 (1968).

[8] 256 SCRA 325 (1996) (per Panganiban; Narvasa, C.J., Melo, J., and Francisco, J., concurring; Davide, Jr., J., in the result).

[9] THE DANGEROUS DRUGS ACT, R.A. 6425 (1972); People v. Cuizon, 256 SCRA 325 (1996).

[10] Under the Heading: "*Comparison Between The Present Case and Earlier Decisions of This Court*," 19-24.

[11] 198 SCRA 401, 402-403 (1991).

"exigency" constitutes an exception, in and by itself, to the prohibition against warrantless arrests and searches, not merely (as will be shown later) the underlying premise for the already recognized exceptions.[12] For instance, in *People v. Fernandez*,[13] the Court, through its Second Division, after enumerating the "generally accepted exceptions to the warrant requirement" for a search referred to earlier, observed in a footnote:

> Exigent circumstances may be the 6th exception. This exception is a general catch-all category that encompasses a number of diverse situations. What they have in common is some kind of emergency that makes obtaining a search warrant impractical, useless, dangerous, or unnecessary. Among these situations are danger to physical harm to the officer or destruction of evidence, danger to a third person, driving while intoxicated, and searches in hot pursuit.[14]

The rest of this comment then is devoted to a review of established doctrine as regards probable cause, warrantless arrests (*in flagrante delicto* and "hot pursuit") and searches; to be followed by a scrutiny and analysis of the cases surveyed by *Malmstedt* and *Cuizon* as measured against established doctrine; and any ramifications arising therefrom.

I. *BURGOS, AMINNUDIN* AND *TERRY*: THE GENERAL RULES

A. Construction

No fixed formula exists to determine the reasonableness of a warrantless arrest or search, the validity of a particular case being purely a judicial question determinable from a consideration of the circumstances involved. As such, the constitutional prohibition should be construed strictly in favor of the individual to prevent stealthy encroachment of the rights secured.[15] In general, a warrantless arrest or search is presumed unreasonable and "the burden is on those seeking the exemption to show the need for it."[16]

[12] DAVIS, *supra* note 4, at 163, where he states that exceptional circumstances "have been found to exist when suspects are fleeing or likely to take flight [hot pursuit], a movable vehicle is involved, contraband is threatened with removal or destruction and, in some courts, where no magistrate is available to issue a warrant." *See also* 68 AM. JUR. 2d, Searches and Seizures, § 76, 701 (1993) [hereinafter 68 AM. JUR. 1993] listing danger of violence and injury to the officers or others [stop and frisk], risk of subject's escape, or probability of destruction of evidence [search incidental to a lawful arrest], as constitutive of exigent circumstances. Clearly, these, excepting the unavailability of a judge, are already recognized exceptions without need of adding "exigent circumstances" as a classification by itself.

[13] 239 SCRA 174 (1994).

[14] *Fernandez*, 239 SCRA 182, n.20, *citing* ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE FOR LAW ENFORCEMENT PERSONNEL 150 (1987).

[15] Alvarez v. Court of First Instance of Tayabas, 64 Phil. 33, 42, 44 (1937).

[16] MICHELE G. HERMANN, SEARCH AND SEIZURE CHECKLISTS 149,151 (1994) *quoting from* United States v. Jeffers, 342 U.S. 48, 41 (1951).

In particular, it has been written that warrantless searches are *per se* unreasonable, and government has the burden of demonstrating that one of the exceptions applies.[17] With respect to warrantless arrests, the author subscribes to the view that these constitute *exceptions* to the general rule, requiring strict construction so as not to render futile, not a mere statutory provision, but a vital constitutional norm. Hence, all doubts must be resolved in favor of the general provision, rather than the exception.[18]

B. Probable Cause

It has been posited that the minimum requirement for a warrantless arrest or search is the existence of probable cause,[19] which has been described, customarily, as consisting of "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing accused to be committing the offense or to be guilty of the offense."[20] Specifically as regards searches, it has been defined as "such facts and circumstances which would lead a reasonably discreet and prudent man to believe that an offense has been committed and that the objects sought in connection with the offense are in the place sought to be searched."[21] Needless to say, "probable cause" implies "individualized suspicion" based on the existence of facts known prior to the search or arrest,[22] demands more than bare or mere suspicion,[23] but requires less than moral certainty.[24] For purposes of this comment, the following definitions or descriptions of suspicion are adopted:

> [T]he perception of something without proof or upon slight evidence; or that it implies a belief or opinion as to guilt, based on facts or circumstances which do not amount to proof. . . . Suspicion is weaker than belief, since suspicion requires no real foundation for its existence, while 'belief' is necessarily based on at least a knowledge of facts [25]

C. Warrantless Arrests

1. *IN FLAGRANTE DELICTO*

Anent the requisites for a valid *in flagrante delicto* arrest, the Court held in *People v. Burgos*[26] that "the officer arresting a person who has just committed, is committing, or

[17] JOHN WESLEY HALL, JR., SEARCH AND SEIZURE, § 7:1, 200 (1982).

[18] Umil v. Ramos, 202 SCRA 251, 286; Feliciano, concurring and dissenting.

[19] 1 BERNAS *supra* note 1, at 86; 123, *citing* U.S. v. Santos, 36 Phil. 851, 855 (1917).

[20] ISAGANI A. CRUZ, CONSTITUTIONAL LAW, 137 (1991), *citing* Kwong How v. U.S., 71 F. 2d 71, State *ex rel* Wong [hereinafter CRUZ].

[21] Burgos, Sr. v. Chief of Staff. AFP, 133 SCRA 800, 813 (1984).

[22] 68 AM. JUR., §70, 695 (1993).

[23] 5 AM. JUR. 2d. Arrest, § 42, 694 (1995) [hereinafter 5 AM. JUR. 1995].

[24] Webb v. De Leon, 247 SCRA 652, 676 (1995).

[25] JOSEPH A. VARON, 120 SEARCHES, SEIZURES AND IMMUNITIES (2d ed. 1974).

