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THE PROTECTIVE SWEEP DOCTRINE: PROTECTING ARRESTING OFFICERS FROM ATTACK BY PERSONS OTHER THAN THE ARRESTEE

Paul R. Joseph

As a prosecutor, you are informed by the arresting officer in a pending case that he went to defendant's house to execute an arrest warrant. He made the arrest in the front hall and then proceeded through each room of the house. In the back bedroom, on a countertop in plain view, he observed cocaine. The defendant is then charged with its possession. "No good" you say, "the house walk-through was a search conducted without a warrant and therefore is unreasonable under the fourth amendment." The

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1. The protective sweep issue arises whenever an arrest is made inside premises. Since Payton v. New York, 445 U.S. 573 (1980), a routine entry to arrest inside a private residence cannot be made without an arrest warrant. Entry into the house of a party, other than the person to be arrested, requires, in the absence of consent, a search warrant in addition to the arrest warrant. Steagald v. United States, 451 U.S. 204 (1981). Neither of these cases limit the right to enter without a warrant in exigent circumstances, such as hot pursuit.

2. "Plain view" expresses the concept that what an officer observes from a place where he is entitled to be is not a search. Thus, if during an arrest the officer observes contraband in plain view on a counter, it may be legally seized. Permitting protective sweeps allows officers to be in more areas of the premises lawfully, thus giving them more opportunities to observe seizable items in plain view. The challenge to a protective sweep arises, as with other search and seizure issues, in the course of defendant's attempt to suppress the items seized. For the seizure to be upheld under the plain view doctrine, the item must be observed from a place where the officer was entitled to be. An unlawful prior search cannot provide legal justification for a seizure under the plain view doctrine. See generally Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion); Texas v. Brown, 51 U.S.L.W. 4361 (1983) (plurality opinion, all concurred in the judgment on plain view grounds).

3. The particular facts given here are for illustrative purposes only.

4. 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 warrant 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.
cocaine will be suppressed."\(^5\)

Do not be so sure. Under the emerging doctrine of "protective sweep," the search of the house might be upheld, and the evidence of the search might be admitted at trial. Although the right to "sweep" premises has been asserted in several different contexts, it is the purpose of this article to examine only one, because it is the one in which the strongest claim of need to search can be made. The issues arising in other sweep situations are analogous but dissimilar enough to deserve separate treatment elsewhere.

This article will introduce and examine the "protective sweep" doctrine, under which police officers may have a right to conduct a limited search of the premises\(^6\) in order to assure their safety after a lawful arrest. This article will examine the possible and actual judicial interpretations of this asserted right and will draw conclusions about the protective sweep doctrine.

Absent a search warrant, a search is per se unreasonable unless it can be shown to fall within one of the narrowly crafted exceptions to the warrant requirement.\(^7\) A nonconsensual walk-through of an arrestee's house in order to discover other persons not named in the arrest warrant is a search.\(^8\) Thus, if the concept of a protective sweep is to be upheld, it must be because the sweep was conducted under the authority of a search warrant or because the sweep, though conducted without a search warrant, was an approved exception to the search warrant requirement.

Obviously, a warrant to "sweep" premises can be obtained under the same conditions and with the same requirements as any other search warrant. Those procedures are beyond the scope of this article. Rather, it is the task of this article to examine whether a protective sweep can be conducted absent a search warrant. If a protective sweep is to be upheld in the absence of a search warrant, it must be on one of two grounds: (1) there is a blanket right to conduct a protective sweep incident to every arrest inside premises;\(^9\) or (2) although no blanket right to search exists, such a sweep is justified on a case-by-case basis due to the exigent circumstances surrounding the particular arrest. Such a justification raises the additional question

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\(^6\) This article will also treat the related assertion of a right to enter premises and conduct a protective sweep when the arrest is effectuated outside the premises.


\(^9\) No Supreme Court case has held this.
of what quantum of knowledge of possible danger to the officers (probable cause, reasonable suspicion, or some other) is necessary before such a sweep can be made.

This article will address whether the protective sweep doctrine authorizes a search on a per se basis. It will examine the different approaches to the protective sweep doctrine and discuss the approach that best maintains the privacy values of the fourth amendment while simultaneously providing reasonable safety to officers making arrests.

I. A Per Se Rule Approach

A. Incident to a Lawful Arrest

A “protective sweep” is a limited search of premises, usually confined to a “walk-through” and visual scan of the area within the view of the officer. The sweep may sometimes extend to an examination of closed areas large enough to hide a human being. It is justified by the need to ensure officer safety in arrest situations by discovering persons other than the arrestee who may be hiding on the premises and thus posing a threat to the arresting officers.

The issue of the right to “sweep” premises in order to protect the safety of arresting officers did not arise prior to 1969, the year the Supreme Court decided Chimel v. California. Prior to Chimel, it was assumed that incident to a lawful arrest, officers could conduct a complete search of the entire premises on which the arrest was made. "Chimel v. California"

10. Probable cause is used because it is the level of knowledge required to obtain a search warrant. When coupled with exigent circumstances, however, the warrant is unnecessary.


12. A 1963 study of 110 police shootings reported that “51% of the 110 cases [56 cases] occurred when the officers were attempting to arrest or interrogate persons in buildings.” In about 40% of the 56 cases, however, the circumstances involved an encounter with a barricaded suspect, a situation irrelevant to protective sweeps. Another 10% of the 56 cases involved officers being shot when knocking at the door. This would also not be eliminated by permitting protective sweeps since such sweeps must be based upon a prior lawful entry. See Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. CRIM. L., CRIMINOLOGY & POLICE Sci. 93, 94 (1963). The article noted that 19% of officer shootings were attributed to “[f]ailure to search the suspects or rooms properly.” Id. at 95. The article did not differentiate between cases in which the officer was shot by the arrestee and those in which the shooting was by another person.


oughly reviewed the conflicting authority that wrestled with the permissible scope of a search incident to a lawful arrest, and attempted to set the limits of the search incident doctrine.

In Chimel, three officers went to petitioner's house to execute an arrest warrant. When they arrived at the petitioner's home, they found his wife and a small child. About fifteen minutes later petitioner returned home, and the warrant was executed. One officer then asked whether the officers could search the house. When petitioner objected, the officer stated that the arrest warrant authorized the search. The officers searched the house, attic and garage. In some rooms they opened drawers and required the petitioner's wife to move the contents of the drawers from side to side. Although described by one of the officers as a "cursory search," the search actually lasted longer than forty-five minutes.

In striking down the search, the Supreme Court limited both the scope and rationale of the search incident to a lawful arrest:

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16. 395 U.S. at 753.
17. Record on Appeal at 202, Chimel, 395 U.S. at 752 (testimony of the officer).
18. 395 U.S. at 754.
19. Id.
20. Record on Appeal at 205, Chimel, 395 U.S. at 752.
21. 395 U.S. at 754. "The basic, direct search was made in the master bedroom and the room commonly referred to as the sewing room." Record at 231.

[W]e went into what I would deem the adult bedroom or the master bedroom. We asked Mrs. Chimel to open drawers, asked her to physically move contents of the drawers from side to side so that we might view any items that would have come from our burglary. She did this without hesitation. In the master bedroom and the . . . sewing room, which in turn is a bedroom we did—she did physically uncover certain items in drawers, and as we would spot them, we would examine them. We picked up items that we felt were similar or in fact the ones taken from our job. We left many items at the residence which we could not identify on the basis of a police report. The specific medals or tokens or specific individual coins as to a particular exact location would be very hard at this time to relate. We found an assortment of all items in the master bedroom area and again in the bedroom that was referred to as the sewing room.

Id. at 204. "There was a brief observation into the child's room, a visual search in the front room, a visual search in the kitchen into several cupboards in that area, a visual, cursory search in the garage, which is attached to the residence." Id. at 231-32.

Nothing in the child's room was seized. Id. at 239. While in the garage Officer Del Coma observed a small dental workshop (petitioner was a dental technician) and certain marked plastic coin tubes which were not listed as missing or stolen. Id. at 239. See also Respondent's Brief at 18-19, Chimel, 395 U.S. at 752.
When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.22

On its face, the holding in Chimel could be read as preventing the recognition of a rule that would uphold the right to conduct protective sweeps routinely incident to lawful arrests. Normally, a protective sweep extends to rooms beyond that in which the arrest took place and is clearly not limited to the area from which the arrestee could procure a weapon or destroy evidence.

Nevertheless, the rule in Chimel must be interpreted in light of its particular facts. Chimel did not involve a mere walk-through of the house. Rather, it involved a seizure of objects from closed drawers.23 Further, whatever the scope of the search in Chimel, it was not made for the purpose of protecting the safety of the officers. The search was justified, at every step of the proceedings, solely as a search for evidence of the crime.24 It can be argued that absent any assertion that the search was made to protect the safety of the officers, no protective sweep issue was before the Court. The holding in Chimel, therefore, should not be read as foreclosing an examination of premises for the purpose of protecting the officers from

22. 395 U.S. at 763.
23. Id. at 754.
24. "I advised him on the basis of a lawful arrest on a Felony warrant, which he had just viewed, that I would like his wife to accompany me through the residence for a cursory search for any possible evidence from our burglary." Record on Appeal at 202, Chimel, 395 U.S. at 752 (testimony of Officer Del Coma) (emphasis added).
possible harm. In fact, the underlying rationale of the Chimel case may lend some support to the protective sweep notion. Although the Supreme Court in upholding the limited search incident doctrine recognized the possibility that the arrestee might destroy evidence of the crime, Chimel sharply limits the scope of searches for evidence incident to a lawful arrest. Rather, Chimel indicates that the major reason for upholding such a search is the Court's strong concern for the safety of the arresting officers. This suggests a willingness on the part of the Court to consider a broader right to search when it is conducted as a precaution for the safety of the arresting officers. In Chimel, of course, no such fear was alleged.

Whether a protective sweep of some dimension would be approved incident to a lawful arrest is neither foreclosed nor approved in Chimel. Rather, it appears that the issue is still an open one after Chimel.

Chimel supplied not only a rule but also a rationale for its decision. The rule provides that a search incident to a lawful arrest is limited to the person of the arrestee or an area that the arrestee could reasonably be expected to reach. This area is the zone of danger within which the arrestee could procure a weapon or destroy evidence of the crime.

Under the rationale of Chimel, where there is no evidence to destroy or weapons to obtain, no search incident should be permitted. The rationale of Chimel, therefore, does not support a blanket right to sweep premises incident to an arrest. Rather the search incident doctrine would apply only to cases where a need to search can be demonstrated.

Nevertheless Chimel's doctrine has been extended. In United States v. Robinson, the Supreme Court converted the search incident doctrine into a per se rule permitting searches within the limits set by Chimel. If incident to a lawful arrest, the search is permissible whether or not weapons or evidence reasonably could be expected to be found.

In Robinson, the petitioner was arrested for driving without a valid operator's permit, a crime for which, by definition, no tangible evidence exists. After the arrest, the officer searched the arrestee. The officer felt something in a pocket, removed it, and found a cigarette package which was "crumpled up". Although it is implausible that the cigarette pack-

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25. 395 U.S. at 763.
26. Id.
27. Id.
28. Id. The Court thus narrowed the scope of the area considered to be within the immediate control of the arrestee.
29. Id.
31. Id. at 220.
32. Id. at 223.
age contained a weapon, the officer opened the package and discovered heroin inside.\(^3\)

In upholding the search, the Court rejected the invitation of the court of appeals to employ a *Terry v. Ohio* rationale to limit the scope of the search incident doctrine. The Court noted the difference between a full arrest and a stop under *Terry*, and concluded that even the absence of any evidence of the crime did not change a search incident to a lawful arrest, to a *Terry* frisk for weapons.\(^3\)

The court rejected any notion that a search of the arrestee incident to arrest required a showing that the circumstances underlying the *Chimel* rationale for a search were present. Rather, the Court declared the search of the arrestee incident to a lawful arrest to be per se reasonable.\(^3\)

Because the risks to the officer in any arrest situation are high, all arrests may be treated alike in measuring the permissible scope of a search incident to those arrests. The Court in *Robinson* adopted this reasoning.\(^3\)

The *Robinson* and *Chimel* cases, taken together, indicate that a concern

33. *Id.* In fact, the testimony from the original hearing on the motion to suppress the heroin indicated that it was departmental policy to open and examine any and all items seized from an arrestee during a search incident to a lawful arrest, whether or not the item was a weapon. By contrast, if the person was not under arrest and only a pat down or frisk was being conducted (under the authority of *Terry v. Ohio*) an item which was clearly not a weapon would not be examined. *Robinson*, 414 U.S. at 221 n.2.

34. *Id.* at 234. See *infra* notes 172-179 and accompanying text.

35. But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest . . . The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a Court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

36. Nor are we inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

*Id.* at 234-35 (emphasis added) (citation omitted).
for an officer's safety as he makes a lawful custodial arrest justifies a narrowly defined search.\textsuperscript{37} It is unclear from those cases alone, however, whether such a search on a per se basis extends beyond the person of the arrestee. Even if it does, the scope authorized by \textit{Robinson} could not extend beyond that authorized in \textit{Chimel}.

\textbf{B. Security of Premises}

Another justification for upholding a protective sweep on a per se basis is emerging. Courts may begin to recognize an officer's right to secure premises while executing an arrest warrant. This idea originates in the analogous right, recognized in \textit{Michigan v. Summers}, to secure premises while executing a search warrant.\textsuperscript{38}

\textit{Summers} involved the execution of a search warrant. Police officers approached the house and detained the defendant as he attempted to leave. The officers then entered the house with defendant and detained eight others found on the premises until the search was completed. The officers found narcotics in the basement and, after confirming that the defendant owned the house, arrested and searched him. Heroin was found in defendant's coat pocket.\textsuperscript{39}

The issue in \textit{Summers}, then, was whether the initial seizure of the defendant and his subsequent detention was reasonable.\textsuperscript{40} Defendant was not searched until after his arrest. That arrest was made with probable cause discovered during the lawful prior search of the house. The initial

\begin{itemize}
\item \textsuperscript{37} \textit{Robinson} dealt with a search of the person only. It is unclear whether such a per se rule would be acceptable if applied to the area under the arrestee's immediate control. The Court noted in its opinion that the search of the person incident to a lawful arrest has had wider and more uniform acceptance. \textit{Id.} at 224. Justice Powell, in his concurring opinion, justified the search of Robinson on the ground that a person once arrested, "retains no significant Fourth Amendment interest in the privacy of his person." \textit{Id.} at 237 (Powell, J., concurring). Under the Powell rationale, the case would not lend support to the notion of a per se search incident rule since it could not be said that a person once arrested retains no privacy interest in his home.

