10-1979

Ybarra v. Illinois

Lewis F. Powell Jr.

ea 2-1-79

D

PRELIMINARY MEMORANDUM

March 23
~~February 16~~, 1979 Conference
List ~~8~~ 2, Sheet 1

No. 78-5937 ASY

Appeal from Ill. App. Ct.(Guild, Woodward, Rechenmacher)

YBARRA

v.

ILLINOIS

State/Criminal

Timely

1. SUMMARY. Appt claims that the state statute authorizing the search of those present at premises subject to search under a warrant is unconstitutional as applied to the facts of his case.

I would ~~deny~~ dismiss for the reasons stated.

E.A.

2. FACTS AND PROCEEDINGS BELOW. The police obtained a valid warrant to search a certain tavern and its bartender to look for controlled substances and related paraphernalia. The complaint requesting the search warrant stated that an informer of proven reliability had been present at the bar on at least eleven occasions, had seen the bartender in possession of tin foil packets of the kind used to package heroin, and had reason to believe that on March 1, 1976 heroin would be sold at the bar.

The warrant was executed on March 1. The officers found about a dozen patrons, among whom was appt, at what the state appellate court describes as a "dismal, drab and shabby type establishment consisting of one room." All persons present were detained and subject to a pat-down search. In appt's case, the officers searched him once, discovering only a cigarette package. A few minutes later he was searched again, and this time six tin foil packets of heroin were discovered in his pocket. It is not claimed that anything about appt's appearance or conduct gave the police reason to suspect him, more than any of the other patrons, of possessing the drugs.

Appt moved unsuccessfully to suppress the heroin, and was convicted and sentenced to two years probation. The search was upheld on the basis of a state statute that provides:

> In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

(a) To protect himself from attack, or

(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

The state court of appeals affirmed. It made clear in its opinion that the statute, as construed in previous state-court decisions, did not authorize general warrants or the search of all persons found present at any premises to be searched. Based on the facts of this case, however, the court concluded that the search was proper: Narcotics are easily capable of being concealed on persons present; the complaint referred to probable sales of controlled substances by the bartender (presumably to those present), there were not so many people in the room, and the tavern was not so large, that searching all those present was unreasonable under the circumstances; appt was not an innocent stranger having no connection with the premises. The court compared the facts of this case with others from Illinois and other States with similar statutes. It concluded that the requirements of the Fourth Amendment had been met. The state supreme court denied leave to appeal.

3. CONTENTIONS. Appt contends that the court below construed the statute to permit general warrants and the search of all those present at a place described in a warrant, even if the police have no cause to suspect any wrongdoing by them. He argues that he was searched for no other reason than that he was

present at the tavern were illegal activity was suspected, and that "mere presence" is insufficient to give probable to search. He further claims that even if the first pat-down were permissible, the police were not entitled to search him a second time, since the first search gave them no reason to suspect he had concealed weapons or contraband. All this, says appt, violates the Fourth Amendment. He claims that other States with similar statutes have construed their laws more narrowly, and that this case conflicts with those.

4. DISCUSSION. Appt does not fairly represent the holding the of the court below. Its opinion made clear that the statute does not authorize general warrants or the search of anyone present at any place subject to search under a warrant. It grounded its opinion in the specific facts of the case, as described above. Since the officers had probable cause to believe that narcotics were being sold at the tavern, it does not seem unreasonable under the circumstances to search the potential buyers present there. The second pat-down of appt does raise some questions, but if the officers were entitled to search him the first time, a second search moments later probably should not require additional justification.

Because the court below tied its holding to the particular facts of this case, and because appt apparently makes only an as-applied attack on the statute, the case does not appear suitable for review in any event.

There is no response.

2/1/79 Andersen op. in petn.

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No.78-5937

Submitted ....., *19*... *Announced* ....., *19*...

YBARRA

vs.

ILLINOIS

Justice Powell did not vote in any of the cases for the 3/23/79 Conference.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

lfp/ss 8/9/79

78-5937 Ybarra v. Illinois

TO: Clerk

FROM: LFP, Jr.

An Illinois statute authorizes, where police pursuant to valid warrant search a "place" to "search any person in the place . . . (a) to protect himself from attack or (b) to prevent the disposal or concealment of . . . articles or things particularly described in the warrant".

The place involved in this case was a grubby, one-room bar. The warrant to search it, describing only the place and the bartender, is not challenged. The application for the warrant was explicit that the bar was a place where heroin was sold (and, I believe, used). The warrant itself authorized the seizure of "evidence of the offense of possession of a controlled substance", including "heroin".

The police searched all 12 persons found in the bar, most of whom were patrons. Appellant was a patron on whom heroin was found. The state contends that the officer was authorized by Terry principles to "patdown" these persons; that, upon the patdown of appellant, the officer felt a "pack" - like a cigarette pack - that contained some hard substance; and that this provided probable cause for a

second and complete search that turned up heroin. Appellant disputes this version of the facts.

The state of Illinois advances two grounds in support of the decision of the Illinois Appellate Court. The first is limited to the facts of this case, which are described as a Terry-type situation where the officer had authority to patdown the appellant and thereafter had probable casue to search. The state argues that the constitutional issue can and should be avoided on this theory.

The "alternative" ground for affirmance is that the Illinois statute, properly construed, is valid; that a state must have the authority - in situations like the present case - to authorize what in effect is a general warrant search of persons present in a place where there is reasonable belief that contraband is located or being dispensed, or where other products or instrumentalities of crime may be secreted on persons present.

It is said in an amicus brief (supporting affirmance) that all decided state court cases have sustained similar searches either on the basis of state statutes or principles of Terry. Cases in the District of Columbia and Georgia are particularly relied upon. An article by LaFave also is cited. See the state's brief p. 36.

If traditional 4th Amendment analysis is applied, the answer in this case is too easy: The warrant was invalid because it authorized a blanket search of all persons present with no specific information that any of them possessed contraband. If a one-room bar justifies such a search, where does one draw the line?

But there should be a better answer to the problem involved than the foregoing. There is no way in which law enforcement authorities, in this case or similar ones, can known in advance who will be present when a particular place is validly searched for contraband or other evidence of crime. As the appendices to the state's brief, and examples cited in professor Inbaug's brief abundantly show, police confront two serious problems in this situation: (i) the real danger that someone present will have a weapon and, perhaps under the influence of drugs use it; and (ii) the danger, at least equally if not more likely, is that the evidence or fruits of an obvious crime will be secreted or lost. All persons present certainly could not be arrested. Thus, they could walk out with the evidence. Indeed, if this technique is legally available, the persons operating a bar or other place where drugs are dispensed, could simply take the precaution whenever open for business to secrete all drugs on a few friends or regular customers.

The Illinois statute well may be invalid, as it appears on its face to authorize indiscriminate search or persons present in any place - large or small - which officers are authorized to search. Certainly, there must be some limitation. The Illinois court says that each case must be decided on its facts.

I consider this a case of major importance to law enforcement, and would like some careful thinking by all of us as to a principled answer to the answer - one that would be protective of legitimate 4th Amendment rights and the public interest in effective law enforcement. If one thinks in terms of the one-room bar involved in this case, there probably was no legitimate expectation of privacy by most if not all of the patrons. But this cannot be said about larger and more diversified restaurants, stores or commercial places.

Perhaps an answer might follow general Terry principles - though stretched a bit - as follows: Where a warrant states with particularity that certain persons are known to frequent the target place apparently for participation in illegal activity, and describes the likelihood of such persons secreting or leaving with critical

evidence, or of having weapons on their persons, some sort questioning may be justified.

L.F.P., Jr.

ss

Revised 9/13 - Thorough memo. with which I largely ~~agree~~ agree.

This is case in which Ill police searched all twelve people in grubby bar, including first a "pat-down" of appl. & then a "head to toe" search. DOS

There was a warrant to search the Bar & Bartender but none to search anyone else.

1. Terry-type "pat down". Though not-raised below, State relied on this in State appeal. If we must reach this issue (& I doubt we can avoid it), David thinks this would unduly extend & distort Terry. No ev. of weapons.

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: Aug. 20, 1979

RE: No. 78-5937, Ybarra v. Illinois

This case presents two questions:

1) When the police executed a search warrant at the Aurora Tap were they justified in conducting a Terry frisk of all patrons, and in then returning to re-frisk Ybarra; and 2) Is the Fourth Amendment violated by Ill. Rev. Stat, Ch. 38, § 108-9 (1975), which permits a police officer executing a search warrant to search all people on the premises "(a) to protect himself from attack or (b) to prevent the disposal or concealment of . . . articles or things particularly described in the warrant?

