Constitutional Law—Plain View Observation of Bullet Warrants Protective Sweep of Vehicle Despite Potential Lawful Explanations—*People v. Colyar*, 996 N.E.2d 575 (Ill. 2013)

The Fourth Amendment protects the right of the people to be free from "unreasonable searches and seizures."[1] Despite this constitutional guarantee, the Supreme Court has carved out numerous exceptions to the warrant requirement, most notably, allowances for searches made in the interest of police officer safety.[2] In *People v. Colyar*,[3] the Illinois Supreme Court confronted the issue of whether a bullet observed in a vehicle during a lawful encounter was sufficient to justify a protective sweep of the vehicle despite the fact that possessing a bullet is not per se illegal.[4] The court held that a protective search for weapons was justified under the circumstances.[5]

At approximately 8:45 p.m. on June 29, 2006, two Homewood police officers observed a vehicle containing the defendant and a companion blocking the entrance to a motel parking lot.[6] As the officers approached the idling vehicle, a third passenger exited the motel and got into the backseat.[7] During a brief conversation with the occupants of the vehicle, the officers observed in plain view a large bullet inside a plastic bag in the center console.[8] Upon

1. U.S. CONST. amend. IV. The Fourth Amendment to the U.S. Constitution states, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." *Id*.; *see* ILL. CONST. art. I, § 6 (providing same protections as U.S. Constitution).

2. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (announcing *Terry* frisk, permitting protective search of suspect for weapons where reasonable suspicion exists); Katz v. United States, 389 U.S. 347, 357 (1967) (holding searches outside of judicial process per se unreasonable subject to few established exceptions); *see also Warrantless Searches and Seizures*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 46, 46 (2012) (outlining numerous exceptions to warrant requirement); *infra* note 21 (listing various exceptions to warrant requirement).

3. 996 N.E.2d 575 (Ill. 2013).

4. *See id*. at 580.

5. *See id*. at 583-84, 587 (reiterating interest in officer safety and inherent dangers of automobile encounters). The United States Supreme Court has previously recognized that traffic stops are "especially fraught with danger to police officers." Michigan v. Long, 463 U.S. 1032, 1047 (1983).

6. *See* 996 N.E.2d at 578-79. Officers routinely patrolled the motel for underage parties and drinking, although no tips or complaints had been received on this specific evening. *See id*. The lighting conditions were described by Officer Alcott as "dusk" but not yet dark. *See id*. at 579. Officers observed the defendant's car for approximately two or three minutes before approaching his vehicle. *See id*.

7. *See id*. Officers approached the vehicle only to ascertain why it was blocking the entrance. *See id*. The defendant replied that he was parked only to pick someone up from the motel, as was confirmed by the arrival of the third individual. *See id*. At this point, nothing suggested criminal activity was afoot. *See id*. (stating officers had no reason to suspect weapons or danger when approaching vehicle).

8. *See id*. "Officer Alcott described the bullet as 'the largest pistol round' he had ever seen" and later commented "it was as large as a rifle round." *Id*. Defense counsel unsuccessfully argued at oral argument that the officer initially believed the bullet was in fact a rifle round. *See* Oral Argument at 31:00, People v. Colyar,

noticing the bullet, the officers immediately ordered the occupants out of the vehicle, handcuffed them, and retrieved the plastic bag containing five rounds of live ammunition.[9] A pat-down search of the defendant revealed a sixth bullet, prompting the officers to conduct a protective sweep of the vehicle for weapons.[10] During the sweep, the officers recovered a .454 revolver under the front passenger side floor mat.[11]

As a result of the search, the officers arrested Colyar, charging him with multiple weapons offenses.[12] The trial court denied the defendant's motion to suppress the bullets ruling the seizure was valid pursuant to an investigatory stop, but granted his motion to suppress the gun, finding that requisite probable cause to arrest did not exist.[13] Upon reconsideration, the Circuit Court of Cook County ordered that all of the bullets be suppressed because the officers did not eliminate a lawful explanation for the bullets by requesting a Firearm Owner's Identification (FOID) card.[14] The Illinois Appellate Court reiterated that probable cause did not exist, while acknowledging that the State may have intended to argue the search was valid under *Terry v. Ohio*,[15] and affirmed.[16] The Illinois Supreme Court granted the State's leave to appeal, and reversed the lower court's order suppressing the evidence, holding that the State did not