Furthermore, even assuming a per se search incident rule extending beyond the body of the arrestee, this case alone would not settle the issue of the legality of a blanket sweep of the entire house. Because any extension beyond the area under the arrestee's immediate control is a greater intrusion upon the arrestee's privacy rights, the intrusion must be weighed against the legitimate state interest in officer safety. If permitted, the scope of any such search must be carefully limited to preserve this balance.

\item \textsuperscript{38} 452 U.S. 692 (1981).

\item \textsuperscript{39} \textit{Id.} at 693. The defendant successfully moved to suppress the heroin as the product of an illegal search. The trial court's decision was upheld on appeal. The state's subsequent motion for certiorari was granted by the Supreme Court. \textit{Id.} at 694.

\item \textsuperscript{40} "The dispositive question in this case is whether the initial detention of respondent violated his constitutional right to be secure against an unreasonable seizure of his person." \textit{Id.}
Protective Sweep Doctrine

detention was a seizure without probable cause and, under the fourth amendment, unreasonable.\textsuperscript{41} The Court, however, noted that there were exceptions to the general rule. When the level of intrusion into a citizen's privacy is substantially less than that involved in an arrest or similar seizure, and where the need to make the intrusion is based on an important state interest, the Court, in the past, has upheld such intrusions as reasonable under the fourth amendment.\textsuperscript{42} The limited street stop of a suspicious person for questioning, approved in \textit{Terry v. Ohio},\textsuperscript{43} is an example of one such exception.

In analyzing the intrusion in \textit{Summers}, Justice Stevens noted that the seizure of the defendant occurred only after the police had obtained a warrant to search the house. The Court stated that "[t]he detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself."\textsuperscript{44}

Is it fair to ask why this matters? If two fourth amendment seizures are separate and unconnected with each other, the fact that one is judicially approved does not legalize the other that has not been approved. The fact that a warrant was issued does not give police a \textit{carte blanche} to make other lesser intrusions. Thus, it seems crucial to the analysis that the two intrusions, the search of the house and seizure of its owner were closely connected. Analytically, the lesser intrusion, the detention of the defendant, was incident to the greater judicially authorized intrusion, the search of defendant's house.

This initial point closely parallels the protective sweep situation. The doctrine is raised incident to an arrest of defendant upon private premises. As a result of recent Supreme Court decisions, no entry to make such an arrest is constitutional without an arrest warrant absent exigent circumstances.\textsuperscript{45} It is the warrant which "authorized a substantial invasion of the

\textsuperscript{41} \textit{Id.} at 694-95. The Court noted that generally even seizures not tantamount to formal arrests require probable cause. \textit{Id.} at 694 n.2. In Dunaway v. New York, 442 U.S. 200 (1979), for example, defendant was taken into custody for interrogation and transported to the station (although not formally arrested). The Court refused to uphold the actions that were taken in the absence of probable cause.

\textsuperscript{42} Dunaway v. New York, 442 U.S. at 200, is an example of a seizure which did not involve a formal arrest, but was as intrusive as such an arrest and so could not be justified on less than probable cause.

\textsuperscript{43} 392 U.S. 1 (1968).

\textsuperscript{44} \textit{Summers}, 452 U.S. 692 at 693, 701 (citation omitted).

privacy of the persons who resided there.\textsuperscript{46} "Physical entry of the home is the chief evil against which the wording of the fourth amendment is directed."\textsuperscript{47} As in \textit{Summers}, it can be argued that the additional intrusion of briefly checking and securing the premises and detaining those found is a significant but lesser intrusion than that authorized by the arrest warrant.\textsuperscript{48}

There are differences between the two situations. In \textit{Summers}, the search warrant would have authorized the entry into all parts of the house. Thus, permitting police to sweep the premises does not permit them to enter any additional areas. The arrest warrant would support only an entry extensive enough to find the arrestee, which could vary from case to case. It would not authorize police to enter other areas of the house once the arrestee was in custody. Yet, not every search warrant authorizes the search of the entire premises. If the \textit{Summers} doctrine were applied to allow police to detain occupants of the house in areas the police were not authorized to search, then the gap between the protective sweep doctrine and the \textit{Summers} doctrine narrows dramatically.

Several reasons are offered for the decision in \textit{Summers}. One reason, the "safety of the officers," is identical to the justification for the protective sweep:

\begin{itemize}
\item \textsuperscript{46} 452 U.S. at 701.
\item \textsuperscript{47} \textit{Id.} at 701 n.13 (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)).
\item \textsuperscript{48} In United States v. Chapman, 549 F.2d 1075 (6th Cir. 1977), police executing a search warrant for marijuana in a house containing 10 people also seized all weapons found during the search of the house. In upholding the action, Judge Edwards, writing for a divided panel, analogized the conduct to a \textit{Terry} "frisk" and declared it reasonable: "In a search warrant raid on a portion of the Detroit drug scene, police officers have good reason to secure any deadly weapons they may come upon until their authorized mission has been accomplished." \textit{Id.} at 1078.
\end{itemize}

The court explicitly cited the officer safety rationale while noting that any such search absent probable cause had to be strictly limited. In \textit{Chapman}, the search was no more extensive than that authorized by the warrant. The seizures, although broader than those authorized by the warrant, were confined to impoundment of weapons found on the premises during the course of the search. Under the circumstances, the seizures were reasonable to ensure police safety. \textit{Id.} at 1079.

In dissent, Judge McCree noted that the facts were not known with the specificity that would permit a determination of reasonableness. There was some indication that the premises had already been secured and that all occupants of the house had been herded into two rooms where they were effectively under the control of the police officers. If this is true, the second search which produced the rifle cannot be justified as a protective measure. \textit{Id.} at 1080 (McCree, J., dissenting) (citation omitted). Judge McCree would appear to be correct. If the premises were secure then there was no need for the seizure, which appears to go beyond the scope of the conduct later upheld in \textit{Summers}.
the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.\textsuperscript{49} Significantly, the Court noted that no such danger to the officers existed in the facts in \textit{Summers}.\textsuperscript{50}

Another reason the Court offered for its decision in \textit{Summers} is that when a warrant authorizes a search for contraband,\textsuperscript{51} there is probable cause to believe that someone connected with the premises is committing a crime. \textit{"The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant."}\textsuperscript{52} This analysis is not similarly applicable to the protective sweep situation because merely occupying a house in which there is a person whom the police have probable cause to arrest does not suggest any reason to suspect the other occupants of crime.

To the extent that the Court based its decision on the suspicion that anyone connected with the premises may be involved with the searched-for contraband, the \textit{Summers} rationale should logically apply only to permanent residents of the home. There would be little reason to believe that casual visitors to the home, at the time the search warrant was executed, were involved with crime. For example, the warrant may have been executed during a dinner party with twenty guests. This interpretation, however, contradicts the rationale that officer safety authorizes officers to "routinely exercise unquestioned command of the situation."\textsuperscript{53} Such "unquestioned command" can be had only if officers are authorized to locate all persons on the premises no matter how great or how small their connection with the premises. The police in \textit{Summers} evidently detained everyone on the premises without stopping to determine the particular relationship to the premises of each person in the house.\textsuperscript{54}

\textsuperscript{50} No special danger to the police was suggested by the evidence in this record. \textit{Id.} at 702. The Court noted, however, that there was a legitimate interest in preventing flight by the home's occupants in case incriminating evidence had been found during the search. \textit{Id.} This reason is inapplicable to protective sweeps.
\textsuperscript{51} The Court left open the issue of the applicability of \textit{Summers} to searches for mere evidence. \textit{Id.} at 705 n.20.
\textsuperscript{52} \textit{Id.} at 703.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 693 n.1. The case discussed the detention of home "occupants," not limited to residents. Since only the home owner was eventually arrested, it could be argued that the case only authorized the detention of the home owner. Yet the Court discussed the case as
One reasonable interpretation of *Summers* is that the concern for safety of officers executing search warrants caused the Supreme Court to authorize detention of all persons present on the premises until the search warrant is executed and the search is completed, whether the facts indicate actual danger to the officers or not. Similar concerns exist in cases where police lawfully enter premises to execute arrest warrants.\(^{55}\) This concern underlies the protective sweep concept.\(^{56}\)

### C. Cases

There is only limited case authority in the federal courts of appeal that supports, even indirectly, a recognition of the protective sweep doctrine on a per se basis.\(^{57}\) For example, in *United States v. Vasquez*,\(^ {58}\) the Court of Appeals for the Second Circuit noted that “one of the exceptions recognized was the ‘security check’ or ‘protective sweep’ incident to a lawful arrest.”\(^ {59}\) The court, relying on *United States v. Agapito*,\(^ {60}\) indicated in dicta that the sweep following an arrest was only a minimal intrusion. *Agapito* analogized the protective sweep to the protective action, approved as a de minimis intrusion in *Pennsylvania v. Mimms*.\(^ {61}\) In *Mimms*, a mo-

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55. In most cases the amount of time for which persons would be detained under the protective sweep doctrine would be considerably less than under *Summers* since the arrest and removal from the premises of the arrestee would generally take only a few minutes. A search, by contrast, can take several hours.

56. The right to detain persons in order to “secure the premises” does not carry with it any per se right to search persons who are detained. See generally *Ybarra v. Illinois*, 444 U.S. 85 (1979).

57. The Seventh Circuit declined to recognize the protective sweep doctrine as a separate per se exception to the warrant requirement in *United States v. Gamble*, 473 F.2d 1274, 1276 (7th Cir. 1973). “We are thus invited to establish a new exception to the Fourth Amendment requirement of a warrant. We decline to do so.” The court then examined the facts under a general reasonableness standard and found them insufficient to warrant the search in question.


59. Id. at 530 (citation omitted). While noting that the Supreme Court had yet to rule on the issue, the court stated that it was in line with various Supreme Court dicta and the officer safety rationale of *Chimel*. “Like reasoning justifies the minimal additional intrusion of a quick check through the home to detect the presence of others who might attack the arresting officer or destroy evidence.” Id.

60. 620 F.2d 324 (2d Cir. 1980), cert. denied, 449 U.S. 834 (1980).

61. 434 U.S. 106 (1977). The *Mimms* Court cited a study of 110 cases of police shootings. The study revealed that of those shootings, 32% “could be identified as occurring when the officers were attempting to investigate, control, or pursue suspects who were in automobiles.” Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 93 (1963). This amounts to about 35 cases. Of those cases,
torist was lawfully stopped by police on the highway, and was required to exit the vehicle. This de minimis invasion would not be cognizable under the fourth amendment and would therefore amount to a per se rule.

The statements in both Vasquez and Agapito are, in reality, dicta. Vasquez involved an arrest outside the premises. The entry and sweep of the premises was not justified under a per se rule. Instead it was permitted on the basis of exigent circumstances. In Agapito the arrest took place in the lobby of a hotel. Officers then went to the arrestee's room, entered it, conducted a security sweep and remained in the room for twenty-four hours. The court approved the concept of a protective sweep and called it a modest intrusion. It struck down this particular sweep, however, for two reasons: the arrest was made outside the room and no exigent circumstances justified the entry. There was no exigency because the officers

however, 7% involved shootings while in pursuit of the vehicle and in an additional 28%, the officers were shot while still in their vehicles. In 22%, the shooting took place when the officers approached the vehicle. In those cases, it is doubtful that officers would have required the suspect to leave the car as yet so the procedure approved in Mimms would not have protected them. Only in the other 43% was the shooting after the first contact between officer and suspect. This amounts to only about 14% of the total officer shooting cases examined in the study. Id.

62. United States v. Vasquez, 638 F.2d 507, 531-32 (2d Cir. 1980), cert. denied, 454 U.S. 975 (1981). The court of appeals correctly noted that the protective sweep doctrine is based upon a prior lawful entry. Lacking such an entry “the government has an especially heavy burden in justifying the ‘breach of the entrance to an individual’s home.’” Id. at 532. Further, the court acknowledged that the need for protection from persons inside the home is usually much less when the arrest is made outside. Id.

63. In Vasquez, the entry seemed to have been made to prevent destruction of evidence in circumstances indicating that arrestee’s confederates would quickly become aware of the arrest. Id. at 531-32.


65. The Agapito court stated:

The reasonableness of a security check is simple and straightforward. From the standpoint of the individual, the intrusion on his privacy is slight; the search is cursory in nature and is intended to uncover only “persons, not things.” Once the security check has been completed and the premises secured, no further search—be it extended or limited—is permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important, the safety of the arresting officers or members of the public may be jeopardized. Weighing the public interest against the modest intrusion on the privacy of the individual, a security check conducted under the circumstances stated above satisfies the reasonableness requirement of the Fourth Amendment. Id. at 336 (citations omitted).

66. Id. at 336 n.18. The court stated in the note that since the arrest took place outside the premises, the entry could not be upheld unless the authorities had a reasonable belief both that there were others on the premises and that those persons had become aware of the
knew that the room was empty, having observed it for two days from an adjacent room. In most cases, however, officers have no knowledge of who might or might not be in the house. If lack of such knowledge alone would authorize a sweep, such sweeps would be permitted on a per se basis in most cases. Nevertheless, the Agapito court was not willing to extend such a rule to a situation where the police had actual knowledge that the room was empty.

United States v. Marszalkowski involved two different appeals in a complex drug case. The case concerned the entry, with probable cause, of an apartment that was the center of a drug selling operation. The police conducted a protective sweep and seized a number of items found in plain view, including cocaine. The trial judge granted defendant's motion to suppress the evidence obtained during the sweep.

After holding that the entry itself was lawful, the Eleventh Circuit also upheld the protective sweep on two grounds. First, the court indicated arrest. In that situation they might escape, destroy evidence, or pose a threat to the officers. It is questionable, however, whether even this authorizes the entry absent an affirmative reason to believe that those in the house actually posed such a threat.