I. The Raid -- Based on firsthand observation and a tip from a reliable informant, the police obtained a warrant to search for heroin at the Aurora Tap, a grubby, one-room bar, on March 1, 1976. The warrant also specified that "Greg" the bartender should be searched. According to

testimony by Agent Johnson of the Illinois Bureau of Investigation (IBI), the warrant was executed by three IBI agents, two officials of the Aurora Police Department, and several uniformed officers of that department, or about eight police personnel in all. A.24. When they entered the bar between 4 and 4:30 in the afternoon, the police found approximately 12 people clustered at the bar. The light was dim in the large room, but Agent Johnson said he could see all the people inside.

After announcing that they had a warrant to search the place Agent Johnson frisked everyone. Ybarra, who was standing at the bar drinking a beer, was casually dressed. Johnson had never seen Ybarra before, and Ybarra's appearance and actions did not strike him as suspicious. At the "suppression hearing, Johnson testified that during this first pat-down he felt a cigarette pack with objects in it. Johnson then agreed with the prosecutor's statement that three minutes later, after frisking other patrons, he returned to Ybarra and searched his pockets. At the full "trial", however, Johnson's story was somewhat different. He stated that he first frisked Ybarra for weapons, and then came back to him to search for "controlled substances" about fifteen minutes later. A.49. The second search did not involve simply a review of Ybarra's pockets, but was a full pat-down from neck to toes. A.50, A.61. Ybarra himself testified that first Johnson patted him down, then the agent returned to check Ybarra's shoes, and then

First statement of officer

Second statement

finally Johnson patted him down again before reaching into his pockets. A.63-64. In any event, Johnson found six tinfoil packets of heroin in Ybarra's pockets. The entire raid netted those six packets, two baggies with "green plant-like substance," hypodermic needles, a spoon, and several packages of fireworks.

II. Proceedings Below -- Ybarra was indicted for unlawful possession of heroin. He unsuccessfully moved to suppress the heroin as evidence on the ground that the police had no probable cause to search him and he was not named in the warrant. The trial court denied the motion on the basis of § 108-9. Ybarra was convicted and sentenced to two years probation. The Illinois Appellate Court for the Second District upheld the conviction, ruling that although the sort of "blanket search" undertaken by the police in this case would not have been appropriate in "a large retail or commercial establishment," it was all right "in a one-room bar where it is obvious from the complaint of the officer seeking the search warrant that heroin was being sold or dispensed." A.8. The Illinois Supreme Court denied cert.

III. The Terry Frisk -- The state did not offer this argument in the court below, and appellant has not addressed it in this court (though a reply brief may be forthcoming). The contention, however, raises substantial

issues. As the state argues, if the court upholds the search of Ybarra on ~~this~~ Terry ground[5], there is no need to consider the constitutionality of the statute. I see the question as involving two steps: A) Did the police officers have the right to subject all the occupants of the Aurora Tap to a weapons pat-down? and B) Did that initial frisk provide probable cause for Officer Johnson to return and search Ybarra's pockets?

A) The first pat-down -- Agent Johnson conceded that he had no basis for singling Ybarra out for frisking. Instead, the state contends that the police were justified in searching all the patrons. The state claims that it is always dangerous to execute narcotics search warrants because drug dealers are frequently armed and violent. Accordingly, a Terry frisk is always appropriate in such circumstances. The important feature of this argument is its departure from traditional Fourth Amendment methodology. Rather than demonstrate the need for a weapons pat-down in each search warrant situation, the state proposes a per se rule that all warrants to search for drugs may be enforced with a Terry frisk. This Court has emphasized the importance of supporting circumstances to justify the intrusion of a pat-down. Compare Terry v. Ohio (furtive movements over extended period of time); and Adams v. Williams (reliable tip that suspect was armed; officer approached parked car in high-crime neighborhood at 2:15 a.m.; suspect was uncooperative); with United States

v. Brignoni-Ponce (cannot make roving border check merely because occupants of car are Mexican); and United States v. Sibron (consorting with known drug addicts does justify frisk). The state has offered little support for abandoning this focus on the facts of each case. Indeed, the data presented in the Report of the Drug Enforcement Administration, Appendix B of appellee's brief, do not support such a per se rule. Of the 72 assaults on drug enforcement officers analyzed in that report, none took place during the execution of a search warrant. Appellee's brief, 5a.

The state's second position on this point is that the situation at the Aurora Tap was so dangerous that the Terry frisk was appropriate. The state cites very little evidence in support of this claim. The search warrant and underlying affidavit make no mention of the presence of weapons in the tavern, or of a pattern of violence there in the past. The state points to no action by one of the bar's occupants or suspicious bulge in anyone's clothing. See Smith v. State, 227 S.E.2d 911 (1976) (no basis for patdown of customer at searched barber shop since there was no reason to think he was armed and dangerous). Admittedly, the search took place in a dimly-lit, down-at-the-heels bar, but the police were present in sufficient force for some to search while others watched the bar's occupants. Finally, the state's proffered empirical data does not support the claim that drug enforcement agents are

particularly at risk when searching a place like the Aurora Tap. Of the 72 assaults cited by the report in appellees' brief, 27 took place in automobiles, 20 in open areas, 13 in private residences; any assaults in bars or restaurants would have to be subsumed in the catchall "Other" category covering 10 assaults. I would expect that the presence of witnesses would deter assaults on law enforcement agents in such establishments.

Good point as to assaults. But what about loss of ev. by departure of "guests"?

B. The Second Search -- Johnson stated that following the first frisk he was satisfied that Ybarra had no weapon, and that Ybarra did nothing in the interim to change that opinion. A.28-29. So even if the first pat-down was justified, the state must establish probable cause for Johnson's second search of Ybarra. The evidence on this question is not clear. As noted above, Johnson testified at the suppression hearing that he felt a cigarette pack with hard objects in it during the first pat-down, and that after he searched the other people in the bar he returned to retrieve the cigarette pack. Under this version the Terry frisk would have revealed the presence of contraband (the supporting affidavit specifically referred to tin-foil packets of heroin), and Johnson had probable cause for a more complete search. Testimony at trial, however, calls this version into question. Both Johnson and Ybarra agreed that the second search was a full pat-down, from neck to toes. If Johnson had suspected that the cigarette pack contained heroin, why

It was second search that discovered heroin.

Full pat-down

did he not simply take that from Ybarra's pockets? Possibly after searching all the patrons and the premises and finding little, the police decided to search the people again (it is noteworthy that the final haul from the Aurora Tap raid was rather modest). An alternative view is that after frisking the other patrons, Johnson could not remember precisely where the suspicious cigarette pack had been on Ybarra, so he had to pat Ybarra down again.

Assuming that the seizure was proper, the question arises as to the admissibility of "windfall" evidence that is discovered during a Terry search. Although this Court has not directly ruled on this point, most courts have admitted such evidence. E.g., Guzman v. Estelle, 493 F.2d 532 (5th Cir. 1974); Colding v. State, 536 S.W.2d 106 (Ark. 1976); State v. Yarbrough, 552 P.2d 1318 (Or.App. 1976); but cf. United States v. DelToro, 464 F.2d 520 (2d Cir. 1972) (court rejects policeman's claim that he thought a folded ten-dollar bill containing cocaine might be a concealed razor blade). There is a potential for police to use the frisk as a fishing expedition based on no more than intuition, but few take Prof. Amsterdam's position that the only admissible evidence that can come out of a weapons pat-down is weapons. Such a rule could demoralize both police and citizenry by permitting known crimes to go unpunished. The American Law Institute in its Model Pre-Arraignment Code suggests that because the Terry frisk is most subject to abuse in gambling and narcotics

investigations, the police should be denied the stop-and-frisk power in such investigations. Then, the ALI reasons, the windfall problem would rarely arise. 1975 Draft, at 281-282. This approach also seems a bit extreme. The Terry stop responds to the problems of danger to policemen and the need to prevent incipient crime. Both factors may be present with respect to narcotics and gambling offenses. A possible middle ground on this problem might follow the Uniform Arrest Act in permitting police to detain for up to two hours suspicious individuals discovered on the premises during the execution of a search warrant. See pp. 20-21, infra. In that period, the police may question the person to determine if there is probable cause to search him, or they may seek a personal search warrant from a magistrate.

C. Overview of "Terry issue" -- As the preceding discussion suggests, the Terry issue is not well-presented in this case. Neither the examination of witnesses nor the presentations by counsel were addressed to the problem. The contention was not raised in the court below, and the state did not argue it before this court in its motion to dismiss. Because the issue is not well-framed, and in view of its intricacy and importance, it would be preferable for the Court to sidestep the state's Terry claim. This record provides little basis for deciding questions like the proper scope of a Terry frisk in the execution of a search warrant and the handling of "windfall" evidence from such frisks. Moreover, the statutory issue on which the Court

originally noted jurisdiction is not so difficult, nor its resolution so potentially disruptive, that prudential or federalism considerations would suggest that the Terry ground be seized for decision.