996 N.E.2d 575 (Ill. 2013) (No. 111835), *available at* http://state.il.us/court/Media/On_Demand_2012.asp (arguing protective sweep unnecessary where officer believed bullet belonged to rifle).

9. *See* 996 N.E.2d at 579.

10. *See id*. Based on the six recovered bullets, the officers believed a gun might be present in the vehicle. *See id*. Officers did not ask the defendant if he possessed a valid Firearm Owner's Identification (FOID) card or had been convicted of any felonies, two questions which would have eliminated lawful explanations. *See id*. at 579-80.

11. *See id*. at 579.

12. *See id*. at 578.

13. 996 N.E.2d at 580. The trial court presumed the State's theory regarding the search of the vehicle was search incident to arrest. *See id*.; *see also* New York v. Belton, 453 U.S. 454, 460 (1981) (extending search incident to arrest to containers within passenger compartment of vehicles recently occupied by arrestee); Chimel v. California, 395 U.S. 752, 762-63 (1969) (announcing search-incident-to-arrest exception to preserve evidence and protect officers). *But see* Arizona v. Gant, 556 U.S. 332, 339 (2009) (holding search-incident-to-arrest exception inapplicable where no chance of arrestee reaching area).

14. *See* 996 N.E.2d at 580.

15. 392 U.S. 1, 27 (1968) (permitting brief detention and frisk of suspect's outer clothing for officer safety with reasonable suspicion).

16. *See* People v. Colyar, 941 N.E.2d 479, 480, 483 n.3 (Ill. App. Ct. 2010) (affirming circuit court and refusing to consider State's *Terry* argument). A search incident to arrest requires probable cause to arrest, which the court found lacking here. *See id.* at 492-93. Conversely, a protective sweep under *Michigan v. Long* requires a lower standard of reasonable suspicion, comparable to that required in conducting *Terry* frisks. Michigan v. Long, 463 U.S. 1032, 1049 (1983) (allowing search of passenger compartment where reasonable belief of weapons or danger). Although recognizing the possibility that the State intended to make this argument, the appellate court framed the issue as if search incident to arrest was the proffered theory. *See* People v. Colyar, 941 N.E.2d 479, 483 n.3 (Ill. App. Ct. 2010) (questioning whether state sought to change theory at suppression hearing to justify search on reasonable suspicion). The appellate court determined that the State waived this argument by failing to preserve it in the circuit court or on appeal. *See id*. (recognizing new theory may not be advanced on appeal in effort to overturn adverse decision).

forfeit its *Terry* argument.[17] The State's highest court held that plain-view observation of a bullet was sufficient to raise reasonable suspicion that a gun may be present in the vehicle, justifying a protective sweep of the passenger compartment.[18]

The United States Supreme Court's recent decisions have established the principle that reasonableness is the touchstone of Fourth Amendment analysis.[19] The Fourth Amendment was originally included in the Constitution to protect against the evil that were general search warrants exacted upon colonists by the English crown, and warrantless searches remained an almost foreign idea until the twentieth century.[20] Although the Fourth Amendment requires a showing of probable cause before a search warrant can be issued, the trend has shifted towards welcoming more and more exceptions to the general rule.[21] In *Terry*, the Supreme Court held that an investigatory stop is justified where the officer has reasonable suspicion based on articulable facts that criminal activity is afoot, and a frisk for weapons is justified when the officer reasonably believes the suspect is armed and dangerous.[22] The Court applied a reasonableness standard balancing an individual's privacy interest against the interest of officer safety.[23]