68. Such a limitation is not necessarily inconsistent with the per se approach to searches incident to a lawful arrest in Robinson. See supra notes 30-36 and accompanying text. It is probably never possible to know with certainty that an arrested person will pose no danger to the officer, but it is possible to know as in Agapito, that a room contains no people. Thus, this author would view a rule which permitted protective sweeps incident to arrest absent actual knowledge on the part of the arresting officer that the premises were empty as functionally equivalent to a per se rule.

67. Id. at 336.

69. 669 F.2d 655 (11th Cir. 1982).

70. Moscowitz, a police informant, told DEA agents about a trafficker in drugs, Loran Bennett. The agents and the informant arranged with Bennett to purchase some cocaine. At an arranged meeting in a motel parking lot, Bennett and his companion, Mitchell, were arrested. Bennett was persuaded to call his supplier, Brock, and tell him that the transaction was completed and that the buyers wanted more. Bennett took the agents to an apartment used by Brock. Two persons were observed carrying bags into the apartment. Agents knocked on the front door but Brock came to the kitchen door instead. The agent covering that entrance “fell in” and other agents rushed in after him. Brock was identified and arrested. White powder was visible. A female companion, Marszalkowski, was also arrested. A protective sweep of the apartment for other persons turned up a number of items in plain view, including some cocaine. Some agents remained in the apartment while others obtained and executed a search warrant. More drugs were found. Id. at 657-59.

71. The court refused to apply the case of Payton v. New York, 445 U.S. 573 (1980), retroactively, and upheld the warrantless entry as lawful under Eleventh Circuit case law at the time it was conducted. Marszalkowski, 669 F.2d at 663-64.

72. Id. at 658.

73. Id. at 659.

74. See supra note 71.

75. The trial court's suppression order was reversed. Marszalkowski, 669 F.2d at 665.
that exigent circumstances existed to validate the sweep. An analogy was drawn to another case, United States v. Gaultney, and an extensive quote from Gaultney was included. The exigent circumstances, however, amounted to little more than the fact that the apartment was being used to sell drugs. The key to the protective sweep may be the court's statement that "drug dealers are likely to be armed and dangerous." This second ground cited by the court gave the officers "both the right and the obligation to secure the apartment by conducting a protective sweep." Although decided on the basis of exigent circumstances, Marszalkowski comes close to establishing a per se rule at least in drug trafficking cases since the "exigent circumstances" listed will be present in almost any such case.

Another case in which exigent circumstances may be a veil for a per se rule is United States v. Looney. Officers arrived at the home of Joe Looney with an arrest warrant for Ronald Frick, who was believed to be there. Looney answered the door and denied that Frick was present. The officers entered and found Frick hiding behind a bookshelf. The officers arrested Frick, and to ensure their safety, conducted a protective sweep. They found a submachine gun in plain view. Looney was determined to be the owner and was arrested.

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77. A close reading of the case suggests that most of the factors listed to establish the exigency really related more to the entry than to the sweep. A factor given some prominence was that Brock, the arrestee, expected his partners to return. They had already been arrested, however, and their failure to arrive could have made Brock suspicious. This is really an argument that the entry had to be made without delay. Once entry was made and Brock arrested, that factor cannot be used to justify any additional intrusion of a protective sweep. It seems, then, that the exigency argument was intended primarily to buttress the entry in case the court's refusal to apply Payton retroactively was held by the Supreme Court to be in error.

78. Marszalkowski, 669 F.2d at 665 (quoting Gaultney, 581 F.2d at 1147).

79. 669 F.2d at 665.

80. The Sixth Circuit, however, rejected the notion that the dangerous nature of drug cases justifies protective sweeps on a per se basis. United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982). Hatcher, involved a conviction based in part on evidence obtained during a protective sweep. The district court had upheld the sweep "solely because 'the subject of drugs is a dangerous one, dangerous for all of those persons involved in it, especially those who are on the law enforcement side.'" Id. at 444. The court of appeals feared such a basis for upholding a sweep could too easily be expanded to many other categories of crime "and would permit wholesale abrogation of the Fourth Amendment reasonableness requirement." Id.

81. 481 F.2d 31 (5th Cir. 1973).

82. Id. at 32.
The district court granted Looney's motion to suppress the gun because the search went beyond the scope of a search incident to a lawful arrest. The court of appeals reversed, upholding the walk-through of the house as a protective sweep. The court first distinguished Chimel for the reasons discussed earlier in this article. Then it asserted that a house walk-through for security purposes was not a search at all. Although the statement was inaccurate, it is arguable that this reasoning establishes a per se rule and upholds the protective sweep doctrine.

83. Id. at 32-34.
84. See supra text accompanying notes 12-37.
85. "Indeed, the agents were not engaged in a Fourth Amendment search at all." Looney, 481 F.2d at 33.
86. Katz v. United States, 389 U.S. 347 (1967), determined that any intrusion into the area of one's reasonable expectation of privacy is a search. There is no doubt that one has a reasonable expectation of privacy in one's home. Even after arrest, this privacy expectation is not extinguished. If it were, then the search of the home after arrest would not be a search, but Chimel v. California, 395 U.S. 752 (1969), plainly held that it was. Thus, the statement in Looney that the officers were not engaged in a fourth amendment search must be wrong. To say that conduct is a search is not the same as saying the conduct cannot be legally done. Not all searches are prohibited by the fourth amendment, only unreasonable searches. The result in Looney may be correct because the sweep was a reasonable search under one of the theories suggested in this article, even though Looney's reasoning cannot be supported.
87. The later case of United States v. Smith, 515 F.2d 1028 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976), stated that in Looney there was "probable cause to believe that a serious threat to safety was presented." 515 F.2d at 1031. The facts in Looney did not seem to amount to probable cause.
88. The Looney court relied largely on United States v. Briddle, 436 F.2d 4 (8th Cir. 1970), cert. denied, 401 U.S. 921 (1971), where the Court stated:
The distinguishing and controlling fact, as we view the case before us, is that the shotgun was not discovered as a result of any search whatsoever. Rather, it was discovered by being in plain view in the bedroom which Special Agent Hancock entered in the exercise of his conceded right to conduct a quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk.
Id. at 7.
The reliance on Briddle, which was not confined to the Looney court, was misplaced. As the Briddle court noted "Briddle does not question the right of the officers . . . to conduct a cursory search of the apartment for other persons as a security measure." Id. (citation omitted). The issue of the legality of protective sweeps was not before the court. Therefore, it could not have been decided in that case. The quoted passage suggested that the right to sweep was conceded by the defendant. Since the matter of the house walk-through was not at issue, the court's statement that "the shotgun was not discovered as the result of any search whatsoever," id., applied only to the issue of the object's plain view. The court did not refer to the officer's movement in the house to the spot from which he detected the evidence, which is a fourth amendment search.
The Briddle case is widely cited in support of the protective sweep doctrine. It is strange that rules of law can flourish and grow when they get their start, at times, in such stoney and inhospitable soil.
Incidental support for a per se rule can be implied from cases in which courts have upheld protective sweeps with little or no analysis. If courts justified such sweeps on a case-by-case basis because of special factual considerations, one would expect extensive analysis of those special factors in support of the reasoning. *United States v. Turbyfill* illustrates this. Two police officers went to Turbyfill's house to question him about a counterfeiting operation. Another man, Billy Joe Church, admitted them. Upon entering the house, the officers smelled marijuana and saw a quantity of marijuana in plain view. Upon hearing a noise in the basement, police searched for its source and found Turbyfill and additional marijuana.

In upholding the district court's denial of Turbyfill's motion to suppress, the court of appeals stated that police had probable cause to believe a crime was being committed by Church. The court upheld the officer's entry into the basement as a protective sweep. Although the court considered whether such a sweep was precluded because Church had not been formally arrested, its analysis of the justification of the sweep was limited to a conclusory statement that "[t]he seizure of the marijuana in the basement was also justified. The officers had a right to conduct a quick and cursory viewing of the residence."

The point is not that the sweep was improper. On the particular facts of the case the security check may well have been justifiable. The court made no attempt, however, to justify the sweep on the particular circumstances of the case or to explain a basic theory of the protective sweep doctrine. Apparently the court thought that a simple statement authorizing the action was sufficient.

The same approach (or lack thereof) can be observed in *United States v. Christophe*, in which police obtained information that two men were operating a narcotics business. The police maintained surveillance of one suspect's house. Under the mistaken belief that the vehicle contained the second suspect, a fugitive from justice, the police followed a car leaving the house. Eventually, the officers stopped and searched the car and discov-

89. 525 F.2d 57 (8th Cir. 1975).
90. Id. at 58.
91. Id. at 59.
92. The court held that the sweep was not precluded because there was probable cause to arrest. "There is no reason in such a situation for requiring police officers to formally arrest a suspect before checking the premises for other persons." Id.
93. Id. (citations omitted).
94. 470 F.2d 865 (2d Cir. 1972).
95. Id. at 867.
ered heroin. The occupants of the car were then arrested. The police returned to the home they had been observing and arrested the occupant, Albert Pierro. In conjunction with the arrest, police conducted a sweep of the premises in search of other persons.

Although the court spent considerable time analyzing the stop and search of the car, the sweep of the house was summarily approved. "When the agents first walked through the Pierro house at 2:00 a.m., they were simply securing the premises after arresting Pierro. They were entitled to conduct a cursory examination of the premises to see if anyone else was present who might threaten their safety or destroy evidence." As in Turbyfill, the sweep was upheld but neither analyzed nor explained.

In yet another drug case, United States v. Weber, Goewert agreed to cooperate with the government by participating in an operation to manufacture drugs with three others, Weber, Heath, and Sullivan. While wearing a wire, Goewert went to a farmhouse to set up the drug laboratory. After Weber and Heath arrived, Goewert signaled the agents to close in on the suspects. The authorities seized two men, presumably Weber and Heath, as they exited through a basement door. The agents entered

96. Id. at 868.
97. Id. Pierro's parents were also present. The officers "seated" them in the living room.
98. Id. Police secured the home until a warrant to search the house was obtained. The search was conducted and 39 pounds of heroin were discovered.
99. Id. at 869. Although the court noted that no drugs were found until the later full search, the holding that the protective sweep was legal foreclosed any need to examine whether the later search was tainted by the earlier sweep.
100. In United States v. Cognato, 408 F. Supp. 1000 (D. Conn.), aff'd without opinion, 539 F.2d 703 (2d Cir. 1976), cert. denied, 430 U.S. 956, reh'g denied, 431 U.S. 926 (1977). The district court upheld a warrantless entry to arrest defendant based on his violent history, the probable presence of a pistol in the house, the presence of defendant's girlfriend, and the possibility that the arrest of another outside the house had been observed by those within. The court also upheld a protective sweep of the premises conducted after defendant and his girlfriend were arrested, and after the weapon was recovered in a search incident to the lawful arrest. No analysis was offered to support the conclusion that the sweep was justified. The court merely stated "Once lawfully inside the apartment, the officers plainly had the right to arrest Cognato, and, incident to that arrest, to seize his gun and money from his person, and to inspect the premises to be sure no one besides the girl was present." Id. at 1005 (emphasis added). It was unclear from this statement whether the judge erroneously believed that Chimel explicitly authorized such a sweep, whether the court was extending Chimel without clearly stating this, whether a new protective sweep rule was being adopted on a per se basis, or whether the court justified the sweep on the basis of particular facts in the case. In any event, the lack of discussion of the real justification for the sweep is troubling.
102. Id. at 988.
and saw the lab.\textsuperscript{103}

Although the primary issue in the case was entrapment,\textsuperscript{104} the court also reviewed the defendant's objection to the warrantless entry and search of the basement. The court rejected this objection in a passage which was more cursory than the search at issue in the case. Pointing out that the police had probable cause to make the arrest, the court stated "the officers were justified in making a quick and cursory search of the basement in order to ascertain whether any other individuals were hiding."\textsuperscript{105} The validity of the sweep was upheld without discussion or analysis of the facts, even though the facts seemed to suggest that the officers knew there was no one else on the premises.\textsuperscript{106} Unless the sweep was upheld under a per se rule, the absence of a more detailed analysis of the facts surrounding the sweep is perplexing.

In the final example of this judicial trend, the government argued the protective sweep doctrine as an alternative theory. In \textit{United States v. Blake},\textsuperscript{107} the police arrived to arrest one person, Vale, and saw a second person, Blake, suspiciously handling a purse that the police suspected concealed drugs. The police walked through the house and saw the purse in plain view in the basement.

The court upheld the police action under the theory that the walk-through was to determine whether there were other persons present. "Once in the apartment [to arrest Vale], a quick and cursory viewing of the apartment was permissible to check for other persons who might present a security risk."\textsuperscript{108} Although the court stated that "[t]he Government's alternative justification for the search comported with the reasonableness requirement of the fourth amendment,"\textsuperscript{109} it made no attempt to link the

\begin{footnotesize}
103. \textit{Id.} at 989.
104. The court rejected this argument. \textit{Id.} at 989-90.
105. \textit{Id.} at 990 (citations omitted).
106. Police officers knew about the farmhouse in advance and, presumably, watched it. Of the four persons involved in the operation, one told Goewert he was going to Columbus, two others had just been arrested, and the last was working with the government. \textit{Id.} at 988-89.
107. 484 F.2d 50, 56-57 (8th Cir. 1973), \textit{cert. denied}, 417 U.S. 949 (1974). The police first argued that since defendant was not under arrest at the time, it was likely he would destroy the evidence once the police left, thus triggering the exigency of destruction of evidence to justify the search. The court agreed with this contention. \textit{Id.} at 53-56.
108. \textit{Id.} at 57 (footnote and citation omitted).
109. \textit{Id.} In \textit{United States v. Cepulonis}, 530 F.2d 238 (1st Cir.), \textit{cert. denied}, 426 U.S. 908 (1976), Cepulonis was arrested outside his hotel room. After expressing concern about his wife and child he was allowed to enter the room. The agents accompanied him and conducted a protective sweep of the room. After upholding the entry as one with consent, the court continued, "[o]nce entry had been accomplished, the agents' conduct within the room
reasonableness to any specific facts or situations. Apparently, the Blake court would uphold a routine or blanket right to sweep.