This Court has repeatedly refused to decide consitutional issues that were not raised in state courts, primarily out of concern over the Court's jurisidiction over such claims. See Stern & Grossman, Supreme Court Practice 704 (5th ed. 1978); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971); Tacon v. Arizona, 410 U.S. 351, 352 (1973). These cases, however, all involve questions pressed by a petitioner or appellant, not by a respondent or appellee. Still, valid (if not jurisdictional) concerns support applying this policy to appellees: "Questions not raised below are those on which the record is very likely to be inadequate, since it was certainly not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge. . ." Cardinale, supra, 394 U.S. at 439. Still, I am not sure the Court can avoid the Terry problem without seeming either craven or dense. One approach might be to remand for consideration of the Terry rationale in the court below.

But difficult to avoid Terry issue

Were the Court to meet the Terry issue head-on, I would resist the assertion that a Terry frisk is justified

in the execution of all narcotics search warrants. Such a departure from settled Fourth Amendment practices seems unwarranted. Similarly, I am troubled by the contention that the circumstances in the Aurora Tap justified the general pat-down. The bar was hardly a showplace, but the state can point to no particular factor as establishing the likelihood of violence or danger. By accepting the state's argument on these facts the Court might well open the door to a signficant expansion of the Terry doctrine and an endless exercise in linedrawing. Would a weapons pat-down be justified in a posh establishment like Studio 54, where the presence of drugs is beyond doubt but where there may be more or less likelihood of violence? Or at a Mafia hangout like Umberto's Clam House in Little Italy, which is a fine, well-lit restaurant? What factors were present at the Aurora Tap that should be looked for in the future? Size? Lighting? Clientele? This strikes me as a definitional swamp that the Court would do well to avoid by deciding that there was no basis for the Terry pat-down.

Should the Court determine that the first pat-down was appropriate, I suspect that the second search was permissible. As indicated above, I do not think it is entirely clear on this record that Agent Johnson had probable cause for the second search, but under one interpretation of the record, he would have had probable cause. Again, my doubts on the factual basis for this determination reinforce the idea that the Terry claim

should be viewed as not properly raised in this case. The windfall evidence should probably be admissible. This Court cannot legitimately ask policemen to avert their eyes from illegality and let lawbreakers stroll off.

IV. The Constitutionality of the Search --

Section 108-9 provides: "In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time: (a) To protect himself from attack, or (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." (Emphasis added.) Similar statutes have been enacted in nine other states. Appellee's Brief, at 22. Subsection (a) of Section 108-9 should be seen as a codification of Terry for the warrant situation. To the extent that subsection (a) attempts to grant police officers authority to conduct a full search when they sense danger in executing a warrant, the statute probably upsets the delicate balance struck by this Court in Terry. Somewhat surprisingly, however, the state relies entirely on subsection (b) in this case, as did the court below. Accordingly, this Court should focus on the absconding-with-the-evidence provision. The central inquiry is whether the statute grants too-broad discretion to the executing officer, and thereby thwarts the warrant procedure's requirement of review by an independent magistrate. Marron v. United States, 275 U.S. 192, 196

(1927).

Appellant argues that this statute could not constitutionally authorize the search in this case in the absence of circumstances presenting probable cause. The analogy is drawn to a "general warrant" which authorizes the search of a premises and "all persons" found there. Appellee responds that the statute constitutionally authorized the search because of the connection between the Aurora Tap's patrons and the tavern's "open and notorious" drug trade. The Illinois courts might have attempted to avoid constitutional problems by reading the statutory language "may reasonably detain" as injecting a probable cause requirement. This course was taken by the Connecticut courts in construing a similar statute that referred to the officer's "reason to believe" that he was in danger or that evidence would be carried away. State v. Procce, 260 A.2d 413, 418 (Conn.Cir. 1969). The Connecticut approach has much to commend it.

A. Probable Cause -- Appellant argues that in the absence of probable cause, a search of an individual on premises covered by a search warrant will violate the Fourth Amendment's requirement that there be specific and articulable bases for any official search. The most relevant opinion by this Court is United States v. DiRe, 332 U.S. 581 (1948), involving a conviction for possession of counterfeit gasoline coupons during World War II. In

that case, an informant told the police that he was going to buy counterfeit coupons from Butitia in his car at a certain time and place. At the appointed time, the authorities approached the car with a warrant for Butitia's arrest and found Butitia, the informant, and DiRe. DiRe was taken to the police station, and a subsequent search revealed that he had several phony gasoline coupons. On appeal, the Government conceded that a warrant to search a house would not also authorize the police to search people within the house, but argued that presence in an automobile being used for illegal purposes raises a higher likelihood of participation in wrongdoing. The Supreme Court overturned DiRe's conviction, ruling that if the Government could not use a search warrant to expand the scope of search in a house, the same principle applied to arrests in automobiles. The Court stated, "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." Id. at 587.

Although appellant attempts to make a great deal out of DiRe, I doubt that it controls this case. First, the sort of intermediate police investigation sanctioned by this Court since Terry calls into question the relevance of the Court's holding in 1947. We now have a far more sophisticated Fourth Amendment jurisprudence, at least in part as a response to more sophisticated criminals. Moreover, I doubt that the federal government's concession

in 1948 on the search of houses could be held against it now, but it surely cannot be the basis for ruling against Illinois here. Finally, DiRe did not involve a search pursuant to a warrant, but one incident to arrest.

I think more useful guidance can be derived from state decisions on a police officer's power to search individuals who are on premises for which he has a search warrant. Frequently such cases have involved a "general warrant. Although no "blanket search" authority can be justified in the execution of all warrants, some circumstances may justify searching individuals who are not named in the search warrant and for whom there would not be probable cause to search in a different setting. In particular, courts have focused on the distinction between searches of "public establishments" and of "private homes."

First, only one state court has approved the search of individuals who are not named in a search warrant for a commercial establishment. Colding v. State, supra. Thirteen state courts have overturned convictions based on evidence seized during such a search of a person in a public place. State v. Procce, supra (small variety store); State v. Wise, 284 A.2d 292 (Del. 1971) (small grocery store); Brown v. Wainwright, 337 So. 2d 416 (Fla.App. 1976) (ABC Lounge); State v. Cochran, 217 S.E.2d 181 (Ga.App. 1975) (night club); Purkey v. Mabey, 193 P. 79 (Idaho 1920) (cigar store); McAllister v. State, 306 N.E.2d 395 (Ind.App. 1974) (Blue River Inn); State v.

Sims, 382 A.2d 638 (N.J. 1978) (gas station office); State v. Riggins, 351 A.2d 406 (N.J. Super. 1976) (T & J Tavern); State v. Helton, 369 A.2d 10 (1975) (tavern); People v. Nieves, 330 N.E.2d 26 (1975) (restaurant); Garrett v. State, 270 P.2d 1101 (Okl.Cr. 1954) (gas station and beer tavern); Crossland v. State, 266 P.2d 649 (Okl.Crim.App. 1954) (cafe with 25 customers and ten employees); State v. Massie, 120 S.E. 514 (W.Va. 1923). See United States v. Festa, 192 F.Supp. 160 (D. Mass. 1960) (no general search permitted on basis of warrant for Chick's Bargain Store). The opinions in these cases tend to be cryptic, but all seem to hold that when police are dealing with a commercial enterprise that may house wrongdoing, they cannot routinely assume that customers share that involvement with illegal operations. There was no problem in assuming that link in United States v. Miller, 288 A.2d 34 (D.C.App. 1972), which involved an after-hours club where no one answered the door after the police announced themselves and the police could hear footsteps running away from the door. In the other cases cited above, the connection was too remote. The general principle was well-articulated by the New Jersey Superior Court in State v. Riggins, supra, 351 A.2d at 408: "The tavern, although arguably housing an illegal gambling operation, was also open to the public for legitimate purposes. Both patrons and alleged gamblers frequented the premises. It is quite possible that the illicit operations were covert in nature and went undetected by the tavern's

Rule as to search of persons in a public place when there is a warrant to search the place

9 agree

various customers. Thus, the mere presence of an individual in a public place, absent other factors, is not sufficient to suggest involvement in criminal activity."