[26] People v. Burgos, 144 SCRA 1 (1986).

is about to commit an offense must have *personal* knowledge of that fact. The offense must also be committed in his presence or within his view."[27] The phrase "in his presence or within his view" has been construed to mean: "[W]hen the officer sees the offense, although at a distance, or hears the disturbances created thereby and proceeds at once to the scene thereof; or the offense is continuing, or has not been consummated, at the time the arrest is made."[28]

Most instructive on this subject was the concurring and dissenting opinion of Mr. Justice Florentino Feliciano in the *Umil v. Ramos* Resolution:[29]

> The fact of the occurrence of the offense, or of the attempt to commit an offense, in the presence of the arresting officer, may be seen to be the substitute, under the circumstances, for the securing of a warrant of arrest... Section 5(a) may, moreover, be seen to refer to *overt acts constitutive of a crime* taking place *in the presence* of the arresting officer. The term "presence" in this connection is properly and restrictively construed to relate to acts taking place *within the optical or perhaps auditory perception of the arresting officer.* If no overt, recognizably criminal acts occur which are perceptible through the senses of the arresting officer, such officer could not, of course, become aware at all that a crime is being committed or attempted to be committed in his presence. It is elementary that purely mental or psychological phenomena, not externalized in overt physical acts of a human person, cannot constitute a crime in our legal system. For a crime to exist in our legal law, it is not enough that *mens rea* be shown; there must also be an *actus reus.* If no such overt acts are actually taking place in the presence or within the sensory perception of the arresting officer, there would in principle, be ample time to go to a magistrate and ask for a warrant of arrest. There would, in other words, not be that imperious necessity for instant action to prevent an attempted crime, to repress the crime being committed, or to capture the doer of the perceived criminal act, the necessity which serves as the justification in law of warrantless arrests . . . [30]

2. HOT PURSUIT

With respect to the requisites for a valid "hot pursuit" arrest, the language of the provision requires the concurrence of observance of a time interval and "personal knowledge of facts indicating that the person to be arrested" has committed an offense. *Burgos* then likewise provides the legal standard to be observed under Section 5(b):

[27] *Id.* at 14.

[28] United States v. Samonte, 16 Phil. 516, 519 (1910).

[29] Umil v. Ramos, 202 SCRA 251, 284 [1991] (Feliciano, J., concurring and dissenting) [hereinafter Umil-Feliciano].

[30] Umil-Feliciano, *supra* note 29 at 287; HERRERA, supra note 1, at 166, where he notes: [T]here must be objective facts or overt acts committed in [the] presence of [the] arresting officer reasonably perceived (subjective) as a crime. *Perception*, based on objective facts — not the reality of a crime is the test to determine validity. *See also* 5 AM. JUR. § 49, 699-702 (1995).

[I]t is not enough that there is reasonable ground to believe that the person to be arrested has committed a crime. A crime must in fact or *actually* have been committed first. That a crime has actually been committed is an essential precondition. It is not enough to suspect that a crime may have been committed. The fact of the commission of the offense must be undisputed. The test of reasonable ground applies only to the identity of the perpetrator.[31]

In elaborating on these two requisites and *Burgos*, Justice Feliciano continued his opinion with the following:

In somewhat different terms, the first requirement imports that the effect or *corpus* of the offense which has just been committed are still visible: e.g., a person sprawled on the ground, dead of a gunshot wound; or a person staggering around bleeding profusely from stab wounds. The arresting officer may not have seen the actual shooting or stabbing of the victim, and therefore, the offense can not be said to have been committed "in [his] presence." The requirement of "*personal* knowledge" on the part of the arresting officer is a requirement that such knowledge must have been obtained *directly from sense perception by the arresting officer*. That requirement would exclude information conveyed by another person, no matter what his reputation for truth and reliability might be. Thus, where the arresting officer comes upon a person dead on the street and sees a person running away with a knife from where the victim is sprawled on the ground, he has *personal knowledge* of facts which rendered it highly probable that the person fleeing was the doer of the criminal deed. The arresting officer must, in other words, perceive through his own senses some act which directly connects the person to be arrested with the visible effects or *corpus* of a crime which has "just been committed."

The use of the words "has in fact just been committed" underscores the requirement that the time interval between the actual commission of the crime and the arrival of the arresting officer must be brief indeed. In the first place, the word "just" was fairly recently inserted in Section 5(b) by the 1985 Rules on Criminal Procedure, no doubt in order to underscore the point here being made. In the second place, a latitudinarian view of the phrase *"has in fact just been committed"* would obviously render pointless the requirement in Section 5(a) that the crime must have been committed *"[in] the presence"* of the arresting officer . . . .[32]

3. PERSONAL KNOWLEDGE

Finally on this subject, the author wishes to draw once more from Justice Feliciano's opinion in the *Umil* Resolution as regards the standard of "personal knowledge" required by *Burgos* under Section 5(a), and the language of Section 5(b):

[31] *Burgos*, 133 SCRA at 15.

[32] Umil-Feliciano, 202 SCRA at 236, 289-290.

It is worth noting that the requisite of "personal knowledge" on the part of the arresting officer who is determining "probable cause" right at the scene of the crime, is in a sense more exacting than the standard imposed by the Constitution upon the judge who, in the seclusion of his chambers, ascertains "probable cause" by examining the evidence submitted before him. The arresting officer must *himself* have "personal knowledge;" the magistrate may rely upon the personal knowledge of the witnesses examined by or for him in issuing a warrant of arrest. In the present Resolution, the majority begins with noting the requirement of "personal knowledge" in Section 5(b), but winds upon in the next page with a very diluted standard of "reasonable belief" and "good faith" on the part of the arresting officers. The stricter standard is properly applicable to the officers seizing a person without a warrant of arrest, *for they are acting in derogation of a constitutional right*. That the person unlawfully arrested without a warrant may later turn out to be guilty of the offense he was suspected of in the first place is, of course, quite beside the point. Even a person secretly guilty of some earlier crime is constitutionally entitled to be secure from warrantless arrest, unless he has in fact committed *physically observable criminal acts in the presence* of the arresting officer, or had just committed such acts when the arresting officer burst upon the scene.[33]

4. *AMINNUDIN*

As summarized in *Malmstedt*, the facts in *People v. Aminnudin*[34] were as follows:

Aminnudin was arrested without a warrant by PC officers as he was disembarking from an inter-island vessel. The officers were waiting for him because he was, according to an informer's report, then transporting marijuana. The search of Aminnudin's bag confirmed the informer's report; . . . The Court nevertheless held that since the PC officers failed to procure a search warrant although they had sufficient time (two days) to do so and therefore, the case presented no such urgency as to justify a warrantless search, the search of Aminnudin's person and bag, the seizure of the marijuana and his subsequent arrest were illegal; and the marijuana was inadmissible in evidence in the criminal action subsequently instituted against Aminnudin for violating the Dangerous Drugs Act.[35]

It bears mention that the *Aminnudin* Court,[36] in light of the sufficient period of time for law enforcers to obtain a warrant, expressly rejected "expediency" or "exigent circumstances" as a justification for the warrantless arrest and search:

Contrary to the averments of the government, the accused-appellant was not caught *in flagrante* nor was a crime about to be committed or had just been committed to justify the warrantless arrest . . . *Even expediency could not be invoked to dispense*

[33] *Id.* at 290-291.

[34] 163 SCRA 402 (1988).

[35] *People v. Malmstedt*, 198 SCRA at 416-417 (1991).

[36] Excepting Griño-Aquino, J., the lone dissenter of the then First Division.

with the obtention of the warrant as in the case of Roldan v. Arca (65 SCRA 336), for example. Here it was held that vessels and aircraft are subject to warrantless searches and seizures for violation of the customs law because these vehicles may be quickly moved out of the locality or jurisdiction before the warrant can be secured.

The present case presented no urgency. . . .[37] emphasis added

The author submits this rejection of "expediency," viewed properly, refers to "the moving vehicle" exception to warrantless searches, only in view of the fact that Aminnudin was arrested as he disembarked from an inter-island vessel. This should forestall any misinterpretation of the above-quoted statements from *Aminnudin* that in instances presenting a sense of urgency, but not involving the already recognized valid warrantless arrests and searches, "expediency," *per se*, may be properly invoked as a justification.

D. Warrantless Searches

1. CUSTOMS SEARCHES AND THE MOVING VEHICLE DOCTRINE

The moving vehicle doctrine, *vis-a-vis*, customs searches, as first encountered[38] by the Court in the 1968 case of *Papa v. Mago*,[39] were originally intended to exempt from the warrant requirement a search of "a ship, motorboat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[40]

The Court then upheld the validity of warrantless searches for contraband, except in the case of a dwelling house, by persons exercising police authority under the customs law.[41] Moreover, in view of *People v. Case*,[42] *Papa* adopted the "moving vehicle" doctrine, independent from customs searches, in this jurisdiction.

Rev. Joaquin G. Bernas, S.J., comments on *Papa* in this wise:

First, the *Carroll* rule arose out of a portion of the Volstead Act providing for warrantless searches of a moving automobile on the open road "where it is not practicable to secure a warrant . . . " *It was thus founded on an exigent circumstance which demanded immediate action.* Thus in *Coolidge v. New Hampshire*, the Court did not allow the warrantless search of a parked car because the facts did not indicate that it

[37] *Aminnudin*, 163 SCRA at 408-409.

[38] 1 BERNAS, *supra* note 1, at 105.

[39] 22 SCRA 857 (1968).

[40] *Id.* at 873, *quoting* 47 AM. JUR., pp. 513-514, *citing* Carroll v. United States, 267 U.S. 132, 69 L. Ed., 543, 45 S. Ct. 280, 39 A.L R. 790; and People v. Case, 320 Mich. 379. 190 N.W. 389, 27 A.L.R. 686.

[41] *Id.* at 872.

[42] Umil-Feliciano, 202 SCRA 251 (1991).

was impracticable to secure a warrant. Secondly, the *Carroll* rule does not dispense with the requirement of probable cause [citing the later cases of *Almeida-Sanchez v. United States*, 37 L. Ed. 2d 596, 600-1 (1973) and *Chambers v. Maroney*, 399 U.S. 42, 51 (1970)].

It should also be noted that the *Papa* case involved enforcement of customs laws which, as is also recognized in *Papa*, establish the third exception to the requirement of warrants. It was therefore comparable to American border control cases which give to customs and immigration officers the broadest power of search. As the Carroll case itself said, "Travelers may be . . . stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." Thus, the doctrine in the *Papa* case cannot be applied without necessary purification to any and every search of moving vehicles.[43] (emphasis added)

The "moving vehicle" doctrine, however, has been modified by the promulgation of the *Valmonte* Decision[44] and Resolution,[45] upholding the reasonableness of limited visual searches conducted at "checkpoints" in light of national security considerations, despite the absence of probable cause.[46]

2. STOP-AND-FRISK

A detailed examination of *Terry* is in order, given that as of this writing, it has been mentioned in case reporters in this jurisdiction only twice.[47] The fact pattern in *Terry* has been summarized as follows:

One afternoon [approximately 2:30 p.m.][48] a Cleveland policeman became suspicious of two men standing on a street corner in the downtown area. One of the suspects walked up the street, peered into a store, walked on, started back, looked into the same store, and then joined and conferred with his companion. The other suspect repeated this ritual, and between them and the two men went through this performance about a dozen times. They also talked with a third man, and then followed him up the street about ten minutes after his departure. The officer, thinking that the suspects were "casing" a stickup and might be armed, followed

[43] 1 BERNAS, *supra* note 1, at 106-107.

[44] Valmonte v. de Villa, 178 SCRA 211 (1989).

[45] 185 SCRA 665 (1990). *See* People v. Exala, 221 SCRA 494 (1993), decided on strength of *Valmonte*, 178 SCRA 211 (1989).

[46] *See* HERRERA, *supra* note 1, at 117, for enumeration of guidelines issued by the Supreme Court; *See however* DAVIS, *supra* note 14, at 349-351, and 68 AM. JUR. 1993, § 57, 684-685, citing authorities to state that "mere observation or visual inspection of what is open and patent does not constitute a search."

