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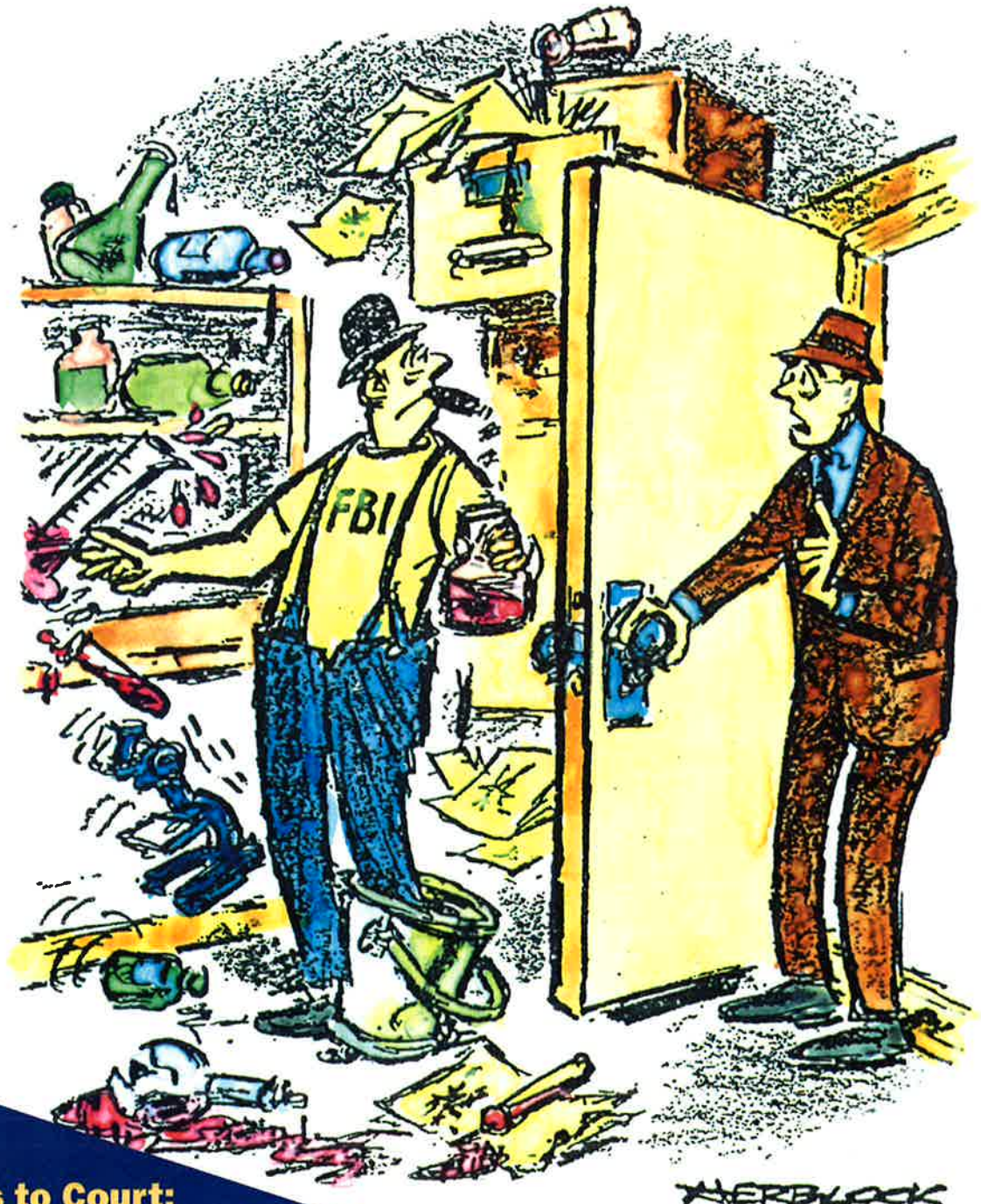

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FOURTH AMENDMENT FORUM

By Howard M. Srebnick and Scott A. Srebnick

Street Smarts: What Is the Cop on the Beat To Do with an Anonymous Tip?