A final group of cases upheld protective sweeps without recognizing them as belonging to a new and separate category. Rather, they were upheld under the existing doctrine of search incident to a lawful arrest. As a result, the doctrine has been altered and expanded.\(^{110}\)

In *United States v. Jones*,\(^{111}\) an agent posing as a busboy went to Nisbet's hotel room to execute a warrant for his arrest. When the door was opened, the agent and others announced their true identity. After a struggle, in which a gun was fired, the agents arrested Nisbet and Jones and removed them from the room. During a subsequent protective sweep of the hotel room, the agents discovered drugs.\(^{112}\)

Citing *Chimel v. California*\(^ {113}\) and *Warden v. Hayden*,\(^ {114}\) the court upheld the protective sweep. In fact, it stated that the sweep was within the bounds of the search approved in *Chimel*.\(^ {115}\) This is hard to understand because the sweep in *Jones* extended beyond the room in which the arrest was clearly justified. They were entitled to assure themselves that no confederates were in the room who might be armed and dangerous.” *Id.* at 244.

\(^{110}\) In *United States v. Squella-Avendano*, 447 F.2d 575 (5th Cir.), *cert. denied*, 404 U.S. 985 (1971), the court also used *Chimel* to uphold a search. Agents, with probable cause, raided a house to arrest those inside on drug charges. Due to the fast breaking nature of the case there was no time to obtain an arrest warrant. After some officers announced their presence, another officer looked through a window into the house and observed cocaine in the kitchen. *Id.* at 577. While acknowledging that the observation was a search, the court upheld the action arguing that it amounted to a search incident to a lawful arrest, although the search took place before the arrest. “Moreover, the agents knew that their surveillance had been detected. In these circumstances it is certainly reasonable for the agents to survey the apartment in an attempt to learn in advance whether the arrest would be dangerous and forcefully resisted.” *Id.* at 583.

In the normal search incident case, the arrest has been made so the location of the arrestee is known, and the search of the area under the arrestee's immediate control, authorized in *Chimel*, can be determined with some precision. In a case such as this where the search takes place first, how can it be said that the search is limited to the area within the control of the arrestee when that person may well not be located anywhere near the area searched? Although some such searches could be justified on the basis that officers were searching *for* the arrestee in order to make the arrest, it would not be correct to justify such conduct under the rationale of *Chimel v. California*. Thus, although the rationale is questionable, there does exist a valid reason for the conduct. It must be noted that probable cause to arrest existed prior to the observation through the window. In fact, the arrest was already in progress. If the observation had been used to obtain the probable cause to arrest, the arrest would not have been constitutionally permissible.

\(^{111}\) 696 F.2d 479 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2453 (1983).

\(^{112}\) 696 F.2d at 483.


\(^{114}\) 387 U.S. 294 (1967).

\(^{115}\) 696 F.2d at 487.
took place, an action specifically rejected in *Chimel*.\textsuperscript{116} *Warden v. Hayden* dealt with a hot pursuit situation followed by a search for the fleeing defendant,\textsuperscript{117} and is therefore not applicable to the facts in *Jones*. Yet, the *Jones* court flatly stated that, on the authority of those cases, "[t]he police may search adjoining rooms to look for possibly dangerous persons."\textsuperscript{118} Although the court also discussed the possible reasons that justified the sweep in this particular case,\textsuperscript{119} its interpretation of Supreme Court precedent suggests that the court may have approved a per se sweep rule in everything but name.

*United States v. Clemons*,\textsuperscript{120} also involved a hotel room arrest with probable cause. After the arrest, the agents checked the bathroom and found heroin in a waste basket. The Court held that the search was reasonable under *Chimel*. "Nor do we find the search violative of the *Chimel* rule. The bathroom was immediately adjacent to where Thomas and Clemons were standing. The officers had every right to look inside it to see if other persons might be within."\textsuperscript{121}

The search might have been reasonable under *Chimel* depending upon where the arrestees were standing. The court did not elaborate beyond the statement that they were "immediately adjacent" to it. Yet, under *Chimel*, the purpose of the search would be to locate weapons or evidence which the arrestees might reach. Nothing in *Chimel* extended this to the right, found in *Clemons*, to search for other persons.\textsuperscript{122}

Finally, in *United States v. Mulligan*,\textsuperscript{123} FBI agents arrested Christopher under a warrant. They allowed him to go into the bedroom to dress but ordered him to stay seated on the bed. Instead, he got up twice and moved toward the closet. An agent did a protective sweep of the closet to check for other persons.\textsuperscript{124} Feeling a lump in a garment bag he proceeded to search it and found a large amount of cash.\textsuperscript{125}

The court upheld the search under *Chimel*, but its analysis undercuts the *Chimel* reasoning. The court noted that one circuit held a distance of four

\begin{itemize}
  \item \textsuperscript{116} See supra note 22.
  \item \textsuperscript{117} See generally *Warden v. Hayden*, 387 U.S. 294 (1967).
  \item \textsuperscript{118} *Chimel*, 696 F.2d at 487.
  \item \textsuperscript{119} The agents did not know who was in the room and since a gun had been fired, police reasonably could have believed that anyone in the room would be hostile. *Id.*
  \item \textsuperscript{120} 503 F.2d 486 (8th Cir. 1974).
  \item \textsuperscript{121} *Id.* at 488 (citation to *Chimel* omitted).
  \item \textsuperscript{122} *Id.*
  \item \textsuperscript{123} 488 F.2d 732 (9th Cir. 1973), cert. denied, 417 U.S. 930 (1974).
  \item \textsuperscript{124} "Agent Robertson then drew his gun and brushed the clothing that was in the closet aside to see if there was anybody hiding there." *Id.* at 734.
  \item \textsuperscript{125} *Id.*
\end{itemize}
feet to be beyond the area of immediate control. The court distinguished this, however, on the grounds that the purpose of the search in the other case \textsuperscript{126} was to find evidence, while in \textit{Mulligan} the purpose of the search was to preserve officer safety. \textsuperscript{127}

The flaw in this \textit{Chimel}-based reasoning is that \textit{Chimel} addresses searches for evidence or weapons that could be reached by the defendant. Thus, a search of the area within the defendant's immediate control is authorized. \textsuperscript{128} The area within the defendant's immediate control is a finite area governed by such things as his reach and mobility. The area is the same whether the search is for evidence or weapons. If the court is saying that when the search is for evidence, the area searched was not within the defendant's immediate control but was under his immediate control if the search is for weapons, the distinction is illogical. If the search was for other persons, it is not authorized by the \textit{Chimel} case. \textsuperscript{129}

\textbf{D. Per se Rule Considerations}

Although officer safety in arrest situations might increase if police are authorized to sweep premises, this justification alone should not authorize such conduct. Actions such as spot checks of citizens' homes or random searches of cars might also make police safer and more secure and yet are still prohibited by the fourth amendment. \textsuperscript{130}

The fourth amendment stands as a limit on governmental activity (even some activity which is undertaken for beneficial purposes). It represents a constitutional validation of the important interest in individual privacy. More specifically, the fourth amendment recognizes the right to be secure from governmental intrusions into the privacy of one's person, house, pa-

\textsuperscript{126} United States v. Shye, 473 F.2d 1061 (6th Cir. 1973), aff'd, 492 F.2d 886 (6th Cir. 1974).

\textsuperscript{127} The complete discussion of the issue was:

In United States v. Shye, the Sixth Circuit affirmed the District Court's suppression of a bag of money found in a 'closet-type depression' next to a water heater in an apartment in which the four defendants were arrested. 473 F.2d at 1063. Although the bag of money was only four feet from one of the defendants, the court held that the area from which the bag was seized was not within the defendant's 'immediate control,' as defined in \textit{Chimel}. \textit{Shye} is easily distinguishable from the present case. In \textit{Shye}, as in \textit{Mapp}, the only purpose of the search was to seize evidence. The search here was to protect the agents from possible harm. The latter type of search is expressly condoned by \textit{Chimel}; the former is expressly forbidden without a search warrant. 488 F.2d at 735.

\textsuperscript{128} For a complete discussion of \textit{Chimel}, see supra notes 13-29 and accompanying text.

\textsuperscript{129} \textit{Id}.

\textsuperscript{130} U.S. CONST. amend. IV.
Privacy interests are continually balanced against governmental interests, rendering only unreasonable searches and seizures unconstitutional. The courts, therefore, must consider which intrusions are reasonable under the fourth amendment. It should be clear that the greater the need to intrude the more likely it is that the intrusion will be deemed to be reasonable. By the same token, the greater the intrusion, the greater the need must be to justify it. Viewed in this light, it should be apparent that declaring protective sweeps de minimis intrusions is not an acceptable answer.

Such an approach was taken in Pennsylvania v. Mimms. In Mimms, police officers stopped a car to ticket the driver for an expired license plate. The driver was ordered out of the car. When he exited the vehicle, an officer observed a bulge in the driver's jacket. A frisk revealed a gun at the driver's waist. The driver was then placed under arrest.

The key issue in the case was whether it was unlawful to make the driver leave the car, because observing the bulge and the subsequent frisk would not otherwise have taken place. In its per curiam opinion upholding the action, the Supreme Court acknowledged that there was no indication that the driver was dangerous. It was the officer's practice to make all such persons leave their cars. Yet, considering the danger to officers approaching cars lawfully stopped on the highway, the additional intrusion of making those in the car get out was dismissed as "incremental" and "de minimis."

As the Court noted, the driver was asked to expose very little more of his person than was already exposed. The police lawfully decided that the driver should be briefly detained. The remaining question was whether he should spend that period sitting in the driver's seat of his car or standing alongside it.

Not only is the insistence of the police on the latter choice not a 'serious intrusion upon the sanctity of the person,' but it hardly rises to the level of a 'petty indignity.' What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

One may wonder how much of a privacy expectation a driver of a car

133. *Id.* at 107.
134. *Id.* at 109-10.
135. *Id.* at 109.
136. *Id.* at 111.
137. *Id.* (citation omitted).
can have when the police are viewing his exterior body only. Historically, privacy expectations of those in cars are lower than those in houses; observations are limited to the appearance of the driver. By contrast, a protective sweep takes place in the home, the historic heart of fourth amendment protection. Such a sweep significantly expands the area of the home that is open to scrutiny and permits entry into areas that would otherwise be off limits to police officers.

Although it is improper to characterize a protective sweep as de minimis conduct, a protective sweep on a per se basis is not necessarily foreclosed. The need for the sweep—the safety of officers when making a lawful arrest inside a home or other premises—must be balanced against the significant intrusion of that particular sweep.

This balancing has led to the validation in some cases of per se rights to search regardless of the particular facts of the case under review. Yet, courts should not be too quick to embrace such a per se solution to search and seizure problems. It is a virtual certainty that a per se rule will be applied in some specific cases where, considering the particular facts, there is no need to search. Where a rule permits a search or seizure, its application in a case not requiring the search appears to be unreasonable unless there is a counterbalancing reason for justifying the adoption of a per se rule.

A reason favoring per se protective sweeps might be that the danger inherent in all arrest situations justifies a sweep. A corollary concern might be that it is impossible to determine with any precision whether such a search is necessary. It also might be suggested that some good would follow from a per se rule that would not follow from a case-by-case approach. These possible advantages will be discussed after the alternatives to a per se rule are considered.

Justifying a per se rule based solely on the danger existing in any arrest is highly problematical. Although this danger is enough to permit a search of the person in Robinson, it is unclear whether it is sufficient to justify a per se search even of the area within the immediate control of the arrestee.

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141. See, e.g., supra notes 30-35 and accompanying text for a discussion of the Robinson extension of Chimel.
142. In Robinson, the danger inherent in all arrests is cited in support of a per se right to search the person of the arrestee following the arrest. A protective sweep, however, is a more extensive search because it would permit officers to move throughout the premises. It is less in depth, however, since it does not generally permit penetrations into closed containers.
Assuming that Robinson can be read as extending this far, it would be yet another step toward approving protective sweeps. This author does not suggest that the protective sweep doctrine can be justified solely on the basis of the potential danger in any arrest.

The other justifications for the per se approach cannot be effectively evaluated until alternatives to a per se approach are considered. A per se rule is broader, and therefore more intrusive, than a rule that would permit a protective sweep on a case-by-case basis. While a per se rule may be permissible, it is, in general, not preferable. Thus, in balancing a per se rule against a case-by-case approach, the latter is preferable because it is less intrusive, unless there is some additional justification for the per se approach.

II. CASE-BY-CASE APPROACH

A. Introduction

The second way to justify protective sweeps is on a case-by-case basis. That is, while rejecting a per se rule permitting a protective sweep, it is acknowledged that the particular facts of some situations justify conducting such a sweep.

The burden of justifying a sweep is, of course, on the prosecution. Courts may adopt one of two approaches to determine the legality of the search. The first would be to take a “totality of the circumstances” approach to protective sweeps. That is, uphold a sweep when it is deemed to be reasonable upon an examination of all facts and circumstances surrounding the sweep, without articulating any specific standard against which to judge this “reasonableness.” The second approach would be to adopt a specific level of need for a sweep against which the facts in each particular case would be judged. The two most likely levels of need are the reasonable suspicion standard upheld in Terry v. Ohio,¹⁴³ and the probable cause standard.¹⁴⁴

¹⁴³. 392 U.S. 1 (1968).
¹⁴⁴. A “bare suspicion” standard, by which a sweep would be permitted whenever the arresting authorities had a subjective belief that they were in danger could also be adopted. Under this standard, the only issue would be the honesty of the officers in stating their subjective state of mind. Essentially, this standard would become either a per se rule in all but name if applied as stated, or would become one of the other standards if the court looked beyond the subjective beliefs of the officers and considered the actual need to conduct the sweep. Therefore, the “bare suspicion” standard will not be separately discussed.

A “reasonable suspicion” standard requires more than a good faith subjective belief in the need to sweep the premises. Rather, the officers must be able to point to specific and articulable facts that justify such a belief. The facts known do not, however, have to be clear enough to rise to a level of probable cause.
Beyond the question of the standard is the issue of what facts are necessary to support the standard that justifies the sweep. For example, assume that a court determines that Terry's reasonable suspicion standard is required before a protective sweep can be made. What exactly must the arresting officers be reasonably suspicious about? Is it enough that they have reason to believe that others are in the house? Suppose officers had reason to believe that the arrestee's seven year-old son and aged grandmother were in the house. Would this authorize a sweep of the house? The answer should be "no," because the sweep doctrine is based on the rationale that there is a need to sweep to protect the officers from others who may harm them. Thus, officers would need reasonable suspicion both to believe others were on the premises and that those persons are likely to be dangerous to the officers. If a court logically followed the case-by-case approach, the analysis would always have to include two steps: the likelihood of others on the premises and the likelihood that they would act to harm the officers. Both elements would have to be met before the sweep could be conducted.