The Supreme Court has recognized that for the duration of a traffic stop, the occupants of the vehicle have effectively been seized in much the same way a

17. *See* 996 N.E.2d at 580-81 (granting petition and determining State had not waived reasonable suspicion argument). The Illinois Supreme Court decided the case based on defense counsel's concession at oral argument that upon seeing the bullet, officers were justified in asking the defendant out of the car and conducting a pat-down search. *See* Oral Argument at 26:13, People v. Colyar, 996 N.E.2d 575 (Ill. 2013) (No. 111835), *available at* http://state.il.us/court/Media/On_Demand_2012.asp (responding, "Yes, yes of course" when asked if officers had right to conduct pat-down search). The dissent questioned the validity of viewing contradictions so harmful to defendant's case as purposeful concessions. *See* 996 N.E.2d at 597 (Burke, J., dissenting).

18. *See* 996 N.E.2d at 585 (using officer safety as rationale for allowing search).

19. *See* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:41 (3d ed. 1996) (suggesting some warrantless searches deemed constitutional based on reasonableness); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 476 (1991) (accusing justices of abandoning warrant requirement for "chameleon-like 'reasonableness' approach" (internal citation omitted)).

20. *See* LEWIS R. KATZ ET AL., BALDWIN'S OHIO PRACTICE: CRIMINAL LAW § 2.2 (3d ed. 2012) (analyzing modern departure from historical perspective of Fourth Amendment).

21. *See* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (recognizing exception for imminent destruction of evidence); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (permitting warrantless entry into home for emergency aid); United States v. Santana, 427 U.S. 38, 42-43 (1976) (defining exception to warrant requirement for hot pursuit); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (explaining plain-view exception); *see also* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 (1985) (suggesting exceptions to warrant requirement "are neither few nor well-delineated").

22. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (introducing *Terry* stops and frisks). The Court does not require the officer to be certain that the individual is armed, but instead applies a reasonably prudent person standard, giving deference to the officer's experience and rational inferences drawn therefrom. *See id.* at 27 (setting forth standard for frisks).

23. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (recognizing narrowly drawn authority to search for weapons to ensure officer safety).

person on the street is seized during an investigatory stop.[24] Because occupants are briefly detained by virtue of the traffic stop, and police encounters involving vehicles are inherently more dangerous, the Supreme Court has held that it is reasonable for officers to order the driver and his passengers out of the vehicle as a safety precaution.[25] Although a valid *Terry* frisk requires a lawful investigatory stop as well as a reasonable belief that the suspect is armed and dangerous, the first prong of this test is necessarily met during a valid traffic stop.[26] In *Michigan v. Long*,[27] the Supreme Court extended the protective pat down of a person to a protective sweep of the passenger compartment of a vehicle where the suspect was a recent occupant and the officer reasonably believes the suspect is armed and dangerous and could use a weapon in the vehicle to harm him.[28] Whether or not handcuffing necessarily escalates an investigatory stop to an arrest depends on the totality of the circumstances, and may be a mere indication of the officer's attempt to maintain a safe and stable

24. *See* Berkemer v. McCarty, 468 U.S. 420, 438-39 (1984) (likening traffic stop to *Terry* stop rather than custodial interrogation).

25. *See* Maryland v. Wilson, 519 U.S. 408, 410 (1997) (extending *Mimms* rule to permit officer to order passengers out of vehicle during valid stop); Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977) (announcing officer's ordering driver-defendant out of car during traffic stop reasonable preservation of officer safety).

26. *See* Arizona v. Johnson, 555 U.S. 323, 327 (2009) (holding first *Terry* condition met whenever lawful for police to detain vehicle for traffic violation); 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.8(e) (3d ed. 2012) (indicating valid traffic stop plus officer apprehension may merit frisk without suspicion of criminal activity). If it is lawful for the officer to detain the vehicle and its occupants for a traffic violation, there is no additional requirement that the officer have an independent belief that an occupant of the vehicle is involved in criminal activity. *See* Arizona v. Johnson, 555 U.S. 323, 327 (2009).