A suspicious looking guy is casing your store. A strange man is wandering in your neighborhood in the wee hours of the night, pry tools in hand, a ski mask protruding from his back pocket. Two youths are jimmying the door of a Mercedes, Porsche, or Rolls, and they look too young to drive any car, much less one that expensive. Worse yet, it's your car. Thank heavens that Concerned Citizen used his cellphone to report the suspicious activity. Concerned Citizen did not want to get involved so he left no name, just a report of the imminent crime.

The dispatcher radios Officer Friendly, who promptly drops his doughnut and proceeds to the scene. The clothing description focuses Officer Friendly's attention on Joe Suspect, who is just standing around doing nothing. What is Officer Friendly's next move? What do you, as a citizen and potential crime victim, expect of Officer Friendly? How should Officer Friendly approach Joe Suspect? What if the suspect is potentially armed with a handgun, can Officer Friendly frisk him? If Officer Friendly feels an object he believes to be contraband, but not a firearm, can Officer Friendly seize it?

From all that Officer Friendly can see, Joe Suspect is doing nothing illegal. No one questions Joe Suspect's Fourth Amendment right to be left alone if he is doing nothing wrong. But an anonymous tip claimed that someone loosely fitting Joe's appearance was casing the joint or selling a joint. Should Officer Friendly arrest Joe Suspect and send him to the joint?

Referring to his handy, pocket Constitution, Officer Friendly concludes that the Fourth Amendment prohibits him from accosting Joe Suspect. Left to his own devices, Joe Suspect thereafter breaks into your home or steals your car or sells drugs to your child. Did Officer Friendly make the right call? Should he have stopped Joe Suspect when he had the chance?

These are the rhetorical questions that have challenged judges in balancing the Fourth Amendment right of the suspect to be left alone against the public's interest in having police respond to reports of crime and stopping it in its tracks, preferably before your home is invaded or the drug deal goes down. As Judge Posner of the Seventh Circuit has put it, it is a question of "strik[ing] the proper balance between the right of the people to be let alone and their right to be protected from armed predators." *United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996).

Anonymous tips have an undisputable value in preventing and solving crime, but there is a corresponding risk that people will be subjected to searches and seizures in the absence of reasonable suspicion or probable cause. When litigating a case involving an anonymous tip, therefore, the criminal defense lawyer must be prepared to answer some tough questions. Judges want to render decisions that give appropriate guidance to our law enforcement officers. The criminal defense lawyer must articulate how the police should have responded under the circumstances of the case, recognizing that there will be a next time.

A flurry of recent cases has brought this issue to the forefront of the Fourth Amendment debate. The overriding question is whether an anonymous tip of criminal activity by a suspect, containing only information readily observable at the time the tip is made, may supply reasonable suspicion for a *Terry* stop or probable cause for an arrest, in the absence of police observations of any suspicious conduct. *See United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996); *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996); *United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995); *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992); *United States v. Fernandez*, 1996 U.S. Dist. Lexis 12384 (S.D.N.Y. Aug. 27, 1996). In answering this question, we must remain cognizant of the demands placed upon our law enforcement officers, the risk to their safety, and the expectations that we citizens have of our law enforcement officers' efforts to curb crime.

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'Consensual' Encounter

As a preliminary matter, police can always approach a suspect in response to a tip and ask to speak with him without implicating the Fourth Amendment. No level of suspicion is needed to justify a "consensual" encounter between the lawman and citizen. *Florida v. Bostick*, 501 U.S. 433 (1991). "At least as far as the Fourth Amendment is concerned, police do not have to have *any* degree of reasonable suspicion in order to accost a person and say they want to talk to him." *DeBerry*, 76 F.3d at 885 (emphasis in original) (citing *Florida v. Royer*, 103 S.Ct. 1319, 1323-24 (1983)). And the Supreme Court just reaffirmed that police need not tell a suspect that he is free to go as a pre-

requisite to a consensual encounter. *See Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). This is despite Judge Posner's observation that "very few people think themselves free not to stop if a policeman accosts them. But the law is well settled that if the officer asks rather than commands, the person accosted is not seized, and so the protections of the Fourth Amendment do not attach." *DeBerry*, 76 F.3d at 886.