The primary advantage of a case-by-case approach over a per se rule is that reviewing courts will be able and willing to engage in close and detailed analysis of the facts in each case to determine whether the sweep was reasonable. With this as a guide, officers in the field will be able to determine in later arrest situations, whether they are authorized to conduct a protective sweep. This will result in fewer sweeps and a lower level of

145. Although beyond the scope of this article, the same basic approach should be evident in cases dealing with searches to prevent the destruction of evidence. Fourth amendment reasonableness is a matter of balancing the interest of the government (the reason for the intrusion) against the privacy interest of the citizen. Although discovering evidence of crime (crime prevention) is an important interest, it is not as pressing as protecting the life of the officer. Therefore, cases dealing with searches to prevent the destruction of evidence are not directly relevant to the protective sweep issue under discussion here, because the interest involved is not as compelling. A higher standard should be required for a sweep to discover evidence than for one based on officer safety. Yet, there is at least a very rough analogy between the two situations and it might be somewhat relevant to briefly consider Vale v. Louisiana, 399 U.S. 30 (1970).

In Vale, officers with arrest warrants went to the place where Vale was known to be living. While the officers watched, Vale came out in answer to a car horn. He then returned to the house, then to the car again. Officers moved in and arrested him outside the premises. Id. at 32. Believing that the actions by Vale indicated a drug sale, the officers decided to search the house. They took Vale inside to the front room and conducted a protective sweep. At about the same time Vale's mother and brother arrived at the house. A search of the house then revealed narcotics in a back bedroom. Id. at 33.

The Supreme Court struck down the search citing Chimel v. California, 395 U.S. 752 (1969), and rejecting the Louisiana Supreme Court's view that the search was lawful because it was in the "immediate vicinity of the arrest." Vale, 399 U.S. at 33. The Louisiana court had also noted that drugs are easily destroyed and that officers would not know who might
intrusion into the privacy of the people.

This possible benefit must be tested, however, to determine whether it actually exists. A sampling of cases utilizing a case-by-case approach must be examined to determine whether the courts are able to articulate and apply a clear standard; whether the analysis is as complete and detailed as it should be to realistically test the need to sweep under that standard; and whether the actual results in the cases allow officers to determine with a reasonable degree of certainty when they may sweep and the extent of a permitted sweep.

B. Totality of Circumstances

The fourth amendment condemns only "unreasonable" searches and seizures. A warrant for an arrest or search can be issued only upon probable cause and generally a full search or an arrest without a warrant requires the same standard to be met, searches and seizures less intrusive have been upheld on less than probable cause. A popular approach to the protective sweep question in a case-by-case determination of the reasonableness of the sweep is to examine all of the relevant facts surrounding a situation. An examination of several cases will serve to il-

have been inside the house to destroy them. The Supreme Court rejected this argument as justification for a warrantless search for two reasons. First, the protective sweep made it clear that no one was in the house. Second, the facts did not fit any of the narrowly defined search warrant exceptions previously recognized. To meet the reasonableness standards, the Court indicated that the officers would need to possess knowledge that the evidence was actually in the process of being destroyed. \textit{Id.} at 35 (citing Schmerber v. California, 384 U.S. 757, 770-71 (1966)). "We decline to hold that an arrest on the street can provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestees' house." \textit{Vale}, 399 U.S. at 35.

Because no evidence was discovered during the protective sweep and the Court's review was limited to the search and seizure question, \textit{id.} at 31, it cannot be said that the case represents any specific holding in reference to the protective sweep question. The Court did suggest a very high standard for warrantless searches for evidence (an "actually in the process of destruction" standard), but officer safety considerations are somewhat distinct. The case indicates the Court's often stated preference for search warrants and the need to confine exceptions closely.

Justice Black, with whom the Chief Justice joined, dissented, arguing that there was probable cause to believe that narcotics were in the house. In addition, the dissent asserted that the ignorance as to who might be in the house and the public arrest within view of the house justified the entry (and, one would assume, the sweep). Finally, Justice Black argued that the return of Vale's relatives made further search reasonable. \textit{Id.} at 38-39 (Black, J., dissenting).

146. U.S. CONST. amend. IV.
148. In another group of cases the sweep is upheld with little or no analysis. \textit{See supra} notes 57-129. These cases were examined earlier under the per se section. It was suggested that such cases provide tangential or incidental support for the notion of a per se rule be-
illustrate the considerations involved.

In United States v. Baker,\textsuperscript{149} police with probable cause arrested Baker and Miranda without an arrest warrant outside Baker's home while the two were transporting drugs from the house to a car. After the arrest, officers entered and conducted a search of the house. The scope of the search was not detailed by the court but was labelled a "protective sweep." The sole justification for the sweep was officer safety.\textsuperscript{150} Without knowing the actual scope of the search inside the house, the conduct of the officers was more intrusive than in the classic sweep situation because the arrest was not conducted inside the house. Thus, the sweep and the entry into the premises must be justified in this case. In a normal sweep situation,

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  \item cause no basis for upholding the sweep is provided. This could indicate support or at least sympathy for such a per se rule by at least some courts. It is also possible, however, that such cases represent a case-by-case approach by the courts. Thus, in a particular case it could be that a court believed, on the facts before it, that the sweep was reasonable but merely chose not to include an analysis of the facts in relation to the sweep question. Thus, many cases discussed in the previous section could also properly be included here.
  \item An example of the difficulty in determining the approach a court may use to justify a protective sweep can be seen in United States v. Guidry, 534 F.2d 1220 (6th Cir. 1976). Guidry involved an investigation into counterfeiting. During the course of the investigation, defendants became aware that secret service agents were present and the defendants started a fire. Police entered with firefighters and found the money in a back room. \textit{Id.} at 1221. The court examined all the facts and upheld the entry, stating "[w]e agree with the District Judge that the totality of circumstances confronting the officers on the scene was such as to indicate that efforts to destroy evidence were in progress and would be likely to be completed absent prompt action in entering the premises under surveillance." \textit{Id.} at 1223. A subsequent protective sweep was justified on two grounds: evidence destruction and officer safety. "Assuming the validity of the entry, the officers had a right first to secure the premises for their own protection, and secondly, to make sure that no one was engaged in destroying evidence in any part of the house." \textit{Id.} (footnote omitted). The right to sweep was stated by the court without separate factual justification of the officer safety issue. It could be argued that the case either supports a per se approach or, more probably, that the facts of the case indicated a need to search for the safety of the officers although those facts were not specifically discussed. A discussion of the facts relating to the destruction of evidence, of course, do not in themselves provide justification for the officer safety rationale since it cannot be said that all acts to destroy evidence are also threatening to the physical safety of the officers. Reason to believe that a college student was flushing marijuana down the toilet, for example, would not support a protective sweep based on probable danger to the officer.
  \item The problem with all cases which, even on a case-by-case basis, uphold protective sweeps without discussion of the facts involved, is that such cases provide little guidance to officers in the field as to when they can and cannot sweep. Neither is there a standard established nor even an articulation of particular facts which reflect upon the officer safety issue. In Guidry, the court primarily focused on the evidence destruction issue and the officer safety rationale might well have been an afterthought. However, the same problem can be noted in connection with all of the cases upholding protective sweeps on the basis of officer safety, but not articulating either a standard for sweeps or discussing the particular facts which justify one in a given case.
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\textsuperscript{149} 577 F.2d 1147 (4th Cir. 1978).
\textsuperscript{150} \textit{Id.} at 1149-52 & n.12.
entry into a home is justified to make the arrest. The sweep is a mere extension of the area in which police are authorized to be anyway. In this case, once the arrest was made outside the premises, there was no separate need to enter the home. This entry intruded into an important sanctuary of privacy. Thus, the need to make the sweep would have to be particularly acute and the danger to officers even greater than in an ordinary sweep situation. The analysis of the reasons for the entry and sweep should be particularly painstaking.

In fact, the court upheld the entry and sweep in one long paragraph. Only three factors were listed in upholding the conduct. First, it was noted that Miranda had been seen in the house armed the day before. But at the time the sweep was made, Miranda was already under arrest. Second, it was explained that Miranda was known to be working with a confederate. Of course, this could have been Baker, who was under arrest, or another individual. In any event, there was no indication that this person was in the house or that he was likely to attack the officers. Third, the police expressed a fear that there could be an armed confederate in the house. No further support was offered, however, and it appears to be no more than a subjective "bare suspicion" on the part of the officers.

Under the totality of circumstances-general reasonableness approach, officers were authorized to enter and search a private home. The state was not required to show that others were actually in the house or that the others were actually a threat to the officers. The state also was not required to demonstrate why the safest course would not have been merely to remove the arrestees from the area. In fact, it can be argued that the entry to make the sweep was more dangerous than leaving the scene of the arrest.

In contrast, in United States v. Cooks, the court of appeals affirmed the district court's decision that a protective sweep violated the fourth amendment. With reason to believe that drugs were being sold at a certain house, officers went to the house to purchase drugs and then arrest those involved. Two officers were allowed into the house by Calvin Cooks. Defendant Smith was standing inside the house and recognized one of the "buyers" as a police officer. There was a short scuffle and three other officers entered the house. One officer conducted a protective sweep. Donald Cooks was discovered in the kitchen with marijuana and a gun on the table. Calvin Cooks and Smith had also been armed when police

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151. 493 F.2d 668 (7th Cir. 1974), cert. denied, 420 U.S. 996 (1975).
152. Id. at 669.
The court held that even if the entry to "buy and bust" was assumed to be valid, the protective sweep could not stand fourth amendment scrutiny. The search was plainly beyond that authorized in Chimel, and the court rejected the suggestion that exigent circumstances in the case (that two men encountered in the house were armed coupled with a possibility that there could be others present) were sufficient to permit the sweep.

Comparing Cooks and Baker, it can be suggested that the weight of need versus intrusion is, if anything, more apparent in Cooks. Cooks did not involve an entry justified solely on protective grounds as in Baker. Rather, in Cooks, officers were initially admitted to the house by those inside. Thus, the level of intrusion of the total conduct was much less in Cooks. In Cooks it was known that at least some persons involved in the operation were armed. One of those involved actually scuffled with police. The state suggested a "possibility" that others might be present, in essence no more than a bare suspicion. In Baker it was known that one of those arrested had been armed in the past and that another might be involved in the crime and might possibly be in the house.

The need to search appears to be much greater in Cooks and the intrusion in Cooks was less than that in Baker. Yet, the sweep was upheld in Baker and struck down in Cooks. These results are difficult to justify

153. Id.
154. Id. at 671.
155. Id. at 672.
156. In the earlier case of United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973), a citizen reported that he had been abducted at gun point by three people, taken to Gamble's home, beaten and robbed. Id. at 1275. Seven police officers, with an arrest warrant, went to Gamble's home. The officers knocked and heard a rustling noise from behind the door, but no one answered. Id. The officers broke in to the house with their guns drawn, arrested Gamble, who was coming out of the bedroom with a female companion, and conducted a protective sweep. Id. at 1275-76. The court declined to adopt a per se rule upholding protective sweeps and found the facts insufficient to uphold the sweep under a general reasonableness standard. Id. at 1276-77. This case illustrates the protective sweep problem well. Gamble's two associates were in police custody, and there was no reason to believe that other confederates in the criminal enterprise were present. Id. at 1275. Similarly, rustling noises are normal sounds heard in any occupied dwelling. On the other hand, those inside did not open the door when requested to do so and the house was one police had often gone to in answer to reports of weapons being fired. Id. at 1277. An explosion had recently taken place there, there were bullet holes in the walls, and the door was boarded up. Id.

The court correctly noted that several of the circumstances listed were not exigent because they were either known ahead of time (condition of the house), or some other factors were inconsequential (rustling). Id. Yet, it can also be suggested that while there was not probable cause which would have made it possible to obtain a search warrant, the officers were entering a potentially violent situation. A protective sweep in this situation might well have
and unlikely to give police officers any real guidance in determining when and to what extent a sweep is permitted.

Other cases show this variance in analysis and result. In United States v. Hobson,157 a revolutionary group engineered the escape of one of its members, Ronald Beaty, from custody. During the escape a guard was killed. The plan was devised by Beaty and the mother of defendant Hobson. Later Hobson loaded weapons and drove Beaty to a “safe house,” where Hobson guarded him for almost a month and gave him weapons. Still later, at another home, Newman gave Beaty more weapons and discussed plans to shoot it out with police if capture seemed imminent.158

Eventually, Beaty was captured and told police of his experiences including the part played by Newman. An arrest warrant subsequently was issued for Newman and was executed at Newman’s home.159 Although Newman and at least one other person were seen in the house, no one answered the door and officers had to break it down to enter. A protective sweep was conducted.