27. 463 U.S. 1032 (1983). In *Long*, officers encountered a driver who appeared to be under the influence and was nearly unresponsive. *See id*. at 1036. Upon noticing a large hunting knife and suspecting more weapons may be present in the vehicle, officers conducted a protective sweep and recovered a pouch of marijuana. *See id*.

28. *See* Michigan v. Long, 463 U.S. 1032, 1049 (1983); *see also* PAUL COLTOFF ET AL., 79 C.J.S. *Searches* § 119 (2013) (indicating limited protective sweep for area where weapons may be concealed mirroring limited *Terry* pat down). The Court explained that if a suspect is dangerous, a lack of probable cause to arrest does not eliminate that danger. *See id.* at 1050. The Court's later holding in *Arizona v. Gant* did not upset this precedent, declaring only that a search incident to arrest is inapplicable where there is no chance the defendant will reach into the vehicle by virtue of the fact that the defendant has been effectively restrained or taken from the scene. *See* Arizona v. Gant, 556 U.S. 332, 339 (2009); *see also* Kimberly J. Winbush, Annotation, *Construction and Application of Supreme Court's Holding in* Arizona v. Gant, 55 A.L.R.6TH 1 (2010) (comparing searches permitted under *Long* versus those under *Gant*). Officers are justified in taking preventative measures to ensure no weapon is present in the vehicle where there exists no probable cause to arrest during a valid *Terry* stop because, even if restrained, an individual may break away to retrieve a weapon, and ultimately will be permitted to return to the vehicle where a weapon may be hidden. *See* Michigan v. Long, 463 U.S. 1032, 1051 (1983) (using *Terry* balancing test to allow protective sweep before permitting individual to reenter vehicle). Circuits are split, however, on whether an officer's reasonable belief that the suspect is armed and dangerous should be measured under an objective or subjective standard. *See* Brian Puchalsky, Note, *Weapon on Board? A Proposal to Solve the Riddle of the Nonprotective Protective Search*, 107 COLUM. L. REV. 706, 718-23 (2007) (recognizing split and advocating for modified subjective-objective approach). The Illinois Supreme Court applies an objective standard to determine whether an officer of reasonable caution under the same circumstances would be permitted to conduct the search. *See* People v. Close, 939 N.E.2d 463, 467 (Ill. 2010) (applying objective standard to judge police officer's conduct).

environment to conduct the brief detention.[29] Additionally, some courts have recognized the constitutionality of protective frisks arising from consensual encounters, noting the same interests and analysis involved in traditional on-the-street or traffic-violation stops.[30]

Reasonable suspicion does not require that the conduct or item that raises suspicion during the encounter be illegal on its own.[31] Rather, it must only be proven that the officer possessed reasonable suspicion that a weapon may have been present and his safety may have been endangered.[32] While no case has reached the Supreme Court on whether plainly viewing bullets is sufficient cause to search the passenger compartment of a vehicle, several lower courts have determined that ammunition does give rise to reasonable suspicion that a gun may be present.[33]

29. *See* United States v. Glenna, 878 F.2d 967, 972 (7th Cir. 1989) (refusing to second guess officer's decision to handcuff during investigatory stop); United States v. Kapperman, 764 F.2d 786, 790 n.4 (11th Cir. 1985) (holding handcuffs do not "*automatically* convert a *Terry* stop into de facto arrest requiring probable cause"); *see also* People v. Arnold, 914 N.E.2d 1143, 1151 (Ill. App. Ct. 2009) (applying totality-of-circumstances approach, refusing to extend allowance for handcuffs during all *Terry* stops).