Nor is the Fourth Amendment implicated when police initiate a routine surveillance of a suspect that does not impede the suspect's freedom of movement. So, one immediate option available to a police officer acting upon an anonymous tip is to set up a surveillance of the suspect, observe his behavior, and seize (and perhaps search) him only after the officer himself has observed criminal activity.

These investigative techniques have their obvious limitations. The officer cannot demand that the suspect answer him, much less force the suspect to stay put. If the suspect wants to take off, there he goes. A suspect in possession of guns or drugs is not likely to stick around for idle chat with a policeman who is looking for any excuse to cuff and search him. A bad guy can get away — and place the rest of us in danger — if the officer does not seize the opportunity (and the suspect).

When Does a Tip Justify a *Terry* Stop?

Courts give police a certain measure of latitude to seize a suspect temporarily in order for police to make a meaningful inquiry of the suspect and resolve the matter once and for all. This stop — a *Terry* stop — must be supported by reasonable articulable suspicion. Does an anonymous tip supply the level of suspicion needed to justify a *Terry* stop, including the threat of deadly force to stop the suspect?

If the tip comes from an anonymous source or an unproven informant, the case law puts the police to an exacting standard to justify reliance upon such information. The courts typically stress two factors: (1) an officer's ability to corroborate significant aspects of the tip, and (2) the tip's ability to predict future events. *See United States v. Roberson*, 90 F.3d 75, 77 (3d Cir. 1996). Courts are most impressed by the "insider quality of predictive information." *Id.* Thus, for police to act on a tip, provided anonymously or by an informant, the tip must be of the kind that accurately predicts "future actions of third parties ordinarily not easily predicted." *United States v. Padro*, 52 F.3d 120, 123 (6th Cir. 1995); *United States v. Walker*, 7 F.3d 26, 30 (2nd Cir. 1993). The tip must contain "a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future *actions* that [are] not easily predicted." *Walker*, 7 F.3d at 30 (emphasis added) (citing *Illinois v. Gates* and *Alabama v. White*).

In *Alabama v. White*, 110 S. Ct. 2412, 2417 (1990), the Supreme Court held that a tip provided the requisite reasonable suspicion to justify a brief detention:

> What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information — a special familiarity with the respondent's affairs . . . because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities.

Along these lines, the D.C. Circuit has observed that without sufficient indicia of reliability, a 911 call *alone* will not establish reasonable suspicion needed to justify even a *Terry* stop. *See United States v. Cutchin*, 956 F.2d 1216, 1217-18 (D.C. Cir. 1992). The Third Circuit recently concluded that police lacked reasonable suspicion in a case in which the anonymous tip provided no information about future behavior of the suspect. In *United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996), an anonymous tipster told police that "a heavy set, black male wearing dark green pants, a white hooded sweatshirt, and a brown leather jacket was selling drugs on the 2100 block of Chelton Avenue." The reliability of the tipster was unknown. Police stopped an individual matching the description of the suspect who was right where the tipster said he would be, although the officers observed no suspicious conduct by the suspect. Holding that the stop was not justified, the court wrote:

> We hold that the police do not have reasonable suspicion for an investigative stop when, as here, they receive a fleshless anonymous tip of drug dealing that provides only readily observable information, and they themselves observe no suspicious behavior. To hold otherwise would work too great an intrusion on the Fourth Amendment liberties, for any citizen could be subject to police detention pursuant to an anonymous phone call describing his or her present location and appearance and representing that he or she was selling drugs. Indeed, any one of us could face significant intrusion on the say-so of an anonymous prankster, rival, or misinformed individual. This, we believe, would be unreasonable.

Roberson, 90 F.3d at 80-81; *see also United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996) ("It is true that an anonymous tip, considered wholly without regard to its content or context, is not deemed an adequate basis for a *Terry* stop."). Sensitive to the danger of guns, and concerned about the possible far-reaching effects of its decision, the Third Circuit expressly did not address the question of "what corroborating factors would be required for an anonymous tip of gun possession to serve as the basis for reasonable suspicion. . . ." *Roberson*, 90 F.3d at 81 n.4.