In upholding the sweep, the court marshalled some very strong facts. Others were known to be in the house. Although their identities were unknown, it was likely that they were associates of Newman. The officers knew from Beaty of the plans to resist violently. “In the present case, the officers found two persons, in addition to Newman in the house. Weapons were lying around in almost every room in plain view. It was entirely proper to quickly search each room for additional persons and weapons.”160 The sweep in this case was clearly justified and the factors used by the court to uphold it were directed both at the issue of others in the house and at the likelihood of violent resistance from those people.161

Hobson is not the only case in which a court has engaged in detailed consideration of factors under a general reasonableness standard. United States v. Carter,162 involved a burglary of military weapons including M-14 rifles from an army facility.163 A drawing found nearby and slogans on

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157. 519 F.2d 765 (9th Cir.), cert. denied, 423 U.S. 931 (1975).
158. Id. at 768.
159. Id. at 775.
160. Id. at 776.
161. “Clearly, where the house is reputed to contain an arsenal of weapons and people who know how to use them and have expressed an intent to do so, some protective measures are in order.” Id.
162. 522 F.2d 666 (D.C. Cir. 1975).
163. Id. at 670.
the wall indicated that the theft was political in nature.\textsuperscript{164} Over a year later FBI agents armed with an arrest warrant, went to the home of Peterson, one of the several persons believed to be involved. When Peterson was arrested inside his house, an officer went to the attic because he feared a sniper could be hiding there. He saw a pile of boxes and blankets in the corner. Fearing that someone was there, the agent moved some shopping bags to get to the area, and uncovered military equipment that was then seized.\textsuperscript{165}

The court refused to uphold the search as a protective sweep, noting first that the arrest took place long after the crime and that no information known to the officers indicated that the accomplices were within the house or even in the area at all.\textsuperscript{166} Although the stolen weapons were still unrecovered and warrants were outstanding for accomplices who had in the past been involved in shootouts with the police, this evidence was not sufficient absent some reason to believe that accomplices were in the house.\textsuperscript{167}

It should be noted that the weapons were not found during a mere visual scan of the attic. Rather, it was only after the officer actually moved articles that he found the arms. Thus, it is very likely that the evidence might be suppressed even in a jurisdiction upholding the general notion of protective sweeps, because the conduct in \textit{Carter} was more extensive and more intrusive than the brief visual scan permitted by that doctrine.\textsuperscript{168}

\textsuperscript{164} \textit{Id.} at 672. \\
\textsuperscript{165} \textit{Id.} \\
\textsuperscript{166} \textit{Id.} at 674-75. In United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982), officers arrested Hatcher in his basement, and conducted a sweep search of the entire house. Cocaine was discovered in the basement, but not in a place in plain view at the time or place of the arrest. \textit{Id.} at 442-43. The district court upheld the sweep solely because the court considered crimes involving drugs dangerous. \textit{Id.} at 444. The lower court found "no evidence that Hatcher was a dangerous individual and no indication that any other persons were in the house at the time of Hatcher's arrest." \textit{Id.} The Sixth Circuit reversed, suggesting that only a "reasonable belief by the officers that there may be other persons on the premises who could pose a danger to the agents would support a sweep." \textit{Id.} "[O]fficers must be able to articulate justification for a warrantless search." \textit{Id.}

\textsuperscript{167} \textit{Carter}, 522 F.2d at 675. "For a rule that permitted a warrantless residence-wide search in any instance where an arresting officer hypothesized the presence of armed felons and noticed a potential vantage for a sniper might very well abolish the \textit{Chimel} doctrine for all but plate glass houses." \textit{Id.} (footnote omitted).

\textsuperscript{168} The court upheld a protective sweep in United States v. James, 528 F.2d 999 (5th Cir.), \textit{reh'g} & \textit{reh'g en banc denied}, 532 F.2d 1054 (1976), where officers attempting to execute an arrest warrant on four persons were met with armed resistance from those within. The altercation resulted in a firefight and the use of tear gas. A later sweep of the premises was upheld on officer safety grounds, because of the need to locate other fugitives for whom the officers had warrants, and to see whether anyone in the house was injured. Similarly, in United States v. Young, 553 F.2d 1132 (8th Cir.), \textit{cert. denied}, 431 U.S. 959 (1977), defendant surrendered following a shootout and was arrested outside. The Eighth Circuit upheld a
The picture that emerges from a recounting of a number of "totality"

subsequent protective sweep, but defendant Young apparently failed to contest the entry, as opposed to the sweep. *Id.* at 1134.

In a few cases protective sweeps have been authorized due to special circumstances. In United States v. Perez, 440 F. Supp. 272 (N.D. Ohio), *aff'd without opinion*, 571 F.2d 584 (6th Cir. 1977), *cert. denied*, 435 U.S. 998 (1978), although the house in question had been under surveillance as a source of narcotics, the initial entry into the house was in response to a fire call and the first "sweep" was "to determine the scope of the fire and to insure evacuation of the building." *Id.* at 286 (footnote omitted). During the fire investigation marijuana was discovered and defendant was arrested. Shortly thereafter, high explosives were spotted in the backyard in a bag similar in style to one officers had seen defendant carrying out of the house earlier. Thus, a second search was upheld on the grounds that police had probable cause to believe that high explosives were in and around a house in which there was or had just been a fire. Similarly, in United States v. Picariello, 568 F.2d 222 (1st Cir. 1978), officers had probable cause to believe that dynamite, some of which had been used in various politically motivated bombings, was located in a particular residence. The danger of the explosives supported the warrantless entry into the premises to secure them until the search warrant arrived, particularly since those responsible for the bombings, having just alluded police, were still at large.

By contrast, in United States v. Stoner, 487 F.2d 651 (6th Cir. 1973), where an arrest was made outside of a motel, an entry and search of the room could not be upheld on the ground that a particular armed fugitive might be in the room when there was no evidence that the arrested person was involved with the fugitive in any way.

There was no evidence that Stoner, who purported to be James Clark, was in fact, Bobby Clark, a friend of Bill Sides. This being the case, there was no reason for believing that Bill Sides was in the motel room. They had no information that Sides was an acquaintance of either Mr. and Mrs. Robert Stoner or Mr. and Mrs. James Clark, and in fact there was no such relationship between them and Sides. *Id.* at 653.

In United States v. Velasquez, 626 F.2d 314 (3d Cir. 1980), an agent entered a house without any warrant, but with consent of those inside, in order to purchase narcotics. Before any drugs were seen or the deal complete, other officers forced their way into the house and searched it. Aside from problems with the scope of the search (a brown paper bag with drugs was seized from a closet), the preceding entry was itself a problem. In a typical sweep situation, as has been noted, a prior lawful entry has taken place. Thus, the need to sweep is balanced only against the level of intrusion of the sweep itself and not also against the additional level of intrusion of the entry. More need should be shown if the entry itself must be justified on protection grounds. Here, the Court examined the facts, but concluded that no objective facts indicated any danger to the officer. Although nobody answered the door when the officers knocked, nothing indicated that the officer was in trouble. The crime involved was not a violent one and nothing indicated that anyone was armed. *Id.* at 318.

Similarly, in United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), where defendant was arrested outside his home, the mere fact that he turned and yelled "it's the police" toward the house did not give officers the right to enter the house to conduct a protective sweep, even though defendant had carried weapons in the past and the shout made it obvious that others were in the house. *Id.* at 789. Not only is entry into a home more intrusive than merely sweeping a home already lawfully entered (thus requiring a stronger showing of danger before such an entry could be permitted), in most cases it will be safer for the officers merely to leave the area with the arrestee than to thrust themselves into a home unnecessarily. United States v. Wellins, 654 F.2d 550 (9th Cir. 1981), officers went to defendant's room to question him. Upon entering, the officers immediately conducted a protective sweep which produced evidence leading to defendant's arrest. Although precluded from
cases is one of disparity in result and of scanty and incomplete analysis. In these cases, the treatment of sweep questions generally is limited to one or two paragraphs. Similarly, the cases failed to discuss the evidence necessary to support a sweep—the presence of others and the danger to police officers. Interestingly, the opinions striking down sweeps included a more detailed examination of the facts. It also seems that courts demonstrated more of a willingness to grapple with facts in cases involving more than a cursory safety scan or where the prior entry was not based upon an arrest warrant.  

arguing the protective sweep issue because the government initially admitted that the sweep was unlawful, the court noted that no protective sweep could be authorized in such a situation. This is correct. The sweep itself is premised upon an initial “right” to intrude upon the premises to arrest. Without such an initial “right” there is no basis for a “right” to search the premises. There is, of course, no right for police to enter any home or hotel room just because there is a person within whom police would like to question. 

169. In United States v. Kinney, 638 F.2d 941 (6th Cir. 1981), Workman robbed a bank and Kinney was spotted just outside the bank at the same time. Agents went to the home of Kinney's mother. When Kinney arrived, he admitted only that he had been near the bank. He did know the robber, however, and showed police where he lived. Later, Workman was arrested. Workman told them that Kinney had played a part after the robbery and a warrant for Kinney's arrest was obtained. Officers went to the home of Kinney's girlfriend, where Kinney was known to live, and staked out the house. When a man was seen leaving in Kinney's car, the car was stopped. The man said that the apartment was empty and Kinney was at work. Officers (eight in all) went back to the apartment, knocked and identified themselves. An agent at the back door heard a voice and an agent at the side saw a hand at the window near the door. Kinney opened the front door and then tried to close it but agents pulled him outside onto the porch where the arrest took place. Agents then entered the apartment and conducted a protective sweep. Writing for the Sixth Circuit, Judge Jones stated that the sweep was unlawful because the officers had no objective facts to support a reasonable fear for their safety. Although Kinney was known to associate with others who had committed violent crimes, police knew that Kinney had not actually committed the armed robbery. In addition, the police had interviewed Kinney and his associates at which times no violence had ever been directed against the officers. Chief Judge Edwards concurred in part, stating that the protective sweep portion of the discussion was dicta and that he would take no position on it. Id. at 945 (Edwards, J., concurring). 

Judge Kennedy, concurring in part and dissenting in part, would have upheld the sweep because Kinney had a history of violent crime, the crime in question was armed robbery (though the actual "in bank" portion of the robbery was not done by him), and Kinney had a history of associating with violent people. Judge Kennedy characterized the sweep as a "slight" intrusion only and cited Terry and Chimel in support of the proposition that such "slight" intrusions were constitutional. Id. at 945-46 (Kennedy, J., concurring in part). Judge Jones argued, in a footnote, that both cases were narrower than the facts in Kinney and that reliance on these cases was misplaced. Id. at 944 n.2. 

Kinney is noteworthy because the focus was not only on the sweep but on the entry as well. Judge Jones noted that mere movement is likely in any occupied home and is not indicative of any threat to the officers. Although a crowd was gathering to watch the activity, it was not hostile. "An opposite holding would permit government agents to infer danger from any occupied dwelling." Id. at 944. Judge Jones specifically noted that officers could and should have removed Kinney from the area rather than entering the house.
Protective Sweep Doctrine

The totality of circumstances approach supplies the police with no clear standard. Further, the wide disparity in the depth and level of analysis foreseeable leaves officers uncertain as to the relevant issues to be weighed. Is knowledge of the presence of others sufficient to permit a sweep? Is lack of knowledge about who is in the house or defendant's history of associating with others sufficient? If evidence of dangerousness is required, can this be supplied by general things such as the type of crime or prior violence in an unrelated crime, or the use of weapons to commit crimes? Or must police have specific knowledge of a likely dangerousness of others in the arrest situation?

No single uniform answer emerges from these cases. Without better guidance, it is probable that police will continue to conduct sweeps because they will not know when they should not.

As disturbing as this characteristic . . . is when viewed alone, it becomes even more disturbing when viewed in conjunction with the tendency of these courts to mask the fact that they have countenanced protective sweep searches on so scant a showing or justification by employing a totality of the circumstances approach. Moreover, the courts have included in the litany of justifying circumstances ones which bear no relevance to a reasoned appraisal of the constitutional necessity of such a search.170

The totality of circumstances approach is unsatisfactory. Its application has caused a wide disparity of results because the type and level of analysis is inconsistent, and because the approach does not provide adequate guidance to police officers. Therefore, a case-by-case approach based on a particular standard should be considered.

C. The Search for a Standard

Two obvious standards that have proved attractive to some courts, are the "reasonable suspicion" standard and the "probable cause" standard. A number of courts have explicitly analyzed the sweep issue in one or another of these terms.171

"[L]eaving promptly with the defendant would have been the prudent action to take." Id. at 945. Although Kinney was not completely dressed, he did not desire to go back inside the house to obtain more clothes. 170. Kelder & Statman. The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously With an Arrest on or Near Private Premises, 30 SYRACUSE L. REV. 973, 1016 (1979).

171. Some of the cases discussed under the totality of circumstances approach can be characterized as cases in which reasonable suspicion or probable cause was present. In this section, however, the focus is on those cases explicitly adopting a more general standard against which to measure the facts in the particular case.
An example of the "reasonable suspicion" standard is the well known Supreme Court case of *Terry v. Ohio.*\(^{172}\) *Terry* involved a police officer's observations of two men repeatedly examining a store window, conferring together, and reexamining the window.\(^{173}\) Believing that an armed robbery was imminent, the officer seized Terry for a brief interrogation and frisk for weapons.\(^{174}\)

The Court explained that the balance between the need to search and the right of the individual to be free from governmental intrusion is the basis of the fourth amendment reasonableness standard.\(^{175}\)

And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the fourth amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate.\(^{176}\)

As to the frisk of Terry, the Court noted that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."\(^{177}\) According to the Court, the question was whether the "officer is justified in believing that the individual whose suspicious behavior he is investigating . . . is armed and presently dangerous."\(^{178}\) It was reasonable to suspect that Terry and his companion were planning a daylight robbery and that most such crimes are committed while armed. Where armed men are intercepted before they are about to commit a violent crime, the potential for violence is obvious. Thus, the frisk was upheld. Justice Harlan, in his concurring opinion, expressed the belief that special facts need not exist to justify the frisk, that such protective measures should be permitted on a per se basis whenever there are grounds to seize the person. In fact, Harlan believed this was implicit from the majority

\(^{172}\) 392 U.S. 1 (1968).
\(^{173}\) *Id.* at 6.
\(^{174}\) *Id.* at 6-7.
\(^{175}\) *Id.* at 21.
\(^{176}\) *Id.* (footnotes omitted).
\(^{177}\) *Id.* at 23.
\(^{178}\) *Id.* at 24.
opinion. 179

*Terry* itself neither upholds nor forecloses the protective sweep issue under consideration here. Some parallels, though, are apparent. In each, there is a prior valid seizure of the person and less than a full search carried on for the protection of the officers. Yet, there are differences. In *Terry*, the prior seizure was a warrantless street encounter on less than probable cause while in the typical sweep situation there is a prior arrest based, in most cases, upon a warrant. Yet, if the *legitimate authorized initial seizure* is more extensive in the arrest and sweep situation, so is the *subsequent warrantless search*. A *Terry* stop situation is confined to the detainee's person and then only to a frisk of the outer clothing. In a sweep situation, the search is of a *home* or other premises, but less than a full search. The entry into various rooms of the house and the examination of those areas make the analogy between a *Terry* frisk and a protective sweep less than totally satisfying.