[47] Collector of Customs v. Villaluz, 71 SCRA 356, 382 (1976), where what was in issue was not even the reasonableness of a "stop and frisk," but whether § 1, Republic Act No. 5179 granted jurisdiction to Circuit Criminal Courts to conduct preliminary investigations; and Posadas v. Court of Appeals, *infra*.

[48] Terry v. Ohio, L. Ed. 2d 896 (1968).

and confronted the three men as they were again conversing. He identified himself and asked the suspects for their names. The men only mumbled something, and the officer spun Terry around and patted his breast pocket. The policeman felt a pistol, which he removed. A frisk of Terry's companion also uncovered a pistol; a frisk of the third man did not disclose that he was armed, and he was not searched further. Terry was charged with the crime of carrying a concealed weapon, and he moved to suppress the weapon as evidence. The motion was denied by the trial judge, who upheld the officer's actions on a stop-and-frisk theory. The Ohio court of appeals affirmed, and the state supreme court dismissed Terry's appeal.[49]

The United States Supreme Court, in affirming Terry's conviction, began by emphatically rejecting the suggestion that a "stop and frisk" did not constitute a "search" or "seizure" within the meaning of the Constitution: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person."[50] Delving into "probable cause," the Court initially reiterated that exigent circumstances may justify a "hot pursuit" arrest, then clarified that "stop-and-frisks" dealt with an entire rubric of police conduct ... which historically has not been ... subjected to the warrant procedure. Instead, the conduct involved ... must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[51]

The Court then conducted a balancing-of-interests test between the immediate interest of the police officer to protect himself and other prospective victims (not merely the general governmental interest of crime prevention and detection), on one hand; and an individual's rights, on the other. It must be noted that while the Court made no express finding as to the presence nor absence of probable cause, it may be clearly inferred that the probable cause requirement was not met in *Terry* from the following pronouncements therein:

> [Petitioner's argument] fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, ... is also justified on other grounds, ... and can therefore involve a relatively extensive exploration of the person. *A search for weapons in the absence of probable cause to arrest*, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.[52] (emphasis added)

[49] WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.1(b), 337-338 (2d 1987).

[50] Terry v. Ohio, 20 L. Ed. 2d 896 (1968).

[51] *Id.*

[52] *Id.*

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, *regardless of whether he has probable cause to arrest the individual for a crime* ....[53] (emphasis added)

This reading of *Terry* that a "stop-and-frisk," as held by the United States Supreme Court, does not require probable cause, finds support in a later decision and in works of publicists:

> We have held that probable cause means a fair probability that contraband or evidence of a crime will be found, ... and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.[54]

> Thus, 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 ....[55] (emphasis added)

> It 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*.[56] (underscoring supplied)

> In the "stop-and-frisk" situation, ... there may be no question of probable guilt yet because there may not even be any crime but merely a situation calling for investigation. Thus, to require probable cause may in the circumstances be "premature."[57]

The above notwithstanding, it 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.[58]

In defining then the justification or motivation for a "stop-and-frisk," as well as the allowable scope of this "limited protective search," the Court concluded:

> 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

[53] *Id.*

[54] HERMANN, *supra* note 16, at 187, *quoting* United States v. Sokolow, 490 U.S. 1, 7 (1989).

[55] 3 LAFAVE, § 9.1(d), *supra* note 16, at 342.

[56] 1 VARON, *supra* note 25, at 81.

[57] 1 BERNAS, *supra* note 1, at 124.

[58] 1 VARON, *supra* note 25, at 84.

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. Such a search is a reasonable search under the Fourth Amendment . . . . [59]

3. SEARCH INCIDENTAL TO A LAWFUL ARREST, PLAIN VIEW DOCTRINE AND CONSENT SEARCHES

The search incidental to a lawful arrest, it has been forwarded, is the most important of the valid warrantless searches. 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.[60] In this jurisdiction, the law requires that there first be a lawful arrest before a search can be made — the process cannot be reversed.[61] At bottom, assuming a valid arrest, the arresting officer may search the person of the arrestee and the area within which the latter may reach for a weapon or for evidence to destroy, and seize any money or property found which was used in the commission of the crime, or the fruit of the crime, or that which may be used as evidence, or which might furnish the arrestee with the means of escaping or committing violence.[62]

The plain view doctrine, briefly, allows the seizure, without warrant, of prohibited articles within plain view, open to eye and hand, of the law-enforcement officer who has a right to be in the position to have that view, so long as discovery of said articles is inadvertent.[63] While fruits of a consent or waiver search, in order to be admissible in evidence, the prosecution must prove that defendant-appellant had knowledge, actual or constructive, of the right; and that the latter had an actual intention to relinquish it. The fact that a person fails to object to the entry into his house does not amount to a waiver, the presumption being against the waiver of a constitutional right.[64]

[59] Terry v. Ohio, 20 L. Ed. 2d 896 (1968). In fact, 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, *id.*

See HERMANN, *supra* note 16 at 202: "Nothing in *Terry* can be understood to allow a generalized cursory search for weapons or, indeed, any search whatever for anything but weapons," *quoting from* Ybarra v. Illinois, 444 U.S. 85, 93-94 [1979].

That the scope of a stop-and-frisk should be a limited protective search for concealed weapons is not in issue, according to numerous authorities, *see* 1 BERNAS, *supra* note 1, at 125; CRUZ, *supra* note 1, at 150.

[60] DAVIS, *supra* note 4, at 96-98, 120.

[61] People v. Malmstedt, 198 SCRA 401, 422 (1991), (per Narvasa, C.J., concurring and dissenting).

[62] 1 BERNAS, *supra* note 1, at 105.

[63] *See* CRUZ, *supra* note 20, at 154; and 1 BERNAS, *supra* note 1, at 107.