Yes

This view is buttressed by the disagreement among courts on a police officer's freedom to search individuals discovered on the premises of a house or apartment to be searched under warrant. Compare United States v. Branch, 545 F.2d 177 (D.C.Cir. 1976) (insufficient basis to search individual); United States v. Micheli, 487 F.2d 429 (1st Cir. 1973) (same, in dictum); State v. Fox, 168 N.W.2d 260 (Minn. 1969) (same); State v. Bradbury, 243 A.2d 302 (N.H. 1968) (same); State v. Carufel, 263 A.2d 413 (R.I. 1970) (same); Tacoma v. Mundell, 495 P.2d 682 (1972) (same), with United States v. Peep, 490 F.2d 903 (8th Cir. 1974) (presence in "shooting gallery" apartment sufficient to permit search); Willis v. State, 177 S.E.2d 487 (Ga.App. 1970) (small apartment with people in the same room); People v. Pugh, 217 N.E.2d 557 (Ill.App. 1966) (apartment); State v. Loudermilk, 494 P.2d 1174 (Kan. 1972) (house); Commonwealth v. Smith, 348 N.E.2d 101 (Mass. 1976) (small apartment); State v. DeSimone, 288 A.2d 849 (N.J. 1972) (automobile). Most of these cases can be harmonized by concentrating on the strength of the presumption that all those present on the premises must be involved in the illegal activity. For example, Carufel involved someone attending a large party who might well not have known of any unlawful business ordinarily conducted in the

apartment, while most of the decisions upholding a search concern situations where it was reasonable to assume knowledge of illegal activity.

The most influential statement of this approach was by Chief Justice Weintraub in DeSimone, supra, which upheld the search of a passenger not named in a warrant to search a car used in gambling operations -- a fact pattern reminiscent of DiRe. The case involved a general warrant, so is not directly on point, and I do not agree with its outcome. But Weintraub's analysis is relevant here: "On principle, the sufficiency of a warrant to search persons identified only by their presence at a specified place should depend on the facts. A showing that lottery slips are sold in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises for there would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game is operated in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense. Such a setting furnishes not only probable cause but also a designation of the persons to be searched which functionally is as precise as a dimensional portrait of them." 288 A.2d at 850.

By emphasizing the individual's "physical nexus to the ongoing criminal event itself," Chief Justice Weintraub

offered a usable standard for monitoring police practices. It is important to stress his use of the language of probable cause. Thus his approach should be seen to argue simply that a police officer may have probable cause to searach an individual found on the premises named in a search warrant under certain circumstances -- when illegal activity is present and overt, when there is a physical nexus between an individual and the activity, and when the evidence sought may be concealed easily in clothing. In such a situation, if the officer reasonably concludes that the individual may flee or the contraband be destroyed while a personal search warrant is sought, a search would be permissible.

This position does not expand police discretion in executing warrants. It merely acknowledges that a person may be searched on probable cause and that a probable cause determination should include factors like the existence of a search warrant and the discovery of "overt illegality" in the execution of that warrant. Both the vocabulary and the analytical methods of traditional Fourth Amendment theory would be retained.

This problem can be discussed in terms of the the individual's legitimate "expectation of privacy." At first blush, the expectation test seems to generate counter-intuitive results. The state cases hold that the police have stronger justification for searching individuals discovered in smaller and more private premises, while

ordinarily one would think that a person's expectation of privacy is greatest in such circumstances. This apparent irrationality can be dispelled by the requirement that there be a high probability that the individual is linked to ongoing illegal activity. In a small apartment, it is unlikely that a person will not know that the person he is visiting is a drug dealer. That knowledge would reduce any legitimate expectation of privacy. In a tavern, however, the link between the individual and the wrongdoing is more attenuated, and the legitimate expectation of privacy would be correspondingly higher.

In this case, I do not think that the state showed any illegal activity in the Aurora Tap that was so overt that any customer would be expected to know about it. Accordingly, the circumstances did not establish probable cause for the search of Ybarra. I would not seek a broad pronouncement against the Illinois statute, however. Other Illinois courts have interpreted the law more narrowly than this one did (for example, State v. Miller, reprinted in appellee's brief). This Court could take the Connecticut approach in reading the requirement that police "reasonably" detain or search individuals to involve a simple probable cause determination in the context of the circumstances of the search.

I agree

I agree that this is desirable general formulation

B. Detain-and-Question -- As laid out by Judge Wyzanski in dicta in United States v. Festa, supra, police officers executing a warrant should have the option, in

some situations, of asking individuals found on the premises to remain there for up to two hours and to respond to some questions. The idea is to permit a Terry-type, intermediate investigatory technique, where the police would have to meet a lower requirement (perhaps "reasonable suspicion" rather than probable cause?) in order to impose on the individual.

Judge Wyzanski's suggestion tracks the procedure outlined in the Uniform Arrest Act, Section 2. Although the Uniform Act's proposal is not limited to situations where the investigating officer is executing a search warrant, it does provide an interesting sequence of procedures:

> (1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad, and whither he is going.
>
> (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
>
> (3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 344 (1942).

Uniform Arrest Act

This provision has been enacted in Delaware and New Hampshire.

As pointed out in Note, 58 Cornell L. Rev. 614 (1973), and in State v. Wise, supra, a Delaware case, this procedure may be particularly well-suited to the search

warrant context. It permits the police to prevent individuals from absconding with the evidence and grants the officers an opportunity to establish the person's business on the premises, without authorizing a warrantless search. Thus it may be that the detain-and-question approach can be jusitified as a "reasonable" search; even though it does not involve danger to the policemen as in Terry, it allows arguably less intrusive investigatory measures.

Nevertheless, I am not convinced that the Court should attempt to impose this procedure in this case. There is nothing in this record that would trigger consideration of the Uniform Act procedure, and the imposition of it could be seen as the sort of judicial legislation that should be indulged rarely. We have no idea why the procedure has not spread more widely in the thirty-seven years since the Uniform Act was promulgated, nor how it has worked in Delaware and New Hampshire. Finally, it could be unwieldy in operation.

C. Warrant for Detain-and Question -- A final possiblity is that in seeking a warrant to search a location, the police could attempt to show that people on the premises are likely to be participants in the illegal activity. The warrant could then include some authorization for questioning of those persons. Even assuming that the warrant identified each person in order to avoid the evils of the general warrant, I am uneasy with

True

But Uniform Act adopted in only two states and would not apply in this case

the suggestion. What showing would be required for such authorization? It might be difficult to describe a middle-ground showing that would be appropriate for the intrusion contemplated, and to have that standard enforced consistently. Magistrates might find it difficult to depart from the familiar probable cause calculus without abandoning meaningful standards for review of warrant applications. It is already uncommon for a magistrate to refuse to issue a warrant. A less exacting standard might undermine the effectiveness of judicial check on police discretion. The price of a "workable" standard might be an erosion of the protections of the Fourth Amendment. In addition, I am not sure of the need for such a procedure. Is there any indication that the policed are handcuffed by the current probable cause requirement? How would this Court know if there was or wasn't? There is the same problem of judicial role as in the Uniform Arrest Act context. What is the basis for this Court to propose such a procedure when there is no glimmer of it in the case?

We could, & perhaps should, leave open the validity of procedure like that of Uniform Act

DS

SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell (On Response)

FROM: David

DATE: Oct. 4, 1979

RE: Ybarra v. Illinois, No. 78-5937

Appellant's reply brief responds to appellee's claim that the search in the Aurora Tap was justified under Terry v. Ohio, 392 U.S. 1 (1968), a claim that was not presented in the courts below. Appellant attacks the State's claim that a police officer may pat down all patrons of a bar when executing a search warrant. Such a rule, according to appellant, would expand the Terry stop doctrine beyond the limits of the Fourth Amendment, neglecting the requirement specific, articulable facts must give rise to a reasonable suspicion before a weapons pat-down is justified. Appellant also argues that nothing in the complaint underlying the search warrant would have raised such a suspicion, while Officer Johnson testified that he observed nothing suspicious in appellant's behavior in the tavern. These claims were covered in my initial memorandum in this case.

78-5937 Ybarra v. Illinois Appeal Sct/Ct App Argued 10/9/79

Ill. statute authorizes, when police have valid warrant to search a place (here a grubby one-room bar), they may search any person in the place (i) to ensure safety of police, or (ii) to prevent disposition or removal of evidence.

Police, after a prelim. "pat down" of Petr, searched him.

As applied in this case, statute is invalid. Not even a Terry pat-down was justified. No ev. of weapons or of any law violation by any of the 12 persons in the bar.

A statute of this kind may be valid if properly drawn: e.g. to apply to a private residence or a limited area, & the warrant specified conduct there in which person present normally participate.

(It may not be necessary to hold this statute facially void, as apparently other Sct Cts have construed it quite narrowly)

The Uniform Arrest Act would not (if enacted) fit this case. But could leave it's validity open.

9/9 write I should take a look at he Fave's Arr. cited p 36 of State's Brief.

Goldberg (Petr.)

No reasonable suspicion or probable cause as to customer. Bar tender was named in warrant.

Terry applies to weapons. Probable cause is necessary to search for narcotics.

One could walk into this bar without suspecting narcotics were being sold.

Agent officer had valid warrant to search premises & the bar tender.

J. Stevens put example of a warrant that said bar was regularly used to dispense drugs & that the customers went there for drugs (not liquor), & authorized search of everyone. Goldberg answered ambiguously.

Officer testified he had no reason to suspect criminal activity by any of customers.

Both the initial pat-down & the return to ~~search~~ search of purse are relied upon as illegal.