Some cases seem to suggest that the analogy to *Terry* is not entirely misplaced. In *United States v. Wiga*, FBI agents were informed that Wiga, who was wanted for parole violation, would be in the company of a person named Moody and that Moody would be visiting a particular bank. Police picked up Moody's trail and followed her to a motor home pulled by a car. The driver of the car appeared to be Wiga. Police pulled the motor home and car over to the side of the road. Wiga was arrested but denied that anyone was in the motor home. The motor home's license indicated that it was owned by a handicapped person; neither Wiga nor Moody were handicapped. The officers called for Moody to come out of the motor home, and she did. An officer then entered the motor home and conducted a protective sweep which produced a weapon. 181

The court quoted extensively from its earlier case of *United States v. Gardner*, and particularly noted the analogy to *Terry v. Ohio*. In upholding the sweep, the Ninth Circuit in *Wiga* focused on several factors

179. I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in the affirmance . . . . Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically. *Id.* at 33-34. (Harlan, J., concurring).


181. *Id.* at 1328. The court rejected the notion that the automobile exception could apply to a motor home. *Id.* at 1329.

182. 627 F.2d 906 (9th Cir. 1980).

183. 662 F.2d at 1330. The court noted that although many circuits have upheld the protective sweep notion in one form or another, the standard and requirements necessary vary widely from one jurisdiction to another.
which, taken together, amounted to little. The court noted that police did not know whether anyone else was in the motor home and that Wiga had lied about Moody's presence. The handicapped license plate suggested that someone else would, at some time, be present. Yet, none of these factors seem to rise above a bare fear that a person could be there and nothing suggests that such hypothesized persons would pose any danger to the officers. On the basis of this scanty fare, the court upheld not only the protective sweep but also the entry into the motor home. As a totality of circumstances case, it is weak at best. As a case based on the Terry standard, it seems to fall well short of the "objective and articulable" facts required by that case.

In Wiga, the Ninth Circuit relied upon its earlier decision of United States v. Gardner. In Gardner, DEA agents set up a drug "buy" and kept the house in which it was to take place under surveillance, although one entrance could not be observed by the agents on watch. Three agents went into the house to complete the "buy." When a dispute arose about the sale, one of the sellers left through the exit not under surveillance. He was not seen by the agents until he was somewhere down the block. Meanwhile, one of the agents inside the house convinced the sellers to let him walk through the house to assure himself that he was not being set up to be robbed by the sellers. During the walk-through, the agent saw contraband but no other persons.

Eventually, Gardner left to get the drugs. The agents remained in the house for some time but went out to the front porch just before Gardner returned. When Gardner came back, the group went back into the house. Gardner and one agent then walked outside to an undercover patrol car where Gardner was arrested. Another seller was arrested inside the house at the same time. Another agent entered the house and conducted a protective sweep through the rooms and closets. Various items in plain view were seized as evidence.

The Ninth Circuit upheld the protective sweep on a Terry standard. The court quoted the passage from Terry requiring that the conduct be reasonably based upon "specific and articulable facts." The question must be asked whether the court actually possessed the necessary facts to uphold the search on a Terry standard. Although weap-

184. Id. at 1331.
185. 627 F.2d 906 (9th Cir. 1980).
186. Id. at 908-9.
187. The court cited with approval, Kelder & Statman, supra note 170, as favoring the Terry standard. 627 F.2d at 910 n.3.
188. 627 F.2d at 910.
ons had been seen in the house during the agent's walk-through while posing as a buyer, nothing was seen which would indicate the likelihood of violence by those involved in the drug deal. More telling is the fact that the agents were reasonably certain that no other persons were in the house. Although there was one entrance outside the officers' view, nothing occurred indicating it had been used. To enter without being seen would have required someone to climb the backyard fence and proceed through the undergrowth. It seems that whatever standard the court purported to use, the protective sweep in Gardner was actually upheld on skimp

Another standard that courts might apply to the protective sweep is "probable cause." Only a few cases have done so explicitly. In United

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189. In fact, the court stated that the presence of the weapons in the house created a "potential for violence." Absent some reason to think that others are present and violence prone, this seems to be an overstatement. Id. at 911.

190. Id.

191. In a footnote the court also stated "we do not think it is a controlling fact that Gardner was arrested just outside his premises while his codefendant was arrested inside, instead of Gardner and his confederate both being arrested inside . . . Gardner's residence." Id. at 910 n.2. The court recognized that:

the extensive surveillance of Gardner's residence and the relatively brief period of time when both officers were outside of the residence diminish the strength of the officers' reasonable apprehension concerning the unknown, possibly dangerous, occupants. The facts in this case are not as compelling as those in some prior cases where protective searches have been upheld. Id. at 911.

192. There are two ways to administer such a standard. The first would be to declare protective sweeps to be warrant exceptions as a group and use the probable cause standard purely for judging the reasonableness of the search. In essence, this approach treats the protective sweep as one of the narrowly crafted exceptions to the warrant requirement, while requiring a high level of knowledge of probable danger before invoking it. Thus, the probable cause approach is more analogous to the stop and frisk approach approved in Terry or the search incident to a lawful arrest approved in Chimel (although without the per se element of the latter as approved in Robinson). The other approach would be to deny to protective sweeps the status of warrant exception. Not only would probable cause be required to conduct a protective sweep, but a search warrant would be required which could be dispensed with only if exigent circumstances were present. Not only would a high level of knowledge be required, but a search warrant would be required unless the reasons for making the sweep did not become apparent until the arrival of the arresting officers. Factors often used to justify sweeps, such as type of crime or defendant's past history of violence, are clearly not exigent and would not forgive the lack of a search warrant. Courts adopting a probable cause standard seem to assume that protective sweeps are exceptions to the warrant requirement.
States v. Cravero, police went to the home of one Cook after seeing Chandler and Cravero, two persons for whom there were outstanding arrest warrants, go there. Police also had a warrant for one Troise. Agents entered the home to execute the warrants. After arresting Chandler and Cravero, and with Cook in view, noises were heard in a bathroom. The agents entered the bathroom and found one Willets and saw material they believed to be cocaine and other items used in drug processing. These items were seized.

The Fifth Circuit upheld the entry into the bathroom on a standard of probable cause. The court stated that "[t]his circuit has recognized such an exception in a housewide search after a proper arrest for the purpose of making a cursory safety check when 'the circumstances [provide], at least, probable cause to believe that [there is] a serious threat to [officer] safety.'"

The probable cause standard is a very high one. In finding that there was probable cause, the court listed, without discussion, four factors. First, the arrest was made in the early morning hours, but this seems irrelevant to the issue of danger. Second, the court referred to the "heinous nature of the crimes." Third, the court noted that when Chandler was arrested, he was standing near a pistol which police confiscated. Finally, the court found that the noises in the bathroom gave police probable cause to believe that someone was in the bathroom. However, there was little to suggest that the person in the bathroom would be violent toward the arresting officers on that occasion.

Assuming danger based on the type of crime is speculative at best. The only gun seen by the police was under their control. The facts appear to be too weak to support the probable cause standard that the court purports to follow. Although understandably sympathetic of the desire to assure the officer's safety, it is unfortunate that the court felt compelled to require such a high standard against which to measure the conduct of the officers. The result is a lessening of the meaning of the probable cause standard. Having been bound by this standard, the court was faced either with de-

194. Id. at 412-13.
195. The court declined to consider whether the entry could be upheld due to the asserted belief of the police that Troise was in the house. "We need not consider their belief in Troise's presence, because their bathroom entry can survive as a protective sweep to avoid threats from unknown persons." Id. at 417 (footnote omitted).
196. Id. at 418 (quoting United States v. Smith, 515 F.2d 1028, 1031 (5th Cir. 1975)).
197. These charges apparently included murder, although they were not detailed in the opinion. See United States v. Bowdach, 561 F.2d 1160, 1163 (5th Cir. 1977).
198. Cravero, 545 F.2d at 413.
claring unconstitutional a protective sweep conducted with some justification by the officers involved, or with bending and weakening the probable cause standard by applying it to a weak set of facts. It appears that the latter course was followed.

The earlier case of *United States v. Smith*,199 relied upon in *Cravero*, involved the arrest of Smith at his mobile home.200 FBI agents obtained information that Smith and another person were together there and that Smith was armed. Armed with an arrest warrant, the agents surrounded the trailer, watching all exits from behind their cars, and used a bull horn to order Smith out. As Smith exited from the back door, agents kicked in the front door, found Smith's brother, and conducted a protective sweep.201

The court upheld the action due to the "high potentiality for danger surrounding the arrest . . . ."202 Further, the Fifth Circuit stated that there was "at the least, probable cause to believe that serious threat to safety was presented."203 In one of those incongruous juxtapositions so typical of the protective sweep cases, the court stated that "[t]his court will strictly scrutinize such alleged precautionary searches to insure that there exists a serious and demonstrable potentiality for danger."204 The court then declared that the criteria had been met on the facts of the case and subsequently upheld both the entry into the mobile home and the protective sweep without any further discussion.205

Without discussion, it is difficult to determine why the court thought that there was probable cause to sweep the premises. From the facts of the case, it is known that Smith was believed to be in the company of an armed companion. That alone, however, does not amount to probable cause.206 Police had the mobile home surrounded and Smith came out without resistance. In light of this, probable cause seems to be lacking. It must also be noted that the court, in its brief opinion, upheld not only the sweep, but an entry into the mobile home without any appreciable distinc-

199. 515 F.2d 1028 (5th Cir. 1975).
200. The warrant was for a violation of the Dyer Act. The charge was severed before trial and the appeal at issue here involved other charges. *Id.* at 1029-30.
201. *Id.* at 1031.
202. *Id.*
203. *Id.* (emphasis added). The court also stated that circumstances constituting probable cause existed to uphold the protective sweep in *United States v. Looney*, 481 F.2d 31 (5th Cir. 1973). See *supra* the discussion of *Looney* in text accompanying notes 84-88.
204. *Smith*, 515 F.2d at 1031 (emphasis added).
205. *Id.*
206. This same factor was used to uphold a protective sweep in *United States v. Sellers*, 520 F.2d 1281 (4th Cir. 1975), vacated, 424 U.S. 961, reh'g denied, 425 U.S. 955 (1976), on remand modified on other grounds, 547 F.2d 785 (1975), cert. denied, 429 U.S. 1075 (1977).
tion. No suggestion was offered as to why the agents could not have protected themselves by withdrawing from the scene with their prisoner.207

Interestingly, another protective sweep case decided by the Fifth Circuit involved an associate of Cravero’s.208 Five months after the arrest of Cravero, the government obtained revocation of the appeal bond of one Bowdach, who had previously been convicted of “extortionate extensions of credit.”209 An arrest warrant was then issued. The information known to police suggested that Bowdach was a professional killer and possessed a collection of weapons.210

A surveillance team of six-plus agents waited for Bowdach. Bowdach became aware of the activity and actually called local police, telling them that there were armed men at his home and that he needed assistance. A local police officer entered the house and subsequently exited the home with Bowdach. The agents then arrested Bowdach. Shouts came from the back of the house, “[L]ook out—they have a shotgun” and, later, “[l]ook out, there are shadows in the house.”211

Against the wishes of Mrs. Bowdach, the agents entered the house armed with the belief that two others for whom they had warrants were there. A protective sweep was instituted (as well as a search for the two others) and a shotgun and other items were seized.

The court upheld the sweep, stating that “[t]he law in this circuit holds that police officers have a right to conduct a quick and cursory check of a residence when they have reasonable grounds to believe that there are

207. In Sellers, id., agents arrested defendant outside his apartment on unlawful flight charges. There was also reason to believe that he was involved in bank robberies and that he was “travelling” with armed accomplices. Id. at 1283. The officers entered the apartment to find those persons and saw items that they included in a later application for a search warrant. Defendant attempted to strike down the search warrant by attacking the affidavit on which it was issued. Defendant argued that the entry and search following the arrest was conducted in violation of the fourth amendment. Id. at 1283.

Apparently, the entry was made because defendant was believed to be travelling with armed associates. The agents said they feared that such persons might fire on the officers. The court upheld the sweep on this basis, holding that the officers had “reasonable grounds” to believe that defendant “was travelling with armed associates.” Id. at 1284.

If the court is using the term “reasonable grounds” to mean “probable cause” the result is impossible to justify. Even if probable cause exists to believe that defendant was in the company of armed persons, it does not necessarily follow that those persons were likely to attack the officers. Even under a general reasonableness standard, however, the case seems very weak. In fact, defendant did not resist arrest and his wife and children were standing in the doorway. None of this gives “reasonable grounds” to fear that the officers were in danger. If they were, it seems they could easily have left the area.

209. Id. at 1163.
210. Id.
211. Id. at 1165.
other persons present inside the residence who might present a security risk." Apparently the court used the term "reasonable grounds" as a synonym for probable cause. The court upheld the search as a protective sweep because the defendant was a member of a narcotics ring, the leader of which was later convicted of murder. The court quoted a conclusory passage from the district court opinion which stated that the officers' fear was reasonable, based on their belief that other individuals remained inside. It is questionable whether such a cursory recitation of the key facts would be tolerated in a case where the probable cause issue did not relate to the protective sweep.

*McGeehan v. Wainwright,* a denial of a habeas corpus appeal, involved the commission of an armed robbery by two men who were aided by a female companion prior to the actual robbery. Officers traced a car they believed had been used in the robbery to a trailer park. As they approached the suspect's trailer the lights were extinguished. Movement could be heard inside. After calling for those inside to exit, a woman came out. After repeated requests, three more people exited the trailer. Three of them matched the descriptions of the robbers and their companion, obtained from witnesses at the scene of the robbery. Two officers then entered the trailer and conducted a protective sweep. A weapon was discovered and confiscated. It was eventually admitted into evidence.

Based on the decisions in *United States v. Smith* and a factually distinguishable case, *Hopkins v. Alabama,* in which officers were actually fired...
upon, the sweep was upheld. The court, in its per curiam opinion, noted the following factors which justified the sweep:

An armed robbery had occurred only about an hour earlier; it was nighttime; the trailer was dark; three of those who exited fit the descriptions furnished to the officers, as did the automobile parked by the door; none of the suspects surrendered a weapon. The officers knew that a shotgun had been used in the robbery, and they concluded that additional confederates might be concealed inside the darkened trailer with the missing shotgun. As we held in Smith, "the circumstances provided at least, probable cause to believe that a serious threat to safety was presented."\(^{217}\)

A focused examination of the factors upon which the court constructed its lattice work of probable cause forces the analysis to collapse. Some of the factors listed merely indicated that police had the right location. The car matched descriptions given by the witnesses, as did some of those persons arrested. Other factors are irrelevant to the issue of potential danger. It was nighttime and the trailer was dark. In fact, three persons seemed to have been involved in the robbery, and from the descriptions, it seemed that all three were in police custody.\(^{218}\) Thus, there was little, if any, rea-

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\(^{217}\) McGeehan, 526 F.2d at 399 (emphasis added and citation omitted).

