



# FULLERTON POLICE DEPARTMENT

## TRAINING BULLETIN

ROBERT DUNN, CHIEF OF POLICE

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### DISTRICT COURT DECLINES TO RECOGNIZE A PER SE RULE THAT AUTOMATICALLY PERMITS A PAT-SEARCH FOR EVERY LAWFULLY DETAINED ROBBERY SUSPECT

On October 18, 2019, in the case of *In re Jeremiah S.*,<sup>[1]</sup> the California First District Court of Appeal determined that an officer who conducted a pat-down search of a robbery suspect did not present specific and articulable facts to support a reasonable suspicion that the suspect was armed and dangerous. In reaching its conclusion, the Court declined to recognize a rule that would “essentially validate any pat-search of a suspected robber who is lawfully detained following a report of a fresh robbery, regardless of the particular circumstances.”

#### Background

At approximately 11:29 p.m. on July 2, 2018, Officers Bryan Neuerburg and Anthony Halligan were on patrol in San Francisco when they received “a dispatch call for service for a robbery in the area of 51 Market Street.” The officers were dispatched to the area around Pier 19 to look for the two “robbery suspects.” They had been told that a purse and phone had been stolen and that the phone had been tracked to the area near Pier 19. There was no report that any weapon had been used in the incident. The suspects were initially described as “two black male juveniles,” but the description was updated to “young black males approximately in their 20s,” with one suspect wearing a light blue or gray hoodie. The officers noticed juveniles Jeremiah and J.A. walking, and one was wearing what appeared to be a light gray hoodie. The officers followed them for several blocks, driving slowly while they confirmed the description of the suspects. Meanwhile, two other officers who also had been dispatched to the area detained Jeremiah and J.A. Officers Neuerburg and Halligan then arrived on scene.

Jeremiah complied with an officer’s instructions to face a wall with his legs spread and his arms above his head. Jeremiah made no sudden movements or attempts to run away. Officer Neuerburg did not notice any weapon-like bulges in Jeremiah’s clothing, and there was nothing about Jeremiah’s appearance, behavior, or actions to make him believe that Jeremiah was armed and dangerous. Nevertheless, Neuerburg believed Jeremiah was armed and dangerous because “a robbery occurred” and he knew that “most robberies involve a weapon or most robbers tend to have weapons on their persons.” Neuerburg decided to conduct a pat-down search (“pat-search”). As Officer Neuerburg began his pat-search, he immediately felt two phones in Jeremiah’s

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pocket. Believing the phones were evidence of the reported robbery, Neuerburg asked if he could take them out of the pocket, and Jeremiah consented. One phone's background picture and password matched those of the robbery victim's phone.

An amended wardship petition charged Jeremiah, age 14, with second-degree robbery. Jeremiah moved to suppress the evidence obtained from the pat-search. The juvenile court denied the motion, and found true the allegation that Jeremiah had committed second-degree robbery. The matter was transferred to Alameda County, where a wardship proceeding was already pending, and the juvenile court declared wardship and placed Jeremiah on probation on various terms. Jeremiah appealed from the disposition and jurisdiction orders.

### **Discussion**

The California First District Court of Appeal explained that the Fourth Amendment of the United States Constitution guarantees the right to be free of unreasonable searches and seizures. Under *Terry v. Ohio* (392 U.S. 1 (1968)), if an officer has a reasonable suspicion that criminal activity is afoot, the officer may conduct a brief, investigative stop. If the officer conducting the so-called *Terry* stop believes the suspect is armed and dangerous, the officer may perform a limited search of a person's outer clothing for weapons, i.e., a pat-search, whether or not the officer has probable cause to arrest.

The "sole justification" of the pat-search "is the protection of the police officer and others nearby." (*Id.* at p. 29.) Its purpose "is not to discover evidence of crime, but to allow the officer to pursue his [or her] investigation without fear of violence." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.) The validity of a pat-search turns on whether "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." (*Terry, supra*, 392 U.S. at p. 27.) The officer conducting the pat-search must provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." (*Terry*, at p. 21.) Although the officer need not be "absolutely certain" the individual is armed, an "inchoate and unparticularized suspicion or 'hunch'" is insufficient. (*Terry*, at p. 27.)