Four other circuits have held that "armed persons are so dangerous to the peace of the community that the police should not be forbidden to follow up a tip that a person is armed, and as a realistic matter this will require a stop in all cases." *DeBerry*, 76 F.3d at 886.

> This element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in controlled buys. Where guns are involved, however, there is the risk that an attempt to wait out the suspect might have fatal consequences.

United States v. Clipper, 973 F.2d 944, 951 (D.C. Cir. 1992) ("Officers at the scene were able to corroborate all of the innocent details of the tip. In these circumstances, we conclude that a reasonable trier of the facts could find that the officers had a reasonable suspicion to justify a *Terry* stop and search. . . . We cannot ignore society's plain interest in protecting its members and those who serve them from armed and dangerous persons."); *accord Gibson.*

The notion that some lesser standard of suspicion applies in cases involving firearms presents somewhat of a quagmire. In some states such as Florida and Texas, citizens are permitted to possess firearms, even concealed ones, provided that they obtain a license (for which virtually everyone is eligible). Therefore, when officers receive a tip that an individual is armed, at least in some states that allegation alone does not constitute reasonable suspicion that the individual is com-

mitting a crime, unless the officers know that the individual is a person who is prohibited by law from possessing a firearm. Before an officer can stop or search based on a tip that a suspect is merely possessing a handgun, the officer must first determine whether the suspect is even committing a crime by possessing the gun. The concurring opinion in *DeBerry* wrestled with this dilemma:

> The only fact that saves the officer's stop of DeBerry, in my opinion, is the fact that it is unlawful in Illinois to carry a concealed weapon. The tipster informed the police that DeBerry was armed, and it appears from the facts before us that the weapon was not in plain view. I do not agree that this case would necessarily come out the same way if Illinois law, like the law of many states, authorized the carrying of concealed weapons. At that point, the entire content of the anonymous tip would be a physical description of the individual, his location, and an allegation that he was carrying something lawful (a cellular phone? a beeper? a firearm?). This kind of non-incriminatory allegation, in my view, would not be enough to justify the kind of investigatory stop that took place here. It would mean, in states that permit carrying concealed weapons, that police no longer need any reason to stop citizens on the street to search them.

DeBerry, 76 F.3d 884, 887 (7th Cir. 1996) (Diane Wood, J., concurring in the result).

The problem, of course, is that officers are in greater danger approaching a potentially armed citizen, even if he is committing no crime by merely possessing the firearm. Yet, the officers have no basis to stop and frisk that person unless that individual is reportedly committing some other crime. A citizen's report of a menacing looking person in possession of a firearm in Texas or Florida does not, in and of itself, authorize even a brief detention of that suspect. Powerless to disarm the suspect, officers will be understandably reluctant to approach that individual and engage him in a "consensual" encounter as part of their investigation.

Perhaps this explains the result in *United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995), in which the Eleventh Circuit upheld the stop and frisk of a Florida man who was the subject of an anonymous tip reporting that he was in possession of a firearm. The court concluded that that tips involving guns are of such great safety concern to officers and citizens that they need only corroborate the innocent details of a tip involving guns to justify a stop and frisk. *Id.* at 622-25 (citing *United States v. Bold*, 19 F.3d 99 (2d Cir. 1994)); *But cf. United States v. McElroy*, 584 F.2d 746 (5th Cir. 1978) (although tip indicated that defendant might be in possession of sawed-off shotgun, court held that stop was unreasonable). Although the court professed that the "potential for abuse of anonymous tips gives us pause," the Court was persuaded that this potential was minimal because "the state of Florida provides a significant deterrent against reporting false information to its law enforcement agencies and officers by making such acts punishable by law." *Gibson*, 64 F.3d at 625. What was lost on the court, perhaps, is the fact that *anonymous* prank tipsters would likely be protected from prosecution by virtue of their anonymity.

What Is the Scope of a *Terry* Frisk?