30. *See* United States v. Burton, 228 F.3d 524, 528 (4th Cir. 2000) (holding intervening event necessary to evolve consensual encounter into investigatory stop meriting frisk); United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000) (declaring defendant's refusal to entertain questioning insufficient to merit protective sweep without reasonable suspicion). Officers have the ability to avoid persons they consider dangerous; however, when officers are lawfully engaged in an encounter that evolves into an investigatory stop by virtue of reasonable suspicion, a protective frisk may become appropriate. *See* 4 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a), at 843-44 (5th ed. 2012) (discussing reasonableness of protective sweep where reasonable suspicion arises during consensual encounter). Additionally, an encounter arising from an officer's community-caretaking function may progress into a dangerous encounter warranting a protective sweep. *See* United States v. King, 990 F.2d 1552, 1561 (10th Cir. 1993) (holding presence of gun justified protective sweep of vehicle approached during traffic jam). *But see* Liberal v. Estrada, 632 F.3d 1064, 1079 (9th Cir. 2011) (reasserting two prongs of *Terry* analysis, stressing reasonable suspicion of criminal activity required to stop); Commonwealth v. Narcisse, 927 N.E.2d 439, 445 (Mass. 2010) (providing officers may not develop consensual encounter into more absent reasonable suspicion); Speten v. State, 185 P.3d 25, 33 (Wyo. 2008) (rejecting "'freestanding' right to search based solely upon officer safety concerns") (internal citations omitted).

31. *See* Adams v. Williams, 407 U.S. 143, 146 (1972) (noting possibility firearm was legally carried fails to dispel officer safety concern); Terry v. Ohio, 392 U.S. 1, 22 (1968) (indicating innocent acts taken together may warrant further investigation).

32. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (allowing officer to conduct protective pat down when unusual conduct leads him to reasonably conclude danger).

33. *See* State v. Wright, 763 P.2d 49, 50 (Nev. 1988) (declaring presence of bullet can indicate gun, justifying protective sweep under *Long*); People v. Stack, 613 N.E.2d 366, 369 (Ill. App. Ct. 1993) (indicating bullets create reasonable indication of presence of gun); State v. Garcia Garcia, 821 P.2d 191, 192-93 (Ariz. Ct. App. 1991) (indicating bullet does not provide probable cause, but does provide reasonable suspicion for protective sweep); City of Willowick v. Stephenson, No. 98-L-144, 1999 WL 535280, at *3 (Ohio Ct. App. July 16, 1999) (stating single bullet in vehicle reasonably indicative of gun to prompt protective sweep); People v. Reincke, 405 N.E.2d 430, 432 (Ill. App. Ct. 1980) (stating loose ammunition in vehicle reasonably gave inference of gun). *But see* United States v. Lewis, 672 F.3d 232, 240 (3d Cir. 2012) (holding presence of firearm not per se unlawful to permit stop by itself); United States v. Ubiles, 224 F.3d 213, 217 (3d Cir. 2000) (declaring firearm does not supply reasonable suspicion for search despite inherent dangerousness of it); United States v. Lemons, 153 F. Supp. 2d 948, 960 (E.D. Wis. 2001) (declaring bullets are not contraband capable of providing probable cause void evidence of unlawful activity). It is important to note that in each of these cases,

In *People v. Colyar*, the officers' approach of the defendant's vehicle began as a valid exercise of police community caretaking, but escalated into an investigatory stop meriting a protective sweep upon plain view of the bullet.[34] Determining an argument under *Long* had not been waived by the State on appeal, the court expounded on the quintessential purpose of *Terry* jurisprudence: officer safety.[35] Upon seeing the bullet in the center console of the vehicle, the officers were justified in ordering the occupants out of the car.[36] While recognizing that handcuffing is not always permissible during investigatory stops, the court held it was appropriate under the totality of the circumstances because the officers were outnumbered, it was dusk, and the officers could reasonably suspect one of the three passengers possessed or could reach a gun within the vehicle if not secured by handcuffs.[37] Because it was dusk, the officers were outnumbered, and they had approached an idling vehicle on foot, and only briefly conversed with the defendant before noticing the bullet, the court held the officers had reasonable suspicion to pat down the defendant and perform a protective sweep of the vehicle.[38] When faced with a potentially dangerous situation, officers are not required to adopt less intrusive

other suspicious conduct was coupled with the presence of a bullet, most typically suspicious or nervous behavior of the defendant. *See* State v. Garcia Garcia, 821 P.2d 191, 193 (Ariz. 1991) (stating bullets coupled with suspicious conduct gave rise to reasonable suspicion); *see also* CHRISTIAN FISANICK, INVESTIGATORY SEARCHES, VEHICLE SEARCH LAW DESKBOOK § 5:8 (2012) (suggesting officers know buzz words to merit search including "plain view" and "furtive gesture").