[64] *People v. Burgos*, 144 SCRA 1 (1986)

II. THE *MALMSTEDT* AND *CUIZON* SURVEYS

A. Framework

In the critique of the following cases, this comment adopts and shall attempt to confine its analysis within the following framework, insofar as pertinent to this comment:

> The recommended pattern of inquiry involves four basic questions. First: Was there a "search" or "seizure" within the meaning of the [Constitution]? . . . If the answer is "yes," the inquiry should proceed to the second question. If the answer is "no," the problem is immediately resolved in favor of the prosecution — that is, there has been no violation of the defendant's constitutional rights. Second: Was a warrant (a) required, and (b) obtained? . . . If a warrant was both required and obtained, the inquiry should proceed to the third question. If a warrant was required but not obtained, the problem is thus resolved in favor of the defendant — that is, his constitutional rights have been violated. But if a warrant was not required, the inquiry should proceed immediately to the fourth question. Third: Was the warrant valid? . . . If the answer is "yes," the inquiry proceeds to the fourth question. If the answer is "no," the problem is consequently resolved in defendant's favor — there has been a violation of his constitutional rights. Fourth: Was the search or seizure properly conducted and properly limited in scope? . . . If the answer is "yes," the problem is resolved in favor of the prosecution — the defendant's rights have not been violated. If the answer is "no," the problem is resolved in defendant's favor — his rights have been violated.
>
> Although it constitutes an oversimplification of this complex area of law, the foregoing outline may offer a helpful starting point in attacking search and seizure problems.[65]

B. Summary and Critique

The first of six[66] cases was *People v. Claudio*,[67] and summarized in this manner:

> [T]he accused, a passenger on a bus [from] Baguio city, was arrested by a policeman on the same bus because of the distinctive odor of marijuana emanating from the plastic bag she was carrying. The Court held the warrantless arrest under the circumstances to be lawful, the search justified and the evidence thus discovered admissible in evidence.[68]

While according to *Malmstedt*, it was the accused's act of placing her plastic bag behind the seat occupied by the policeman which aroused the latter's suspicion, and at first

[65] 68 AM. JUR. 2d, Searches and Seizure, § 1 (1973).

[66] People v. Malmstedt, 198 SCRA 401 (1991), surveyed five (5) cases: *Claudio, Tangliben, Posadas, Maspil*, and *Lo Ho Wing*; while *Cuizon* surveyed the same quintet with the addition of *Malmstedt*.

[67] 160 SCRA 646 (1988).

[68] People v. Cuizon, 256 SCRA 325, at 344 (1986).

opportunity and without the accused's knowledge, the policeman surreptitiously looked into the plastic bag, noted that it contained camote tops as well as a package, and that the smell of marijuana emanated from the package.[69]

What the above summaries omit, however, is that the case itself makes no mention of any odor of marijuana emanating from the package; in fact, it was only after the policeman inserted his finger inside the accused's bag that he smelt marijuana. The facts, as reported in Claudio, read:

> The act of the accused putting her bag behind Pat. Obiña's seat aroused his suspicion and made him felt (sic) nervous. With the feeling that there was something unusual, he had the urge to search the woven plastic bag. But it was only at San Fernando, Pampanga when he was able to go to the bag. He inserted one of his fingers in a plastic bag located at the bottom of the woven bag and smelt marijuana. The plastic bag appearing to contain camote tops on the top [had] a big bundle of plastic of marijuana at the bottom.[70]

At any rate, the Court upheld the warrantless arrest of Claudio as she was caught *in flagrante delicto*, while the search on her bag was validated for having been conducted incidental to a lawful arrest, despite the search having preceded the arrest:

> Appellant Claudio was caught transporting prohibited drugs. Pat. Daniel Obiña did not need a warrant to arrest Claudio as the latter was caught *in flagrante delicto*. The warrantless search being an incident to a lawful arrest is in itself lawful. (Nolasco v. Pano, 147 SCRA 509) Therefore, there was no infirmity in the seizure of the 1.1 kilos of marijuana.[71]

Clearly, the policeman's act of inserting his finger in appellant's bag constituted a search. As to whether it fell within one of the exceptions to the warrant requirement, it is likewise clear, even from a cursory inspection, that the following are inapplicable: the plain view doctrine, customs searches, consent searches, and a "stop-and-frisk" (despite what could have been deemed more than "mere suspicion" on the part of the policeman, the search was not a limited "pat down" of appellant's clothing). The author submits that invocation of the search incidental to a lawful arrest cannot prosper, in absence of a clear showing of probable cause to justify a warrantless arrest, the fulfillment of which is a condition *sine qua non* to the validity of the incidental search.[72] Unfortunately, the bare reporting of facts failed to manifest the existence of probable cause, and did not allow for an exacting appreciation of the circumstances of time, place and person. Without more, the existence of probable cause could not have been properly passed upon, and it should have been ruled that

[69] People v. Malmstedt, 198 SCRA 401 (1991).

[70] People v. Claudio, 160 SCRA 646, at 649 (1988).

[71] *Id.* at 654.

[72] DAVIS, *supra* note 4, at 60.

the prosecution failed to discharge its burden of justifying the warrantless search and arrest. Finally, the moving vehicle exception is likewise inappropriate, due to the absence of the possibility of separation of the policeman and appellant's bag; neither was a checkpoint involved.

Next in line in the *Cuizon* survey was *People v. Tangliben*,[73] which *Cuizon* digested as follows:

> [T]he accused, carrying a travelling bag at a bus terminal, was noticed by lawmen to be *acting suspiciously*, and was also positively fingered by an informer as carrying marijuana, and so he was accosted by policemen who happened to be on a surveillance mission; the lawmen asked him to open the bag, in which was found a package of marijuana leaves. It was held that there was a valid warrantless arrest and search incident thereto. The Court in effect considered the evidence on hand sufficient to have enabled the law enforcers to secure a search warrant had there been time, but as the case "presented urgency," and there was actually no time to obtain a warrant since the accused was about to board a bus, and inasmuch as an informer had given information "on the spot" that the accused was carrying marijuana, the search of his person and effects was thus considered valid.[74]

It is worth noting that in justifying the warrantless arrest *in flagrante delicto* and the search incidental to a lawful arrest, *Tangliben* cited *Claudio*, distinguished itself from *Aminnudin*, then provided that "it was around 9:30 in the evening that said Patrolmen noticed a person carrying a red traveling bag (Exhibit G) who was acting suspiciously and they confronted him."[75]

Again, the law enforcers' act of asking appellant to open his bag was, without question, a search within the meaning of the Constitution. However, the author submits that the *in flagrante delicto* arrest was unreasonable in this instance, thereby rendering invalid the incidental search. The police enforcers did not have personal knowledge that the accused was carrying marijuana, the only basis for probable cause having been the alleged informer's on-the-spot tip. On this score, it has been observed that:

> Where an officer, in making a warrantless arrest, has relied on a tip from an informant, a reviewing court will evaluate the tip based upon the totality of the circumstances, including the informant's veracity, reliability, and basis of knowledge. Probable cause may be supplied by independent police investigation which serves to corroborate the information supplied by an informant.[76] Pro[b]able cause is not

[73] 184 SCRA at 220.