Noel (ant AG Ill)

Common ~~police~~ police practice.

Dispute in ant to "common sense" meaning of search warrant & ~~also~~ also the testimony of officer.

A most recent Ill. decision construes Ill statute as requiring a balancing test. (Case not cited in brief

If purpose of Terry search is to ascertain whether there is a weapon. If in the pat-down, narcotics are found - they are properly admissible in ev.

J. Stevens noted that affidavit for warrant makes no reference to narcotics being sold or in possession of customers

Reverse 6-3

78-5937 Ybarra v. Illinois Conf. 10/12/79

The Chief Justice Affirm

Even if statute is invalid, Exclusionary Rule does not apply.

Absent any statute, Terry search may be OK

~~If~~ If we reach statute, it is overbroad.

Mr. Justice Brennan Reverse

Statute invalid.

No probable cause – probably no reasonable suspicion.

Terry applies only to search for guns.

Mr. Justice Stewart Reverse

Agree with Bill Brennan on merits

Deflippio does not apply here as to exclusionary rule.

It applies only to a substantive statute.

Valid appeal.

Search of person w/o probable cause ~~and~~ & no warrant.

Mr. Justice White Reverse

Ct. below relied on statute.

Only need say invalid as ~~no~~ applied. Possibly could have valid statute

No ev that officer feared weapons. Suspicion of heroin doesn't justify a Terry search - Terry applies to weapons.

Mr. Justice Marshall Reverse

Outrageous conduct.

Mr. Justice Blackmun Affirm

Case is closer than other Justices have indicated. What do officers do? Gut reaction is to sustain this statute. Dispensation of hard drugs is associated with weapons.

Search here was probably reasonable

Mr. Justice Powell Reverse

See my notes on Argument sheets.
I agree essentially with Byron —
bad as applied.
Could have valid statute if
properly limited - e.g. private
residence or a limited area & warrant
specifies illegal content.
Almeida
~~Re~~ As to E/Rule, I understood
~~We~~ DeFlippo as Potter does.
There is not a substantive
statute

Mr. Justice Rehnquist Affirm

Quite apart from statute, Terry
should be extended to cover this
type of situation. It should be
extend to the "stuff" specified
in warrant.
Would accept State's first argument

Mr. Justice Stevens Reverse

Can't apply DeFlippo w/o
overruling Almeida-Sanchez
(Didn't discuss validity
of statute beyond saying it
is invalid)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 29, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Potter:

In due course, I will circulate a dissent in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 29 OCT 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, v. State of Illinois.	On Appeal for the Appellate Court of Illinois for the Second District.

[October —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

An Illinois statute authorizes law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant.[1] The question before us is whether the application of this statute to the facts of the present case violated the Fourth and Fourteenth Amendments.

II

On March 1, 1976, a Special Agent of the Illinois Bureau of Investigation presented a "Complaint for Search Warrant" to a judge of an Illinois Circuit Court. The Complaint recited that the Agent had spoken with an informant known to the police to be reliable and:

> "3. The informant related . . . that over the weekend of 28 and 29 February he was in the [Aurora Tap Tavern, located in the city of Aurora, Illinois] and observed fif-

[1] The statute in question is Ill. Rev. Stat., ch. 38, § 108-9 (1975), which provides in full:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
"(a) To protect himself from attack, or
"(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

Join subject to clarifying note 4. Send P.S. a draft of an addition

L.F.P.

> teen to twenty-five tin-foil packets on the person of the bartender 'Greg' and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on 'Greg' and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.
>
> "4. The informant advised . . . that over the weekend of 28 and 29 February he had a conversation with 'Greg' and was advised that 'Greg' would have heroin for sale on Monday, March 1, 1976. This conversation took place in the tavern described."

On the strength of this Complaint, the judge issued a warrant authorizing the search of "the following person or place: . . . [T]he Aurora Tap Tavern. . . . Also the person of 'Greg,' the bartender, a male white with blondish hair appx. 25 years." The warrant authorized the police to search for: "evidence of the offense of possession of a controlled substance," to wit, "[h]eroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances."

In the late afternoon of that day, seven or eight officers proceeded to the tavern. Upon entering it, the agents announced their purpose and advised all those present to stay where they were, and that they were going to conduct a "cursory search for weapons." One of the officers then proceeded to pat down each of the 9 to 13 customers present in the tavern, while the remaining officers engaged in an extensive search of the premises.

The police officer who frisked the patrons found the appellant, Ventura Ybarra, in front of the bar standing by a pinball machine. In his first patdown of Ybarra, the officer felt what he described as "a cigarette pack with objects in it." He did not remove this pack from Ybarra's pocket. Instead,

he moved on and proceeded to pat down other customers. After completing this process the officer returned to Ybarra and frisked him once again. This second search of Ybarra took place approximately 2 to 10 minutes after the first. The officer relocated and retrieved the cigarette pack from Ybarra's pants pocket. Inside the pack he found six tinfoil packets containing a brown powdery substance which later turned out to be heroin.

Ybarra was subsequently indicted by an Illinois grand jury for the unlawful possession of a controlled substance. He filed a pretrial motion to suppress all the contraband that had been seized from his person at the Aurora Tap Tavern. At the hearing on this motion the State sought to justify the search by reference to the Illinois statute in question. The trial court denied the motion to suppress, finding that the search had been conducted under the authority of subsection (b) of the statute, to "prevent the disposal or concealment of [the] things particularly described in the warrant." The case proceeded to trial before the court sitting without a jury, and Ybarra was found guilty of the possession of heroin.

On appeal, the Illinois Appellate Court held that the Illinois statute was not unconstitutional "in its application to the facts" of this case. 58 Ill. App. 3d, at 64, 1014 N. E. 2d, at 1017. The court acknowledged that, had the warrant directed that a "large retail or commercial establishment" be searched, the statute could not constitutionally have been read to "authorize a 'blanket search' of persons or patrons found" therein. 58 Ill. App. 3d, at 62, 373 N. E. 2d, at 1016. The court interpreted the statute as authorizing the search of persons found on premises described in a warrant only if there is "some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 58 Ill. App. 3d, at 61, 373 N. E. 2d, at 1016. Accordingly, the state appellate court found that the search

of Ybarra had been constitutional because it had been "conducted in a one-room bar where it [was] obvious from the complaint . . . that heroin was being sold or dispensed," 58 Ill. App. 3d, at 62, 373 N. E. 2d, at 1016, because "the six packets of heroin . . . could easily [have been] concealed by the defendant and thus thwart the purpose of the warrant," 58 Ill. App. 3d, at 61, 373 N. E. 2d, at 1016, and because Ybarra was not an "innocent stranger[] having no connection whatsoever with the premises," *ibid.* The court, therefore, affirmed Ybarra's conviction, and the Illinois Supreme Court denied Ybarra's petition for leave to appeal. There followed an appeal to this Court, and we noted probable jurisdiction. — U. S. —.

II

There is no reason to suppose that, when the search warrant was issued on March 1, 1976, the authorities had probable cause to believe that any person found on the premises of the Aurora Tap Tavern, aside from "Greg," would be violating the law.[2] The Complaint for Search Warrant did not allege that the bar was frequented by persons illegally purchasing drugs. It did not state that the informant had ever seen a patron of the tavern purchase drugs from "Greg" or from any other person. Nowhere, in fact, did the complaint even mention the patrons of the Aurora Tap Tavern.

Not only was probable cause to search Ybarra absent at the time the warrant was issued; it was still absent when the

[2] The warrant issued on March 1, 1976, did not itself authorize the search of Ybarra or of any other patron found on the premises of the Aurora Tap Tavern. It directed the police to search "the following person or place: . . . the Aurora Tap Tavern. . . . Also the person of 'Greg'. . . ." Had the issuing judge intended that the warrant would or could authorize a search of every person found within the tavern, he would hardly have specifically authorized the search of "Greg" alone. "Greg" was an employee of the tavern, and the complaint upon which the search warrant was issued gave every indication that he would be present at the tavern on March 1.

police executed the warrant. Upon entering the tavern, the police did not recognize Ybarra and had no reason to believe that he had committed, was committing or was about to commit any offense under state or federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers. In short, the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale.

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed.[3] But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron* v. *New York*, 392 U. S. 40, 62–63. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See *Rakas* v. *Illinois*, 439 U. S. 128, 138–143, 148–149; *Katz* v. *United States*, 389 U. S. 347, 351–352.

Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure.

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[3] Ybarra concedes that the warrant issued on March 1, 1976, was supported by probable cause insofar as it purported to authorize a search of the premises of the Aurora Tap Tavern and a search of the person of "Greg," the bartender.