34. *See* 996 N.E.2d at 578 (indicating both parties classified original incident as valid *Terry* stop). The officers did not suspect the defendant or his companions were engaged in criminal activity or consider them to be dangerous until observing the bullet. *See id*. at 582.

35. *See id*. at 580-81; Michigan v. Long, 463 U.S. 1032, 1047 (1983) (extending *Terry* protective searches to vehicles, highlighting inherent dangers of vehicle encounters); James M. Humphrey IV, Case Note, *"Everybody Out!": The Supreme Court Grants Police the Authority to Automatically Order Passengers Out of Lawfully Stopped Vehicles in* Maryland v. Wilson, 31 CREIGHTON L. REV. 997, 1015-20 (1998) (detailing trend towards greater officer deference during automobile encounters). The State preserved the *Terry* argument during pretrial suppression hearings and in post-trial motion to reconsider by relying on *Long*. *See* 996 N.E.2d at 580-81.

36. *See* 996 N.E.2d at 581-82 (indicating defense counsel conceded this point). The lawfulness of ordering the defendant out of the vehicle was not discussed at length by the majority because defense counsel conceded at oral argument that a valid *Terry* stop had occurred. *See id*.; Oral Argument at 31:00, People v. Colyar, 996 N.E.2d 575 (Ill. 2013) (No. 111835), *available at* http://state.il.us/court/Media/On_ Demand_2012.asp.

37. *See* 996 N.E.2d at 586 (applying totality of circumstances rule declared in *People v. Arnold* to permit handcuffing); *see also* People v. Arnold, 394 Ill. App. 3d 63, 72 (Ill. App. Ct. 2009) (recognizing "the determination that handcuffs or other forms of restraint were reasonable and necessary must be based on the totality of the circumstances actually confronting the officer"). Additionally, nothing in the record indicated the officers employed excessive force or an overly intrusive method of detention when handcuffing. *See* 996 N.E.2d at 586.

38. *See* 996 N.E.2d at 585 (considering vulnerable situation officers were faced with beyond scope of merely observing bullets). Several cases rely heavily on the presence of ammunition to justify a protective search. *See supra* note 33 (exemplifying reasonable inference of presence of gun stemming from presence of bullets).

means whereby they may need to sacrifice their safety.[39]

The court applied an objective standard to determine whether the officers' actions were justified under the facts as presented on the evening of the incident.[40] Recognizing that bullets are not per se contraband, the court reasoned that a person of ordinary sensibility would infer upon discovering bullets in the vehicle and on the defendant's person that a gun was likely present in the vehicle.[41] While a request for a valid FOID card may have assured the officers that any weapon inside the vehicle was carried legally, it would not necessarily dispel officers' concern for their safety.[42] Noting that probable cause to arrest did not exist, the court found even more reason to permit the protective sweep given the imminent release of the defendant to return to his vehicle if probable cause could not be satisfied.[43] Although the facts of this case are unique because the incident began as a consensual encounter rather than during a traffic stop, the court was untroubled by this scenario and explained that the observation of a bullet escalated the incident into a situation requiring heightened awareness for officer safety.[44] Thus, by

39. *See* Michigan v. Long, 463 U.S. 1032, 1052 (1983) (recognizing officer's necessarily quick decision regarding means of protecting himself); 996 N.E.2d at 585 (indicating officers forced to make quick decision after viewing bullets).