[74] *Id.* at 20. *Malmstedt* summary, at 417-418.

[75] *Id.* at 225-226, 221.

[76] This then serves to justify the non-presentation of an informer when, after a buy-bust operation, the law enforcer who participated in the buy-bust testifies against the accused caused as a result thereof.

established, however, by the uncorroborated tip of an informer whose identity and reliability are unknown.[77]

The reason for this is explained, thus:

> The general rule is that the names of the persons who are the channels of information leading to the detection of crime are not to be disclosed. This rule is usually observed by the court as a principle of public policy for the reason that such disclosure can be of no importance to the defense, and may be highly prejudicial to the public in the administration of justice by deterring other persons from making similar disclosures.
>
> But in fairness to an accused, where the disclosure of an informer's identity or of the contents of his communication, is relevant and helpful to his defense or is essential to a fair determination of [probable] cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the government withholds the information, dismiss the action. In at least one instance, failure of the officer to disclose the informer's identity when so ordered by the court, resulted in his being cited for contempt.[78]
>
> [T]he ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis. "The latter is likely someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals."[79]

It may be concluded, therefore, that absent a showing of the reliability of the informant and/or the "tip," which could not have been raised on appeal as it was not mentioned by the trial court's decision,[80] the search of the accused's bag must be validated by some other means. However, since a valid consent search was not clearly proved by the prosecution, neither could the search of the bag have fallen within the ambit of a "stop-and-frisk," the warrantless arrest and search in *Tangliben* find themselves joining *Claudio*.

The facts and ruling in *People v. Posadas*,[81] were detailed as such:

> [T]he accused was seen acting suspiciously, and when accosted by two members of the Davao INP who identified themselves as lawmen, he suddenly fled, but was pursued, subdued and placed in custody. The *buri* bag he was carrying yielded an unlicensed revolver, live ammunition and a tear gas grenade. This Court upheld his

[77] 5 AM. JUR. § 45, 696 (1995).

[78] 1 VARON, *supra* note 25, at 125.

[79] WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3, 611 (2d 1987) [hereinafter 1 LA FAVE], *quoting* United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L. Ed. 2d 723 (1971).

[80] *Tangliben*, 184 SCRA at 220.

[81] 188 SCRA at 288.

> conviction for illegal possession of firearms, holding that there was under the circumstances sufficient probable cause for a warrantless search.[82]

A closer reading of *Posadas* reveals that aside from the above, the Court therein validated the search conducted at 10:00 a.m.[83] as a "stop and frisk" situation,[84] while rejecting the People's argument of a valid search incidental to a lawful arrest.[85] It bears mention, however, that the reasoning of the Court in *Posadas* flowed as such:

> [A]s between a warrantless search and seizure conducted at . . . checkpoints [citing *Valmonte*] 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 . . . probable cause. The probable cause is that when the petitioner acted suspiciously and attempted to flee with the buri bag there was . . . probable cause that he was concealing something illegal . . . and it was the right and duty of the police officers to inspect the same.[86]

The author merely wishes to add that prior to Posadas' attempt to flee, in order to validate the "stop," the Court should not have been content with the bare statement that petitioner therein "acted suspiciously." As has been shown, much of the validity of a "stop-and-frisk" rests upon a critical assessment of the fact pattern, if only to avoid reliance on the appraisal of the witnesses' credibility by the trial court as the sole basis by which to determine reasonableness.

Cuizon then proceeded to recapitulate the facts and ruling in *People v. Moises Maspil, Jr.*,[87] thus:

> [A]gents of the Narcotics Command set up a checkpoint on a highway in Atok, Benguet, to screen vehicular traffic on the way to Baguio City due to confidential reports from informers that Maspil and a certain Bagking would be transporting a large quantity of marijuana. At about 2 a.m. of November 1, 1986, the two suspects, riding a jeepney, pulled up to the checkpoint and were made to stop. The officers noticed that the vehicle was loaded with some sacks and tin cans, which, when opened, were seen to contain marijuana leaves. The Court upheld the search thus conducted as being incidental to a valid warrantless arrest.[88]

To elaborate, *Maspil* was decided on strength of the "check point" ruling in *Valmonte v. de Villa*;[89] in the alternative, the search was incidental to a lawful arrest, the accused

[82] *Cuizon*, 256 SCRA at 345.

[83] *Posadas*, 188 SCRA at 289.

[84] *Id.* at 294.

[85] *Id.* at 292.

[86] *Id.* at 293.

[87] 147 SCRA at 345.

[88] 256 SCRA at 345.

[89] Valmonte v. de Villa, 178 SCRA 211 (1989).

having been caught *in flagrante delicto* (citing *Tangliben*); and again, the factual pattern was different from that obtaining in *Aminnudin*. Concretely, the officers had no information as to the exact description of the vehicle the accused and no definite time of the suspects' arrival;[90] moreover, the Court noted that a jeepney on the road could not be equated with a passenger boat on the high seas, the latter having a route from which deviation is not readily accomplished, and a more or less certain arrival time and route.[91] In light of the Court's pronouncement in *Valmonte*, to the effect that an extensive search of a vehicle at a checkpoint must be due to probable cause,[92] the author may only reiterate the points already raised as regards informers.