That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.[4]

Notwithstanding the absence of probable cause to search Ybarra, the State argues that the action of the police in searching him and seizing what was found in his pocket was nonetheless constitutionally permissible. We are asked to find that the first pat-down search of Ybarra constituted a reasonable frisk for weapons under the doctrine of *Terry* v. *Ohio*, 392 U. S. 1. If this finding is made, it is then possible to conclude, the State argues, that the second search of Ybarra was constitutionally justified. The argument is that the pat-down yielded probable cause to believe that Ybarra was carrying narcotics, and that this probable cause constitutionally supported the second search, no warrant being required in light of the exigencies of the situation coupled with the ease with which Ybarra could have disposed of the illegal substance.

We are unable to take even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must

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[4] The Fourth Amendment directs that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." Thus, "open-ended" or "general" warrants are constitutionally prohibited. See *Lo-Ji Sales, Inc.* v. *New York*, — U. S. —; *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 311; *United States* v. *Chadwick*, 433 U. S. 1, 7–8; *Stanford* v. *Texas*, 379 U. S. 476, 480–482. It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place. Such searches would have to be supported by individualized probable cause, and generally by a warrant specifically authorizing such searches.

form the predicate to a pat-down of a person for weapons.[5] *Adams* v. *Williams*, 407 U. S. 143, 146; *Terry* v. *Ohio*, *supra*, 392 U. S., at 21–24, 27. When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as police agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most agent Johnson could point to was that Ybarra was wearing a ¾-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.

The *Terry* case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain."[6] Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, *e. g.*, *Adams* v. *Williams*, *supra* (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever

[5] Since we conclude that the initial pat down of Ybarra was not justified under the Fourth and Fourteenth Amendments, we need not decide whether or not the presence on Ybarra's person of "a cigarette pack with objects in it" yielded probable cause to believe that Ybarra was carrying any illegal substance.

[6] *Dunaway* v. *New York*, — U. S. —, —.

for anything but weapons. The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.

What has been said largely disposes of the State's second and alternative argument in this case. Emphasizing the important governmental interest "in effectively controlling traffic in dangerous, hard drugs" and the ease with which the evidence of narcotics possession may be concealed or moved around from person to person, the State contends that the *Terry* "reasonable belief or suspicion" standard should be made applicable to aid the evidence-gathering function of the search warrant. More precisely, we are asked to construe the Fourth and Fourteenth Amendments to permit evidence searches of persons who, at the commencement of the search, are on "compact" premises subject to a search warrant, at least where the police have a "reasonable belief" that such persons "are connected with" drug trafficking and "may be concealing or carrying away the contraband."

Over 30 years ago, the Court rejected a similar argument in *United States* v. *Di Re*, 332 U. S. 581, 583–587. In that case, a federal investigator had been told by an informant that a transaction in counterfeit gasoline ration coupons was going to occur at a particular place. The investigator went to that location at the appointed time and saw the car of one of the suspected parties to the illegal transaction. The investigator went over to the car and observed a man in the driver's seat, another man (Di Re) in the passenger's seat, and the informant in the back. The informant told the investigator that the person in the driver's seat had given him counterfeit coupons. Thereupon, all three men were arrested and searched. Among the arguments unsuccessfully advanced by the Government to support the constitutionality of the search of Di Re was the contention that the investigator could

lawfully have searched the car, since he had reasonable cause to believe that it contained contraband, and correspondingly could have searched any occupant of the car because the contraband sought was of the sort "which could easily be concealed on the person." [7] Not deciding whether or not under the Fourth Amendment the car could have been searched, the Court held that it was "not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." [8]

The *Di Re* case does not, of course, completely control the case at hand. There the Government investigator was proceeding without a search warrant, and here the police possessed a warrant authorizing the search of the Aurora Tap Tavern. Moreover, in *Di Re* the Government conceded that its officers could not search all the persons in a house being searched pursuant to a search warrant.[9] The State makes no such concession in this case. Yet the governing principle in both cases is basically the same, and we follow that principle today. The "long prevailing" constitutional standard of probable cause embodies " 'the best compromise that has been found for accommodating the[] often opposing interests'

[7] *United States* v. *Di Re*, 332 U. S. 581, 586.

[8] *Id.*, at 587.

[9] "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?" 332 U. S., at 587.

in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" [10]

For these reasons, we conclude that the searches of Ybarra and the seizure of what was in his pocket contravened the Fourth and Fourteenth Amendments.[11] Accordingly, the judgment is reversed and the case is remanded to the Appellate Court of Illinois, Second District, for further proceedings not inconsistent with this opinion.

It is so ordered.

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[10] *Dunaway* v. *New York*, — U. S., at —, quoting *Brinegar* v. *United States*, 338 U. S. 160, 176.

The circumstances of this case do not remotely approach those in which the Court has said that a search may be made on less than probable cause. In addition to *Terry* v. *Ohio*, *supra*, see, *e. g.*, *Delaware* v. *Prouse*, — U. S. —; *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307; *United States* v. *Martinez-Fuerte*, 428 U. S. 543; *South Dakota* v. *Opperman*, 428 U. S. 364; *United States* v. *Brignoni-Ponce*, 422 U. S. 873; *United States* v. *Biswell*, 406 U. S. 311; *Camara* v. *Municipal Court*, 387 U. S. 523.

[11] Our decision last Term in *Michigan* v. *De Fillippo*, — U. S. —, does not point in a different direction. There we held that the Fourth and Fourteenth Amendments had not been violated by an arrest based on a police officer's probable cause to believe that the suspect had committed or was committing a substantive criminal offense, even though the statute creating the offense was subsequently declared unconstitutional. Here, the police officers acted on the strength of Ill. Rev. Stat., ch. 38, § 108–9, but that statute does not define the elements of a substantive criminal offense under state law. The statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause and without search warrants. This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches. See, *e. g.*, *Torres* v. *Puerto Rico*, — U. S. —; *Almeida-Sanchez* v. *United States*, 413 U. S. 266; *Sibron* v. *New York*, 392 U. S. 40; *Berger* v. *New York*, 388 U. S. 41.

November 1, 1979

78-5937 Ybarra v. Illinois

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 10 OCT 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-5937

Ventura E. Ybarra, Appellant, v. State of Illinois. | On Appeal for the Appellate Court of Illinois for the Second District.

[November —, 1979]

Received 10/11

There is a strong dissent.

MR. JUSTICE REHNQUIST, dissenting.

On March 1, 1976, agents of the Illinois Bureau of Investigation executed a search warrant in the Aurora Tap in Aurora, Ill. The warrant was based on information given by a confidential informant who said that he had seen heroin on the person of the bartender and in a drawer behind the bar on at least ten occasions. Moreover, the informant advised the affiant that the bartender would have heroin for sale on March 1. The warrant empowered the police to search the Aurora Tap and the person of "Greg," the bartender.

When police arrived at the Aurora Tap, a drab, dimly lit tavern, they found about a dozen or so persons standing or sitting at the bar. The police announced their purpose and told everyone at the bar to stand for a pat-down search. Agent Jerome Johnson, the only officer to testify in the proceedings below, explained that the initial search was a frisk for weapons to protect the officers executing the warrant. Johnson frisked several patrons, including petitioner Ybarra. During this pat-down, Johnson felt "a cigarette package with objects in it" in Ybarra's front pants pocket. He finished frisking the other patrons, and then returned to Ybarra. At that time, he frisked Ybarra once again, reached into Ybarra's pocket, and removed the cigarette package that he had felt previously. The package, upon inspection, confirmed the officer's previously aroused suspicion that it contained not cigarettes but packets of heroin.

Mr Justice -

This is rather good. The discussion at pp. 5-8 (covers) when presence in a place designated by a search warrant may justify personal search. I don't think it is persuasive on these facts, but perhaps it will influence Justice Stewart to adopt the language you proposed this morning -

David

Confronted with these facts, the Court concludes that the police were without authority under the warrant to search any of the patrons in the tavern and that, absent probable cause to believe that Ybarra possessed contraband, the search of his person violated the Fourth and Fourteenth Amendments. Because I believe that this analysis is faulty, I dissent.

The first question posed by this case is the proper scope of a policeman's power to search pursuant to a valid warrant. This Court has had very few opportunities to consider the scope of such searches. An early case, *Marron* v. *United States*, 275 U. S. 192 (1927), held that police could not seize one thing under a search warrant describing another thing. See also *Steele* v. *United States*, 267 U. S. 498 (1925) (warrant authorizing search of building used as a garage empowers police to search connecting rooms). Three other cases, *Berger* v. *New York*, 388 U. S. 41 (1967); *United States* v. *Kahn*, 415 U. S. 143 (1974); and *United States* v. *Donovan*, 429 U. S. 413 (1977), examined the scope of a warrant in the context of electronic surveillance. A number of cases involving warrantless searches have offered dicta on the subject of searches pursuant to a warrant. See, *e. g.*, *Bivens* v. *Six Unknown Agents*, 403 U. S. 388, 394, n. 7 (1971) (Fourth Amendment confines officer executing a warrant "strictly within the bounds set by the warrant"). Closest for our purposes, though concededly not dispositive, is *United States* v. *DiRe*, 332 U. S. 581, 587 (1948), a case involving the warrentless search of an occupant of an automobile. In that case the Court suggested that police, "armed with a search warrant for a residence only," could not search "all persons found" in the residence.