The authority to frisk a suspect during a *Terry* stop has been limited to that situation in which officers reasonably believe that the suspect is armed. So, while an officer is authorized to stop and question a suspect who he reasonably suspects is selling or possesses drugs, the officer cannot frisk the suspect or search him unless the officer has a

reasonable basis to believe that the suspect is possessing a weapon. "Self-defense is the original rationale of the *Terry* stop (that is, a stop and frisk) and still the most compelling justification for it." *DeBerry*, 76 F.2d at 885.

And the frisk must target weapons only. Feeling something in the suspect's pocket that is not a weapon but which may be some other form of contraband will not justify a further search or seizure of that object unless the officer knows that the object is definitely contraband. In *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), the Supreme Court clarified the limits of a pat down search during a *Terry* stop, stating:

> The purpose of this limited search is *not to discover evidence of crime*, but to allow the officer to pursue his investigation without fear of violence. . . . (*citations omitted*). Rather, a protective search — permitted without a warrant and on the basis of reasonable suspicion less than probable cause - must be *strictly limited to that which is necessary for the discovery of weapons* which might be used to harm the officer or others nearby. (*citations omitted*). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. (*citations omitted*).113 S. Ct. at 2136 (*emphasis added*).

In creating what has been termed the "plain-feel" doctrine, the Supreme Court held that an officer who conducts a pat-down search that stays within the parameters marked by *Terry* may seize non-threatening contraband as long as the identity of that contraband is immediately apparent to the officer without conducting some further search of the object. *Id.* at 2137. Drawing from the "plain-view" cases, the *Dickerson* court defined the limits of its decision by reminding that police may seize contraband in plain view only when doing so does not intrude into anyone's privacy any more than the police are already authorized to do:

> If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting *some further search of the object* . . . the plain-view doctrine cannot justify its seizure.

Id. at 2137 (*emphasis added*). The *Dickerson* court suppressed the contraband seized from the defendant, holding that the police officer overstepped the bounds of a search for weapons allowed under *Terry* by squeezing and manipulating a lump in the suspect's pocket prior to determining that it was contraband. *See also United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (applying *Dickerson*, the court suppressed the money found in the brown paper bag seized from Schiavo holding that the officer's continued exploration of the bag went beyond that allowed in *Terry* because the incriminating nature of the bulge was not immediately apparent).

One court applying *Dickerson* expressed its skepticism of police testimony on this point. In *United States v. Fernandez* (S.D.N.Y. Aug. 16, 1996), the district judge suppressed drug evidence seized during a *Terry* frisk. The officer testified that as he frisked the suspect and tapped on the suspect's pocket, he heard a "plasticky" crinkling sound. The officer questioned the suspect about it and, according to the officer, the suspect replied that it was "weed." Impressed by defense counsel's successful "impeachment by omission" and impeachment with a prior inconsistent statement in the officer's report, the district judge found the police officer's testimony "unconvincing." The district judge suppressed the drug evidence, concluding that the officer had no reasonable suspicion, much less probable cause, to believe that the object in the suspect's pocket was contraband.

When officers come upon an opaque container in the course of an investigatory stop, a warrant may be required before officers may invade the privacy of the package. This principle follows from *United States v. Jacobsen*, 104 S. Ct. 1652 (1984), in which the Court wrote:

> Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.
>
> Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.

Id. (*emphasis added*). In *Jacobsen*, Federal Express employees opened a damaged package and found plastic bags of white powder inside. They notified the Drug Enforcement Administration. Responding to the call, a DEA agent field tested the powder which tested positive for cocaine and the defendant was subsequently arrested. *Id.* at 1655. Although the Supreme Court held that the agent's search of the tubular package was reasonable because on the agent's search did not go beyond that of the private search, the Supreme Court made it clear that warrantless searches of containers are presumptively unreasonable. *Id.* at 1657.