The fifth case of the *Cuizon* survey was *People v. Lo Ho Wing*,[93] outlined as follows:

> [T]he Court ruled that the search of the appellants' moving vehicles and the seizure of 'shabu' therefrom was legal, in view of the intelligence information, including notably, clandestine reports by a planted deep penetration agent or spy who was even participating in the drug smuggling activities of the syndicate, to the effect that appellants were bringing in prohibited drugs into the country. The Court also held that it [was] not practicable to secure a search warrant in cases of smuggling with the use of a moving vehicle to transport contraband, because the vehicle [could] be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[94]

It must be mentioned that the Court arrived at its ruling despite appellant's argument that the police officers had both time (two days) and opportunity to procure a warrant, since the agent (Tia) had so informed his superior of his and appellant's departure for Hong Kong to purchase metamphetamine hydrochloride. It was only after Tia and appellant had arrived at the airport and left on board two cabs that the law enforcers intercepted them on board the cabs and conducted a search.

Once more, the scant details provided by the decision leave much to be desired. It cannot be doubted that obtaining a search warrant would have been unworkable, in light of the "examination under oath of the complainant" and "particularity of description" requirements.[95] While in arguing against the feasibility of procuring a warrant of arrest, it may be claimed that the law enforcers would have been unable to muster a sufficient *descriptio personae* of Tia's companion, thus rendering a "John Doe"

[90] *Maspil*, 147 SCRA 528, at 762.

[91] People v. Malmstedt, 198 SCRA 401 (1991).

[92] *Supra* note 46.

[93] 193 SCRA 122 (1991).

[94] *Cuizon*, 256 SCRA 325, at 345.

[95] Rules of Court, Rule 126, § 3 (1988).

warrant void; especially since "John Doe" warrants are the exception, not the rule.[96] On the other hand, however, what the facts in *Lo Ho Wing* reveal is that prior to his departure, Tia had been regularly submitting reports of his undercover activities to his superiors and was able to telephone them of their expected date and time of return.[97] Thus, it may have been inferred that the law enforcers already possessed sufficient information as to the identity of Tia's companion, which may have provided a *descriptio personae* adequate to secure a John Doe warrant. In either case, what cannot be overemphasized is that *Lo Ho Wing* should not be used as authority to justify a warrantless search or arrest of a person, effected by law enforcers through the expedient of merely waiting for the suspect to board a moving vehicle, despite ample time and opportunity to procure a warrant.

The final case summarized by *Cuizon* was *People v. Malmstedt*:[98]

> NARCOM agents stationed at Camp Dangwa, Mountain Province, set up a temporary checkpoint to check vehicles coming from the Cordillera Region, due to persistent reports that vehicles from Sagada were transporting marijuana and other drugs, and because of particular information to the effect that a Caucasian would be travelling from Sagada that day with prohibited drugs. The bus in which accused was riding was stopped at the checkpoint. While conducting an inspection, one of the NARCOM men noticed the accused, the only foreigner on board, had a bulge at the waist area. Thinking it might be a gun, the officer sought accused's passport or other identification papers. When the latter failed to comply, the lawman directed him to bring out whatever it was that was bulging at his waist. It was a pouch bag which, when opened by the accused, was found to contain packages of hashish, a derivative of marijuana. Invited for questioning, the accused disembarked from the bus and brought along with him two pieces of luggage; found inside were two teddy bears stuffed with more hashish. The Court held that there was sufficient probable cause in the premises for the lawmen to believe that the accused was then and there committing a crime and/or trying to hide something illegal from the authorities. Said probable cause arose not only from the persistent reports of the transport of prohibited drugs from Sagada, and the "tip" received by the NARCOM that same day that a Caucasian coming from Sagada would be bringing prohibited drugs, but also from the failure of the accused to present his passport or other identification papers when confronted by the lawmen, which only triggered suspicion on the part of the law enforcers that accused was trying to hide his identity, it being the normal thing expected of an innocent man with nothing to hide, that he readily present identification papers when asked to do so. The warrantless arrest and search were thus justified.[99]

To expound, the *Malmstedt* Court initially declared the accused was validly arrested *in flagrante delicto*, the search then being incidental to a lawful arrest. The

[96] People v. Veloso, 48 Phil. 169, 181-182 (1925).

[97] People v. Lo Ho Wing, 193 SCRA 122 (1991).

[98] 198 SCRA 401 (1991).

[99] *Cuizon*, 256 SCRA at 346-347.

Second, three levels of proof exist pertinent to an inquiry into the reasonableness of a warrantless arrest or search in a non-crisis situation: bare or mere suspicion, probable cause as currently understood, and midway to justify a *Terry* search, the author adopts the term "qualified cause."[109] Bare suspicion may have been best exemplified in *People v. Mengote,*[110] where the Court found no reasonable suspicion could have been created by a person arrested without warrant at 11:30 in the morning, on a crowded street, on the basis that he was "looking from side to side" and "holding his abdomen."[111] However, finality as regards the distinction between probable and qualified cause is yet to be achieved, for as aptly prophesied in *Terry*: "[t]hese limitations [upon a stop-and-frisk] will have to be developed in the concrete factual circumstances of individual cases."[112]

In light of the adoption of *Terry* by *Posadas*, the Court then is faced with two choices. It may opt for strict adherence to *Terry, i.e.*, a "patdown" of outer clothing only when qualified cause as regards a weapon exists. In the alternative, it may expand the scope of a *Terry* search in this jurisdiction, in view of pronouncements such as those in *People v. Saycon:*[113]

> It is important to note that unlike in the case of crime like, e.g., homicide, murder, physical injuries, robbery or rape which by their nature involve physical, optically perceptible, over acts, the offense of possessing or delivering or transporting some prohibited or regulated drug is customarily carried out without any external signs or indicia visible to police officers and the rest of the outside world. Drug "pushers" or couriers do not customarily go about their enterprise or trade with some external visible sign advertising the fact that they are carrying or distributing or transporting prohibited drugs. Thus, the application of the rules in Section 5 (a) and (b), Rule 113 of the Rules of Court needs to take that circumstance into account . . . .[114]

In either case, the Court must, from a legal perspective, ensure that members of the prosecutorial arm of government, defense counsel and trial courts present an accurate and detailed narration of the fact pattern in any proceeding where probable or qualified cause is in issue. This is one measure through which "retroactive establishment of probable cause" may be avoided, as expressed in Justice Cruz' *Malmstedt* dissent.[115] Further, this comment urges the Court to consider the points raised as regards informer's tips in determining probable or qualified cause, in light of due process and right of

[109] This should not be misconstrued as the author's adoption, at this time, of a variable or flexible probable cause definition, *see* 3 LaFave, § 9.1(d), *supra* note 49, at 340-345.