Faced with such a dearth of authority, it makes more sense than ever to begin with the language of the Fourth Amendment itself:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As often noted, the amendment consists of two independent clauses joined by the conjunction "and." See, *e. g.*, *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356–357 (1931). The first clause forbids "unreasonable searches and seizures" of "persons, houses, papers, and effects. . . ." The second clause describes the circumstances under which a search warrant or arrest warrant may issue, requiring specification of the place to be searched as well as the persons or things to be seized.

Much of the modern debate over the meaning of the Fourth Amendment has focused on the relationship between the reasonableness requirement and the warrant requirement. In particular, the central question has been whether and under what circumstances the police are entitled to conduct "reasonable" searches without first securing a warrant. As this Court has summarized:

> "Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that '[t]he relevant test is not whether it is reasonable to procure a warrant, but whether the search was reasonable.'" *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474 (1971), quoting *United States* v. *Rabinowitz*, 339 U. S. 56, 66 (1950).

MR. JUSTICE STEWART explained the current accommodation of the two clauses in *Katz* v. *United States*, 389 U. S. 347, 357 (1967): "searches conducted outside the judicial process,

without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." See also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973).

Here, however, we must look to the language of the Fourth Amendment to answer a wholly different question: whether and under what circumstances the police may search a person present at the place named in a warrant. In this regard, the second clause of the Amendment, by itself, offers no guidance. It is merely a set of standards that must be met before a search warrant or arrest warrant may "issue." The restrictions on a policeman's authority to search pursuant to a warrant derive, of course, from the first clause of the Amendment, which prohibits all "unreasonable" searches, whether those searches are pursuant to a warrant or not. See *Go-Bart Co.* v. *United States*, *supra*, at 357. Reading the two clauses together, we can infer that some searches or seizures are *per se* unreasonable: searches extending beyond the place specified, cf. *Steele* v. *United States*, *supra*, or seizures of persons or things other than those specified. Cf. *Marron* v. *United States*, *supra*. No such presumption is available to Ybarra here, however, because the second clause of the amendment does not require the warrant to specify the "persons" to be searched. As this Court has noted in the context of electronic surveillance, "'[t]he Fourth Amendment requires a warrant to describe only "the place to be searched and the persons or things to be seized," not the persons from whom things will be seized.'" *United States* v. *Kahn*, 415 U. S. 143, 155, n. 15 (1974), quoting *United States* v. *Fiorella*, 468 F. 2d 688, 691 (CA2 1972).

Nor, as a practical matter, could we require the police to specify in advance all persons that they were going to search at the time they execute the warrant. A search warrant is, by definition, an anticipatory authorization. The police must offer the magistrate sufficient information to confine the

search but must leave themselves enough flexibility to react reasonably to whatever situation confronts them when they enter the premises. An absolute bar to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket. I cannot subscribe to any interpretation of the Fourth Amendment that would support such a result, and I doubt that this Court would sanction it if that precise fact situation were before it.

Recognizing that the authority to search premises must, under some circumstances, include the authority to search persons present on those premises,[1] courts and legislatures have struggled to define the precise contours of that power. Some courts, for example, have required an indication that the person searched had a "connection" with the premises. See, *e. g.*, *Purkey* v. *Mabey*, 33 Idaho 281, 193 P. 79 (1920); *State* v. *Massie*, 95 W. Va. 233, 120 S. E. 514 (1923). These courts do not explain, however, what form that connection must take or how it might manifest itself to the police. Some States have relied on the Uniform Arrest Act, which allows police executing a warrant to detain and question a suspicious person for up to two hours. See, *e. g.*, *State* v. *Wise*, 284 A. 2d 292 (Del. 1971). Proponents of this approach fail to explain, however, how detention for questioning will produce any hidden contraband. Moreover, in light of the Fourth Amendment's requirement that the warrant specify the person to be "seized," it is at least arguable that this approach substitutes a greater constitutional intrusion for a lesser. Several other States, Illinois included, have simply passed over the constitutional question by identifying the permissible purposes

[1] As even a critic of the approach employed by the court below admitted, "a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that under some circumstances a right to search occupants of the place named in the warrant is essential." LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 Ill. L. Rev. 266, 272.

for a search without specifying the circumstances under which that search can be conducted. Illinois' provision, for example, permits an officer to search persons present on the named premises

> "(a) to protect himself from attack, or
>
> "(b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." Ill. Rev. Stat. 1975, ch. 38, par. 108–9.

The generality of these attempts to define the proper limits of such searches does not mean of course, that no limits exist. A person does not forfeit the protection of the Fourth Amendment merely because he happens to be present during the execution of a search warrant. To define those limits, however, this Court need look no further than the first clause of that Amendment and need ask no question other than whether, under all the circumstances, the actions of the police in executing the warrant were reasonable. Significantly, the concept of reasonableness in this context is different from the prevailing concept of reasonableness in the context of warrantless searches. In that latter context, as noted earlier, there is a tension between giving full scope to the authority of police to make reasonable searches and the inferred requirement that the police secure a judicial approval in advance of a search. In the past we have resolved that tension by allowing "jealously and carefully drawn" exceptions to the warrant requirement. See *Jones* v. *United States*, 357 U. S. 493, 499 (1958); *Katz* v. *United States*, *supra*, at 357. The rationale for drawing these exceptions closely is obvious. Loosely drawn, they could swallow the warrant requirement itself.

In this case, however, the warrant requirement has been fully satisfied. As a result, in judging the reasonableness of the search pursuant to the warrant, we need not measure it against jealously drawn exceptions to that requirement. Only once before, to my knowledge, has this Court been relieved of concern for the warrant requirement to the extent that we

could give full scope to the notion of reasonableness. In *Terry* v. *Ohio*, 392 U. S. 1 (1968), this Court considered the applicability of the Fourth Amendment to an on-the-street encounter between a policeman and three men who had aroused his suspicions. In upholding the ensuing "stop and frisk," this Court found the warrant requirement completely inapposite because "on-the-spot" interactions between police and citizens "historically [have] not been, and as a practical matter could not be, subjected to the warrant procedure." 392 U. S., at 20. The conduct in question had to be judged solely under "the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.*

The petitioner in Terry had sought a "rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment," a model allowing the police to search some individuals completely and other individuals not at all. Such a model, however, would have overlooked "the utility of limitations upon the scope, as well as the initiation, of police actions as a means of constitutional regulation." 392 U. S., at 17. This Court, therefore, opted for a flexible model balancing the scope of the intrusion against its justification:

> "In order to assess the reasonableness of [the challenged search] as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies the official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" 392 U. S. at 21, quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967).

In the present case, Ybarra would have us eschew such flexibility in favor of a rule allowing the police to search only those persons on the premises for whom the police have probable cause to believe that they possess contraband. Presum-

ably, such a belief would entitle the police to search those persons completely. But such a rule not only reintroduces the rigidity condemned in *Terry*, it also renders the existence of the search warrant irrelevant. Given probable cause to believe that a person possesses illegal drugs, the police need no warrant to conduct a full body search. They need only arrest that person and conduct the search incident to that arrest. See *Chimel* v. *California*, 395 U. S. 752, 763 (1969). It should not matter, of course, whether the arrest precedes the search or vice versa. See, *e. g.*, *United States* v. *Gorman*, 355 F. 2d 151, 159 (CA2 1965); *Holt* v. *Simpson*, 340 F. 2d 853, 856 (CA7 1965).

As already noted, I believe it error to analyze this case as if the police were under an obligation to act within one of the narrow exceptions to the warrant requirement, yet this is precisely what Ybarra would have us do. Whereas in *Terry* the warrant requirement was inapposite, here the warrant requirement has been fully satisfied. In either case we should give full scope to the reasonableness requirement of the first clause of the Fourth Amendment. Thus, in judging the reasonableness of a search pursuant to a warrant, which search extends to persons present on the named premises, this Court should consider the scope of the intrusion as well as its justification.

Viewed sequentially, the actions of the police in this case satisfy the scope/justification test of reasonableness established by the first clause of the Fourth Amendment as interpreted in *Terry*. The police entered the Aurora Tap pursuant to the warrant and found themselves confronting a dozen people, all standing or sitting at the bar, the suspected location of the contraband. Because the police were aware that heroin was being offered for sale in the tavern, it was quite reasonable to assume that any one or more of the persons at the bar could have been involved in drug trafficking. This assumption, by itself, might not have justified a full-scale search

of all the individuals in the tavern. Nevertheless, the police also were quite conscious of the possibility that one or more of the patrons could be armed in preparation for just such an intrusion. In the narcotics business, "firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia." *United States* v. *Oates*, 560 F. 2d 45, 62 (CA2 1977). The potential danger to the police executing the warrant and to innocent individuals in this dimly lit tavern cannot be minimized. By conducting an immediate frisk of those persons at the bar, the police eliminated this danger and "froze" the area in preparation for the search of the premises.