The Court observed that four officers were on the scene during the detention of Jeremiah and the other juvenile. No information of any weapon was conveyed to Neuerburg by dispatch. Neither juvenile made any sudden or furtive movements suggestive of weapons. Neuerburg testified that Jeremiah was compliant, had no bulges indicating weapons in his clothing, and that there was nothing indicating that he was armed and dangerous.

The People argued that the pat-search should be upheld due to Officer Neuerburg's testimony that (1) reasonable suspicion justified Jeremiah's detention as a suspect in the robbery of a purse and a phone that had just occurred and (2) it was his experience that robbers tend to have weapons. However, the Court observed that Neuerburg articulated no other aspect of the stop that, together with Jeremiah's status as a robbery suspect, would give rise to a reasonable belief that the officers were dealing with an individual who



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may be armed and dangerous as required. Citing Neuerburg's testimony to the contrary, the Court noted that Neuerburg admitted he had no information indicating the reported robbery involved a weapon, and he acknowledged that Jeremiah was cooperative during the stop and that nothing about Jeremiah's appearance, behavior, or actions caused him to think Jeremiah had a weapon.

Thus, the Court concluded that the record here lacked in specific and articulable facts indicating that Jeremiah might be armed and dangerous, and consequently a pat-search for weapons was an impermissible intrusion under *Terry*. In reaching its conclusion, the First District specifically declined to recognize a rule that would essentially validate any pat-search of a suspected robber who is lawfully detained following a report of a fresh robbery, regardless of the particular circumstances. Accordingly, the Court reversed the jurisdiction and disposition orders and remanded the matter to the juvenile court for further proceedings.

### HOW THIS AFFECTS YOUR AGENCY

The Court's decision in *Jeremiah* creates significant concerns for officer safety. The Court took pains to distinguish prior precedents stating that robbery suspects, by the nature of the underlying suspected crime, present an officer safety issue such that a pat-search would be permissible under the Fourth Amendment, including the First District's own prior decision in *People v. Osborne*, (2009) 175 Cal. App. 4th 1052, decided in 2009. Moreover, in disagreeing with renowned Fourth Amendment commentator Professor LaFave, the Court stated that "[n]otably, many of the robbery cases cited by LaFave involved specific reports that a weapon was used in the commission of the offense. And in nearly all of the remaining cases, the courts recounted other specific circumstances in the record that reasonably justified a pat-search on officer safety grounds." The Court stated that the cases were distinguishable, in part, because the prior precedents involved cases where the officer made first hand observations of questionable activity by the detained individual, as opposed to reports thereof by other parties, as was represented to be the facts in *Jeremiah* by the Court.

The First District declared here that it rejected "a per se type of rule that automatically permits a pat-search for every lawfully detained robbery suspect." The Court said that "[i]n doing so, we do not suggest that an officer's *lack* of knowledge about the particulars of a robbery offense cannot serve to heighten his or her concerns of the unknown when encountering a robbery suspect. Thus, where an officer has neither the time nor the means to obtain additional information about a reported robbery before encountering a suspect, that circumstance can and should be taken into account, along with all other relevant circumstances, in deciding whether a pat-search was justified."



In light of the *Jeremiah* decision, peace officers must be comprehensive in detailing all facts in their reports that they relied upon to justify a pat-search of a suspect. To support a pat-search for weapons, a peace officer must provide specific and articulable facts indicating that a particular suspect may be armed and dangerous. According to *Jeremiah*, the fact that the underlying crime is robbery is only one such factor and insufficient, in and of itself, to justify a pat-search.

As always, if you wish to discuss this matter in greater detail, please feel free to contact James R. Touchstone at (714) 446-1400 or via email at [jrt@jones-mayer.com](mailto:jrt@jones-mayer.com).

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[1] 41 Cal. App. 5th 299 (1st Dist. 2019).

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