\(^{218}\) Id. The court found it significant that the weapon had not been surrendered by those persons, yet it surely would have been foolhardy for any of those inside to exit the trailer carrying a shotgun. With all three in custody there was nothing to indicate a danger that anyone was likely to use the weapon against the officers.
son to fear an attack by the criminals. Furthermore, there was no objective evidence indicating that someone else was in the mobile home. Certainly, there was no probable cause. With all three suspects under arrest, the police should have left the area, thus assuring their safety from any hypothesized danger.\footnote{In contrast, police in hot pursuit of a fleeing felon may, of course, follow him into a home or other structure without a warrant in order to effect the capture. Obviously, upon entering the structure, officers can search for the object of their chase. Thus far, no issue of protective sweep is involved. If police may search further or after the arrestee is found, however, a protective sweep may have taken place. To the extent that courts permit far reaching searches for the arrestee without closely analyzing the time frame or extent of the searches, protective sweeps may be upheld \textit{sub silentio}.}

In Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court's "hot pursuit" case, police were called immediately after the armed robbery of a cab company. Following directions supplied by cab drivers who were on the trail of the robber, police arrived within minutes at the house into which defendant had run. Officers knocked, a woman answered the door and police entered. Officers fanned out through the house. Hayden was found in an upstairs bedroom pretending to be asleep. Other officers on the first floor and in the cellar reported that no one else was in the house and Hayden was arrested. Noise of water running in a bathroom next to the upstairs bedroom led to the recovery of a shotgun and pistol in the toilet tank. An officer in the cellar found various items of evidence in a washing machine. \textit{Id.} at 297-98.

The Court upheld the search stating that it was for the fleeing felon, but in doing so, appeared to uphold a search for weapons throughout the house as well:

They [police] acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. \textit{Id.} at 298-99 (emphasis added). The Court also noted that a search was the only way to ensure "that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." \textit{Id.} at 299.

This broad language would seem to uphold the concept of protective sweeps at least in the hot pursuit situation. Although it could be argued that the dangers faced in any arrest situation are not significantly different than that of a hot pursuit, this is not strictly true. In the hot pursuit situations, the felon himself is at large (at least until found and arrested), while in the more usual arrest situation the object of the arrest is known and in custody and possible danger from other persons is, therefore, the sole concern.

In hot pursuit cases the search is a mixed one, partly for the arrestee and partly for officer protection from others. Thus, perhaps a search for weapons can be justified in a hot pursuit case whereas such a search would not be permitted incident to a lawful arrest even if protective sweeps for people were authorized.

Although the skimpy analysis in the \textit{Hayden} case makes it less than a satisfactory basis for the protective sweep doctrine, it suggests the Supreme Court's high concern with officer safety in arrest situations. A number of appellate court opinions have also upheld protective sweeps in hot pursuit situations.

For example, in United States v. Peterson, 522 F.2d 661 (D.C. Cir. 1975), police on routine patrol spotted two men, one of whom had a shotgun and the other appeared to be holding a rifle. The two spotted the police, fired on them, and fled in a car. The officers plus others gave chase. The car eventually stopped and the men fled. One was arrested on a
III. DISCUSSION AND PROPOSALS

It was stated earlier that as a general principle, a case-by-case approach, either based upon the totality of circumstances or measured against a standard such as probable cause, is preferable to a per se rule. The case-by-case approach is more responsive to fourth amendment values of privacy and freedom from governmental intrusion. In simple language, this means that some searches or seizures that would be permitted under a per se rule would not be permitted under a case-by-case approach.

Although this thesis has surface appeal, the recounting of the cases using a case-by-case approach suggests that this approach has not resulted in a significantly lesser degree of intrusion than would a per se rule. It is true, of course, that some courts have struck down some protective sweeps. Yet, many of these cases involved searches that went beyond what would probably be authorized by a reasonably restrictive per se rule (for example, an entry after the arrest is completed outside or moving bags in the attic) and, therefore, would be struck down under either approach. Furthermore, many courts have upheld, on a case-by-case basis, searches that would not be permitted under a per se rule. This suggests that a per se rule may sometimes be more protective of fourth amendment values than a case-by-case approach.

Why have courts been overly expansive in their treatment of protective sweeps? Although no absolutely precise answer is possible because one cannot see into the minds of the deciding judges, some ideas can be suggested. In reading the protective sweep cases, it is apparent that the courts are responsive to actions taken by officers for their own protection. There appears to be a basic sense on the part of most judges that police in potentially dangerous encounters should be able to take steps to protect their safety. Thus, there is a tendency on the part of many courts to uphold protective sweeps because the basic reason for the sweeps is considered sound. Under a case-by-case approach there is minimal guidance given to
officers in the field as to what should and should not be done. Given this lack of guidance, it is not unusual to find officers conducting sweeps too often and too extensively. The natural nervousness of the agents, coupled with the ad hoc case-by-case approach to the problem, makes this result inevitable. Courts are faced with these sweeps only after they are completed. The particular sweep can be struck down, but, often, the courts uphold protective sweeps. Apparently, the courts understand and sympathize with the fact that agents have little guidance in deciding whether or not to conduct a sweep. In upholding the sweeps, however, the courts have blurred or minimized their analysis of the issues or have twisted and debased traditional fourth amendment concepts.

A similar debasement is less likely to occur in other fourth amendment areas because courts are less sympathetic to interests of evidence gathering or crime detection than they are to the basic safety of those involved in police work. Courts may scrutinize more closely a search conducted for a reason other than the safety of officers.

It is suggested that a narrowly crafted per se rule is a better approach to the protective sweep problem than the case-by-case approach. A narrowly crafted per se rule will give officers clear direction as to what they can and cannot do to protect themselves from possible attacks by persons other than the arrestee during a lawful arrest. Many overly expansive sweeps will not be conducted because the arresting officers will know the limits of lawful protective sweeps. Furthermore, once the limits of such sweeps are clear and are known to the officers in advance, courts are likely to be less sympathetic to sweeps that exceed the limits and, as a result, will be more likely to strike them down with vigor.

What then is the permissible scope of a protective sweep that should be authorized on a per se basis incident to a lawful arrest? When the arrest takes place inside a home, apartment, or other premises, it is reasonable to briefly enter each room and visually scan it to find other persons who could pose a threat to the officers during the course of the arrest. No detached outbuilding can be swept under this per se rule, although the basement and/or attic can be swept if accessible at the time of the arrest. No entry

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220. In contrast, a few courts have taken an unduly restrictive view toward protective sweeps, and there are cases in which the rules advanced in these courts, if followed in future cases, may expose arresting officers to excessive risks.

221. Interestingly, another area in which this author has seen a considerable broadening and watering down (debasement if you will) of the fourth amendment is in the stop and frisk cases under the doctrine of Terry v. Ohio. Of course, Terry is also a case concerned largely with issues of officer safety.

222. The sweep is conducted to discover persons, not weapons or evidence.
into such places should be made if access is available only through an impermanent means, such as a ladder, unless this means of access is set up, suggesting that it may have been recently used. The aim is to quickly enter those parts of the premises that could easily have been reached by persons in the house during the approach of the arresting officers.\footnote{223}

The time allowed for such a sweep is brief. It should include only the time needed to enter and scan each room for persons. In general, such a sweep should take only a few minutes, because police are to look only for other individuals on the premises.

Most cases which have upheld protective sweeps have assumed that “human sized” containers, such as closets, can be examined as part of a protective sweep. This, however, is incorrect. It authorizes too broad a sweep.\footnote{224} None of the cases examined for this article involved a person actually found hiding in such an area. Persons were always found sitting at tables, walking, sitting on steps, or in similar places. Thus, the intrusiveness outweighs the need for protection and no closet or container should be opened during a protective sweep authorized on a per se basis.\footnote{225}

If officers wish to open closets, hampers, trunks or other such areas, there must be particular reason to do so. In general, a sweep of the premises as described above should be sufficient to assure the safety of the arresting officers and safety is the sole justification for protective sweeps. If the sweep authorized by this rule does not lead to a particularized suspicion that someone is in a closet or other container, then the search of that area is unreasonable.

Thus, it is proposed that a \textit{Terry v. Ohio} “reasonable suspicion” stan-

\footnotetext[223]{223. It would be reasonable to require any such persons found during a protective sweep to accompany the officer to some central place in the residence where they could be watched until the arrest is completed and the officers have left the premises. No search of such persons may be conducted under this per se rule, including a frisk for weapons, since the seizure of these persons is on a per se basis and does not satisfy the reasonable suspicion standard of \textit{Terry v. Ohio}. See \textit{Ybarra v. Illinois}, 444 U.S. 85 (1979).}

\footnotetext[224]{224. If a court \textit{does} authorize the opening of “human sized” closed containers on a per se basis, the scope of the permissible sweep is no more than a visual scan of them. Clothes in a closet do not need to be touched or moved to check for persons, since a check for \textit{legs} of a person will serve as well and can be done without such contact. If a hamper is to be scanned, clothing need not be removed or compressed since it is unlikely that a person in such an area could completely conceal himself from view. A court permitting intrusion into closed areas as part of a protective sweep must undertake the responsibility to ensure that a protective sweep for persons does not slip over the line and become, in reality, a search for evidence.}

\footnotetext[225]{225. Although officers might prefer a broader rule, the actual extent of the rule will be clear and it is supported by the actual dangers or lack thereof seen in the cases to date. It is suggested that courts will be more willing, therefore, to strike down protective sweeps exceeding that which is authorized by the per se rule.
standard be adopted for searches of closets or containers during a protective sweep. Assume, for example, that movement by a person other than the arrestee is seen through a window as the arresting officers approach the house, but the protective sweep fails to turn up the second person. In this situation it may be reasonable to open closets, etc., but in the normal arrest situation it would not. It is suggested that substantially fewer intrusions into such areas will take place under this two step approach. A narrow per se rule coupled with a requirement for additional particular reasons to search more fully, will reasonably protect the safety of the arresting officers.

Some courts have upheld entries into premises to conduct protective sweeps following an arrest outside. As has been discussed, such a procedure permits not only a sweep, but an *entry* that could not otherwise be accomplished once the arrest was made outside. Thus, the level of intrusion is much greater than those situations where the entry is separately and lawfully accomplished and only the sweep itself is at issue.

In general, an entry and sweep following an arrest outside is unreasonable and can *never* be permitted on a per se basis under the rule advocated in this article. In addition, due to the high level of the intrusion, even a reasonable suspicion of danger is not enough to validate the entry. Under no other circumstances would reasonable suspicion alone validate an entry and search of a house. The same should be true following an arrest outside. Officers must have probable cause to believe that persons hostile to them are in the house. In addition, the government must be prepared to show why the officers would not have been equally safe or safer had they merely removed the arrestee from the area. These requirements should put an end to most such entries.

The rules advocated in this article are not perfect. Some ambiguities and new questions will arise requiring interpretation and consideration. It is suggested, however, that the rules proposed here will permit arresting officers to take reasonable steps to preserve their safety during arrests while clearly understanding the limits of such steps. The courts, therefore, will be more willing to strike down violations of the limits through the use of the exclusionary remedy. The balance struck will better protect important fourth amendment values than the current hodgepodge of standards and decisions.

**IV. Conclusion**

After *Chimel v. California*, protective sweeps were neither foreclosed nor specifically authorized by the Supreme Court. At all times a protective
sweep is a search under the fourth amendment, because it is a significant intrusion into the reasonable expectation of privacy that an arrestee has in his home. Nevertheless, the protective sweep is justified by a need to safeguard arresting officers from possible attack by persons other than the arrestee. This need to sweep, however, must be balanced against the right of citizens to be secure in their homes from unreasonable governmental intrusions. To maintain this balance, the narrowest rule that will reasonably protect the arresting officers should be adopted.

A case-by-case justification is, as a general rule, preferable to a per se rule. The case-by-case approach is generally a narrower one and, as a result, more protective of important fourth amendment interests. In the case of protective sweeps, however, a case-by-case approach does not work well. Courts are often unable or unwilling to adopt a clear standard and, more importantly, when such a standard is adopted, it is not uniformly applied. Courts are reluctant to strike down protective sweeps because they recognize the need for them. This has led courts to extend traditional doctrines, such as probable cause and search incident to arrest, and to uphold sweeps in factual situations that do not meet the general standards adopted by the reviewing courts. Additionally, the case-by-case approach provides little guidance to arresting officers in determining when a sweep is authorized. The case law to date is not clear enough to be followed by officers in the field.

In practice, a tightly crafted, sharply defined, and narrow per se rule might provide more protection to fourth amendment values than the case-by-case approach. Under this rule, the protection of arresting officers appears to justify a protective sweep of the premises whenever the arresting officers do not know for a fact that no persons other than the arrestee are on the premises. Although a brief detention of persons found on the premises as a result of a protective sweep is authorized, no search of such persons, including a frisk, is permitted under the per se rule. A protective sweep would be limited to a walk-through of the premises and a brief visual scan of each room.

A protective sweep is not conducted for the purpose of discovering contraband or evidence of a crime. The opening of any area within a room, including “walk-in” closets, is not routinely authorized under this per se rule. In the bulk of cases, sufficient protection is provided by permitting the walk-through. Further search must be justified by rea-
sonable suspicion to believe that others are present and that their intentions may be hostile. Thus, if a second person is spotted through a window as officers approach, failure to find such a person during the protective sweep may be sufficient to authorize the opening of closets or other "human sized" areas to locate the individual.

When an arrest is conducted outside the premises, there is no per se right to enter the premises to conduct a protective sweep. Such an action is never authorized by the rule advocated in this article. An entry after an arrest outside can only be justified based on probable cause and exigent circumstances. In addition, the government bears a heavy burden to show why the officers' safety could not be protected by simply leaving the area with the arrestee. A narrowly defined per se rule, therefore, preserves the fourth amendment right to be secure from governmental intrusion, and simultaneously protects the safety of the arresting officers.