Ybarra contends that *Terry* requires an "individualized" suspicion that a particular person is armed and dangerous. While this factor may be important in the case of an on-the-street stop, where the officer must articulate some reason for singling the person out of the general population, there are at least two reasons why it has less significance in the present situation, where execution of a valid warrant had thrust the police into a confrontation with a small, but potentially dangerous, group of people. First, in place of the requirement of "individualized suspicion" as a guard against arbitrary exercise of authority, we have here the determination of a neutral and detached magistrate that a search is necessary. As this Court noted in *Fisher* v. *United States*, 425 U. S. 391, 400 (1976), the Framers of the Fourth Amendment "struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." The question then becomes whether, given the initial decision to intrude, the scope of the intrusion is reasonable.

In addition, the task performed by the officers executing a search warrant is inherently more perilous than is a ~~mere~~ momentary encounter on the street. The danger is greater "not only

because the suspect and the officer will be in close proximity for a longer period of time, but also . . . because the officer's investigative responsibilities under the warrant require him to direct his attention to the premises rather than the person." W. LaFave, Search & Seizure § 4.9, at 150–151 (1978). To hold a police officer in such a situation to the same standard of "individualized suspicion" as might be required in the case of an on-the-street stop would defeat the purpose of gauging reasonableness in terms of all the circumstances surrounding an encounter.

Terry suggests an additional factor that courts must consider when confronting an allegedly illegal frisk for weapons. As this Court admitted in that case, "[t]he exclusionary rule has its limitations . . . as a tool of judicial control." 392 U. S., at 13. Premised as that rule is on the hypothesis that police will avoid illegal searches if threatened with exclusion of the fruits of such searches, "it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." *Id.*, at 14. Where, as here, a preliminary frisk is based on an officer's well-honed sense of self-preservation, I have little doubt that "the [exclusionary] rule is ineffective as a deterrent." *Id.*, at 13.

Measured against the purpose for the initial search is the scope of that search. I do not doubt that a pat-down for weapons is a substantial intrusion into one's privacy. See *Terry* v. *Ohio*, *supra*, at 17, n. 13. Nevertheless, such an intrusion was more than justified, under the circumstances here, by the potential threat to the lives of the searching officers and innocent bystanders. In the rubric of *Terry* itself, a "man of reasonable caution" would have been warranted in the belief that it was appropriate to frisk the 12 or so persons in the vicinity of the bar for weapons. See 392 U. S., at 21–22. Thus, the initial frisk of Ybarra was legitimate.

During this initial pat-down, Officer Johnson felt something suspicious: a cigarette package with objects in it. The record below is not entirely clear as to the shape or texture of the objects, but it is clear that Officer Johnson had at least a subjective suspicion that the objects were packets of heroin like those described in the warrant. He testified, for example, that after patting down the other persons at the bar, he returned directly to Ybarra to search him "for controlled substances." App., at 499. At this point, he reached into Ybarra's pants pocket, removed the cigarette package, and confirmed his suspicion.

While the test of reasonableness under the Fourth Amendment is necessarily objective as opposed to subjective, see *Terry* v. *Ohio*, 392 U. S., at 21–22, Officer Johnson's subjective suspicions help fill out his cryptic description of the "objects" that he felt in Ybarra's pocket. The objects clearly did not feel like cigarettes.[2] In this case we need not decide whether, as a general rule, an officer conducting an on-the-street frisk under *Terry* can carry his search into the pockets of a suspect to examine material that he suspects to be contraband. We are dealing here with a case where the police had obtained a warrant to search for precisely the item that Officer Johnson suspected was present in Ybarra's pocket. Whether Officer Johnson's level of certainty could be labeled "probable cause," "reasonable suspicion," or some indeterminate, intermediate level of cognition, the limited pursuit of his suspicions by extracting the item from Ybarra's pocket was reasonable. The justification for the intrusion was linked closely to the terms of the search warrant; the intrusion itself was carefully tailored to conform to its justification.

---

[2] In fact, Officer Johnson did testify that the objects felt exactly like what they were: heroin. See App., p. 9 ("I felt some objects that I felt to be heroin"). See also App., p. 50 ("I felt objects in his pocket which I believed—"). In both cases defense counsel interposed objections to Officer Johnson's characterization of the objects, which objections the trial court sustained.

The courts below reached a similar conclusion. The trial court noted correctly that "[i]t might well not be reasonable to search 350 people on the first floor of Marshall Field, but we're talking about, by description, a rather small tavern." See App., p. 43. The question, as understood by the trial court, was the "reasonableness" of the intrusion under all the surrounding circumstances. *Ibid.* The Illinois Court of Appeals agreed. In an earlier case, *People* v. *Pugh*, 69 Ill. App. 2d 312, 217 N. E. 2d 557 (1969), the Court of Appeals had concluded that the police acted reasonably in searching the brother of the owner of the named premises during the execution of a search warrant for narcotics. According to the Court of Appeals in that case, "[t]he United States Constitution prohibits unreasonable searches . . . ; the search of Raymond Pugh under the circumstances of this case cannot be so classified." *Id.*, at 316, 217 N. E. 2d, at 559. In this case, the Court of Appeals relied expressly on the holding and reasoning in *Pugh* and found no constitutional violation in the searches of Ybarra. These findings should not be overturned lightly.

I would conclude that Officer Johnson, acting under the authority of a valid search warrant, did not exceed the reasonable scope of that warrant in locating and retrieving the heroin secreted in Ybarra's pocket. This is not a case where Ybarra's Fourth Amendment rights were at the mercy of overly zealous officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948). On the contrary, the need for a search was determined, as contemplated by the second clause of the Fourth Amendment, by a neutral and detached magistrate, and the officers performed their duties pursuant to their warrant in an appropriate fashion. The Fourth Amendment requires nothing more.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 30, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Potter,

Please join me.

Sincerely yours,

Byron

Mr. Justice Stewart

Copies to the Conference

cmc

October 30, 1979

78-5937 Ybarra v. Illinois

Dear Potter:

If we can resolve one small problem, I will be happy to join your opinion.

There are situations where I think perhaps all of us would agree that police, on the basis of a proper warrant, could search everyone in a particular place without an individualized warrant.

Examples include a place used by "pushers" to pick up their quota of heroin; an unlicensed gambling operation; a place that "fences" stolen goods; house of prostitution; etc.

Although your opinion is narrowly written, it may be prudent to make clear that this is not the kind of case mentioned above. Indeed, it seems to me that at least arguably the last sentence in note 4 (page 6) might be construed as precluding the search of anyone in the absence of an individualized showing of probable cause.

What would you think of substituting for that sentence something along the following lines:

> "The warrant for the Aurora Tap Tavern provided no basis for departing from the usual rule that a warrant to search a place does not authorize a search of unnamed individuals in that place. Consequently, we need not consider situations where the search of unnamed persons in a place may be justified pursuant to a warrant stating probable cause to believe that persons who frequent the

place do so with the purpose of engaging therein in specified criminal activity."

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 30, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Potter:

Please join me.

Respectfully,

/ JPS

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 30, 1979

RE: No. 78-5937 Ybarra v. Illinois

Dear Potter:

I agree.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 1, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Bill:

Please join me in your dissent.

Sincerely,

H.A.B.

Mr Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 78-5937 - Ybarra v. Illinois

Dear Potter:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 20, 1979

Re: 78-5937 - Ybarra v. Illinois

Dear Bill:

I am generally in accord with your careful, analytical dissent but I also have a "bone in my throat" on the subject that will not quite go down or up. I hope to have something put together and ready later today. As I often do with concurring opinions I write out, this one may not see the light of day.

Regards,

WEB

Mr. Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 23, 1979

Re: 78-5937 - Ybarra v. Illinios

Dear Bill:

Please join me in your dissent. I have decided also to publish one of my own.

Regards,

WEB

Mr. Justice Rehnquist
Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
		10/15/79						
dissent tipped Draft 11/1/79	agree 10/30/79	1st draft 10/29/79 2nd draft	join PS 10/30/79	join PS 11/8/79	join WHR 11/1/79 join CJ 11/26/79	join PS 11/1/79	wrtd dissent 10/29/79	join PS 10/30/79
1st Draft 11/23/79 join w HB		10/31/79					1st draft 10/30/79 2nd draft	
11/13/79 2nd draft 11/26/79							11/14/79 join CJ 11/23/79	
							3rd draft 11/26/79	
				78-5937 Ybarra v. Illinois				