A recent decision by the court of criminal appeals in Alabama applied the analysis articulated by the Supreme Court in *Jacobsen*. *See Seely v. State*, 669 So.2d 209 (Ala. Cr. App. 1995). With the factual situation being almost identical to that in *Jacobsen* — the decisive exception that the Federal Express employees in *Seely* did not open the tube — the *Seely* court held that the search by police officers was unreasonable and in violation of the Fourth Amendment. Focusing on Officer Ware's actions in cutting open the package, the court explained:

> Ware should have obtained a search warrant before cutting open the tubular package that contained cocaine. Ware had probable cause to obtain a search warrant based on his observations and on the results of the sniff test by the narcotics detection dog. Because Ware had dominion and control over the package, there was little chance of loss or destruction of the package. There were *no exigent circumstances that justified opening the package before obtaining a search warrant. Id.* at 214 (*emphasis added*).

When Is a Tip Probable Cause for Arrest?

The difference between a *Terry* stop and an arrest may be more semantic than substantive in view of recent cases holding that a temporary seizure effected through the threat of deadly force is justified by mere reasonable suspicion. *E.g.*, *United States v. Tillman*, 19 F.3d 1221, 1226 (7th Cir. 1994) ("The mere use or display of force in making a stop does not necessarily transform a stop into an arrest if the surrounding circumstances give rise to a justifiable fear for personal safety."). *Terry*, as applied, stands for the proposition that officers may forcibly, but only temporarily, stop someone against his will so that police officers with reasonable suspicion that the suspect is engaged in criminal activity can investigate. If the officers are permitted to stop the individual, they must necessarily be permitted to use some degree of force to restrict the movement of the individual. The difference between a *Terry* stop and a full-blown arrest thus turns on the duration of the encounter, as opposed to the amount of force employed by the police:

> No doubt at some point [a suspect's] forced immobilization with his hands

> on the hood of the police cruiser would have turned the stop into an arrest, because it is the brevity of the stop that makes it tolerable even though the police lack probable cause to believe that the person stopped has committed a crime. But two minutes is not that point. Twenty minutes was held not too long in *Sharpe*, and we recently upheld a *Terry* stop that lasted sixty-two minutes.

United States v. DeBerry, 76 F.3d 884, 885 (7th Cir. 1996) (citing *United States v. Sharpe*, 470 U.S. 675, 685 (1985) and *United States v. Vega*, 72 F.3d 507, 515-16 (7th Cir. 1995)).

There is a crucial distinction, however, between a brief detention under *Terry v. Ohio*, and a full-blown arrest, as *Terry* stops can be justified by mere "reasonable suspicion," while arrests require "probable cause." Reliance on a tip, anonymous or from an informant, which would otherwise justify a *Terry* stop, will probably not satisfy the more exacting probable cause standard necessary for a full-blown arrest. In *Illinois v. Gates*, 103 S. Ct. 2317 (1983), the Court wrote that:

> Standing alone, the anonymous letter sent to the Bloomindale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates' car and home. The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise the letter gives absolutely no indication of the basis for the writers predictions regarding the Gates' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that the contraband would be found in the Gates' home and car.

This conclusion by the Supreme Court in *Gates* is important because the letter to which the *Gates* court refers provided police with substantial information from an anonymous source: the name of the suspects, a married couple; where they lived; that they made their living selling drugs; that they buy drugs in Florida; that the wife drives the car to Florida, where she leaves it to be loaded up with drugs, then the husband would fly down and drives it back; that the wife would be driving to Florida and the husband would fly to pick up the car with drugs; that there would be $100,000 worth of drugs in the trunk of the car; that they have over $100,000 worth of drugs in their basement; that the suspects brag that they never have to work because they make their living on pushers; that they are friends with some big drug dealers who visit the house often.

Despite the richness of the detail provided by the anonymous source, the Supreme Court found it to be insufficient, alone, to justify an arrest. It was the corroboration of predictive behavior that led the Court to find probable cause in *Gates*.

The D.C. Circuit has specifically addressed the scenario of police relying on the word of an informant to effectuate a warrantless arrest/search:

> Where an informant's tips are concerned, the task turns in large part on *independent police work* corroborating the details of the informant's charge. In some circumstances, it may be enough that law enforcement officers confirm the tip's innocent details, for "seemingly innocent activity may become suspicious in light of the initial tip."