[110] People v. Mengote, 210 SCRA 174 (1992).

[111] *Mengote*, 210 SCRA 174, at 178-179.

[112] Terry v. Ohio, 20 L. Ed. 2d 896 (1968).

[113] People v. Saycon, 236 SCRA 325 (1994).

[114] *Id.* at 330.

[115] *See* LANDYNSKI, *supra* note 3, at 265, where he comments that the United States Supreme Court, when sustaining convictions in search and seizure cases, has sometimes been accused by dissenting justices of being influenced more by the obvious guilt of the defendant than by the commands of the Constitution.

confrontation considerations. Finally, *Valmonte* must be re-examined in order to ensure consistency with however the Court decides to develop the *Terry* doctrine in this jurisdiction, given that both involve "stops" despite the absence of probable cause, as impliedly admitted in *Posadas*.[116] In fact, it might be propitious that an occasion arise for rejection of *Valmonte*, in light of the actuality that the quantum of proof for visual limited searches at checkpoints is even less than the standard of qualified cause proposed by this comment.

In closing, from a policy perspective, it is hoped that the proper balance between the customary norm of probable cause in this jurisdiction and *Terry* is struck, bearing in mind the State's interest in pro-active crime detection and prevention, on one hand, and civil liberties, on the other. On the implications of the development of *Terry* in this jurisdiction, the short-term backlash from and long-term response of policemen in the United States to the promulgation of *Miranda v. Arizona*[117] might prove most helpful:

> [I]n every jailhouse, every criminal attorney's office, every judge's chamber and especially every police station in the nation, *Miranda* sparked a shout of protest that can be heard to this day in the grumblings of some criminal justice officials. The complaints of cops centered on their belief that the decision would make confessions almost impossible to get. "Damndest thing I ever heard," a Garland, Tex., police chief pronounced in 1966. "We may as well close up shop." Two years later law-and-order candidate Richard Nixon won the presidency, while blaming the Supreme Court for an upsurge in crime and promising to nominate justices who would reverse its liberal trend.
>
> Although *Miranda* has held firm for 25 years and even gained the quiet respect and praise of many police officers and prosecutors . . . .
>
> . . . .
>
> Although anything that makes it easier to prosecute a crime is welcomed by law enforcement officers, many of the very same officials have come to appreciate *Miranda* in ways that they never could have predicted a quarter of a century ago. Recent highly publicized examples of police brutality notwithstanding, officers and prosecutors say that the ruling has created a much more sophisticated police force.
>
> In the years before *Miranda*, policemen were often uneducated and untrained, increasing the chances that their conduct would lead to rights abuses . . . .
>
> . . . .
>
> Minnesota narcotics agent Tim O'Malley [declares:] . . . "Police are more sophisticated today. Police work has gone from being blue collar to a mixture of blue and white collar."

[116] People v. Posadas, 188 SCRA 288 (1990).

[117] Miranda v. Arizona, 384 U.S. 436 (1966).

As police were faced with having to prove guilt through means other than confessions, better-educated officers became imperative. "When *Miranda* came down," says Nevada County, Calif., Sheriff William Heafey, "all of law enforcement thought the bad guys had won again. But after some reluctance and suspicion, we just began to work harder. We became more professional. Instead of relying on outwitting somebody in an interrogation, we went and got good evidence."

Better training helped too. By the early 1907s, most states required rigorous schooling in proper law enforcement procedures at their academies. As a result, "the quality of detective work really improved," says Heafey. "We had to gather more physical evidence so we relied more on the work of laboratories and forensic evidence — blood splatters, DNA matching, fiber analysis. The Court decisions really accelerated the technological advancements in our field."

Some of the old resentment has remained, but many officers conclude that if *Miranda* lost a conviction, it was only because of sloppy police work . . . .

"*Miranda* made things more difficult," agrees St. Louis Circuit Attorney George Peach . . . "but they should have been made more difficult. The police were going too far to extract information from suspects in the old days."

Atlanta Lieutenant Louis Arcangeli has similar thoughts. "America isn't Russia. We're a free country. While we wouldn't have crime if we were under martial law, I think that it is a trade-off. We are free. And when an officer violates the law, we are entitled to the same procedures, so I'm glad that our rights are protected."

The price of liberty, however, doesn't go unnoticed. Society suffers because of police mistakes, says Sheriff Heafey: "I lost a murder case once ... because the police department interrogated a kid for forty-eight hours without Mirandizing him. The confession was thrown out, and a murderer went free."

. . . .

One of the justices' most important decisions on criminal rights in the past few years — a 1990 ruling in which they declared, 6-2, that a suspect in custody who asks to consult a lawyer may not be questioned again once his lawyer is no longer present — won a ringing endorsement from all sides. Under the headline "Mainstreaming *Miranda*," *The New York Times* acknowledged what Justice Byron H. White (a fierce *Miranda* dissenter who now has joined its supporters) could never have imagined: *Miranda* had been resoundingly endorsed by a majority of conservative justices who would not have voted for it in the first place.[118]

[118] *Law & Order*, LIFE, Fall 1991, at 85-87.

The above comment regarding a trade-off is most *apropos* when discussing the delicate balance between governmental power and civil liberties. What cannot be denied, however, is that the Bill of Rights, in general, and the prohibition against unreasonable searches and seizures, in particular, were meant to create a zone of privacy, or insulate, individuals from governmental intrusion.[119] Therefore, if the scales of justice continue to be tipped in favor of governmental authority, the entire system of law enforcement is left without impetus to uplift itself and the very equilibrium of our democracy remains displaced.[120]

[119] People v. Marti, 193 SCRA 57 (1991).

[120] *See* People v. Laurente, 255 SCRA 543, 570 (1996).