United States v. Dawkins, 17 F.3d 399, 404 (D.C. Cir. 1994) (quoting *Illinois v. Gates*);

see also United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1297 (9th Cir. 1988) ("[T]he district court found that the reliability of the confidential informant was untested, and thus the tip was unreliable. We agree.").

To satisfy its burden of proving probable cause to justify a warrantless arrest, the government must demonstrate that the tip was corroborated by "independent police work" and that "seemingly innocent activity" became suspicious in light of the initial tip." Without more, the unsubstantiated, unsworn allegation by a nameless informant is insufficient. *See United States v. Padro*, 52 F.3d 120, 123 (6th Cir. 1995) ("Notwithstanding the richness of detail offered by the informant . . . the tip alone could not justify a finding of probable cause.") A single complainant's tip that a crime is occurring will establish probable cause only where that information is sufficiently reliable and corroborated. *Id.* Even when the source is a *disinterested* bystander witness, a report of a crime alone is not enough to establish probable cause. *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) (the court stated that although private citizen witnesses are presumed reliable, that "does not dispense with the requirement that the informant . . . furnish underlying facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator"); *Oliveira v. Mayer*, 23 F.3d 642, 647-48 (2nd Cir. 1994) (court held that police lacked probable cause to arrest suspect for burglary where the only information as to a crime came from a source who saw someone in an inexpensive car with expensive items), *cert. denied*, 115 S. Ct. 721 (1995).

And no citation of authority is necessary for the proposition that police can conduct a complete search of a suspect incident to a valid arrest.

Conclusion

Judge Posner may have overstated the case by posing the dilemma as one pitting the "right to be let alone" against "the right to be protected against armed predators." *DeBerry*, 76 F.3d at 886. Few jurists, conservatives to be sure, would find a substantive constitutional right to police protection, much less a cognizable claim under Section 1983 for the failure of police to provide adequate police protection. Indeed, taken to its logical extreme, Judge Posner's analysis might ultimately justify the invasion of one's home without suspicion, based on the public's right to be protected. But poetic hyperbole aside, the point Judge Posner makes is that we citizens expect our police officers to respond to our pleas for help and to reports of suspicious activity. And we are especially concerned when guns are involved. Yet, we are reluctant to give an anonymous crackpot or a personal enemy the power to turn the police loose on us. And, the citizen who is lawfully carrying a concealed gun will surely find it intrusive when the police search him based on a good samaritan's legitimate fear after having caught a glimpse of the gun.

In the final analysis, the more relaxed standard for a seizure based on an anonymous tip that an individual is in possession of a gun may be legally justified not by the public's "constitutional" right to be protected against armed predators, but rather, by the necessary conditions that a free society places on the exercise of constitutional rights. An individual who chooses to exercise his Second Amendment right to bear arms, *i.e.*, by obtaining a concealed firearm permit, may be assuming the risk that he will lose some of his Fourth Amendment freedoms.

Perhaps Fourth Amendment jurisprudence should recognize that possession of a gun or other contraband, in and of itself, is not as threatening to our safety as conduct-based crimes: brandishing the gun, selling the drugs, trespassing on property, etc. This would be consistent with *Illinois v. Gates* and *Alabama v. White*, which emphasize the "predictive" aspects of the tip.

What we most fear is criminal conduct that places the rest of us in jeopardy, more so than a suspect's mere possession of contraband. When the tip alleges a non-violent crime such as a mere possessory offense, the Fourth Amendment balance weighs in favor of the suspect. When public safety is at risk, the balance favors a brief citizen-police encounter, as least intrusive as possible. *Cf. New York v. Quarles*, 104 S. Ct. 2626 (1984) (public safety exception to *Miranda* warnings).

Thus, a tip that Joe Suspect is smoking weed on the beach may not justify a seizure, whereas a tip that Joe Suspect is selling dope to some kids on the beach might. Likewise, a tip that Joe has a gun tucked away in his ankle holster may be insufficient, whereas a tip that Joe with the gun in his holster is using threatening language would justify a stop and frisk in the name of public safety.

Together, Howard and Scott Srebnick are defending a Washington, D.C. attorney indicted in the "Cali-Cartel" case.