40. *See* 996 N.E.2d at 585 (applying objective standard); *see also supra* note 28 (highlighting dangers of allowing possibly dangerous suspect unrestrained, and analyzing split on objective/subjective standard).

41. *See Id.* (noting "[c]ommon sense and logic dictate that a bullet is often associated with a gun."); *supra* note 31 (indicating reasonable suspicion may arise from culmination of innocent acts); *supra* note 33 (identifying cases permitting reasonable inference of gun's presence upon observing ammunition).

42. *See* 996 N.E.2d at 587 (disagreeing with defendant's argument that officers were required to inquire about possession of FOID card); *supra* note 31 (noting even innocent acts can merit reasonable suspicion). The court declined to accept the defendant's argument that officers are required to determine whether bullets are carried illegally before executing a protective sweep. *See* 996 N.E.2d at 587. "Even assuming *arguendo* that defendant possessed a valid FOID card, that does not necessarily mean that Officer Alcott and Detective Johnson would have had no reasonable basis to suspect their safety was in danger." *Id.*

43. *See id.* (noting *Terry* focuses on officer's reasonable belief of safety in danger regardless of probable cause); *supra* note 28 (explaining decision in *Gant* did not upset *Long* rule). Presence of a bullet will not supply probable cause for an arrest. *See supra* note 33 and accompanying text (explaining bullet inadequate for probable cause, but may supply reasonable suspicion). Although officers believed upon observing the bullet that a gun was present in the vehicle, they did not have probable cause to arrest. *See* 996 N.E.2d at 580 (noting possession of bullet not per se illegal). Without probable cause to arrest, officers would have been forced to release the defendant, allowing him to return to his vehicle where he could access a weapon for use against the officers. *See id*. at 586-87 (explaining danger to officers as justification for protective sweep). Justice Thomas, in his concurrence, discussed a Hobson's choice presented by the dissent: the officer can either walk away, abandoning a valid police duty and exposing himself to danger during retreat, or pursue questioning, putting lives at risk where there is likelihood of a firearm. *See id.* at 595 (Thomas, J., concurring).

44. *See id*. at 584 (stressing key to protective sweep is officer safety); *supra* note 30 (explaining consensual encounter may evolve into situation permitting protective sweep). The record clearly demonstrates that the officers approached the defendant's vehicle only to ascertain why he was blocking the entrance to the motel. *See* 996 N.E.2d at 579. Upon seeing the live ammunition, however, officers were justified in taking control of the scene up until a time where their growing suspicion could be properly dispelled. *See id*. at 586-87 (describing progression of situation led officers to believe gun was present); *cf.* Terry v. Ohio, 392 U.S. 1, 30 (1968) (permitting protective search when nothing serves to dispel reasonable suspicion of weapon). Even if the defendant possessed a valid FOID card, that fact would not necessarily dispel fear for officer safety. *See*

applying the rationales set forth in *Terry* and *Long*, and giving credence to the officers' reasonable inferences regarding the presence of a gun and imminence of danger, the Illinois Supreme Court authorized the protective sweep of a vehicle upon the plain-view observation of a bullet even though the officers did not inquire about a valid reason for possession of the gun.[45]

The decision in *Colyar* should not be construed to conclusively, and without further consideration permit protective sweeps of vehicles carrying bullets in plain view.[46] Instead, it should be understood a to fit within a line of *Terry*-progeny cases applying a totality-of-the-circumstances approach on a case-by-case basis.[47] Given the inherent dangers surrounding automobile encounters, the decision confirms the trend towards awarding officers greater opportunity to protect themselves from otherwise dangerous situations.[48]

Justice Thomas's concurrence advocates for a broader interpretation of the holding, insisting reasonable suspicion of criminal activity is unnecessary to support a protective sweep as long as there is an interest in officer safety.[49] While this interpretation is dangerously overbroad by dismissing the requirement of reasonable suspicion for searches, it is not reflected in the

supra note 42 and accompanying text (discussing how lawful acts can merit reasonable suspicion).

45. *See* 996 N.E.2d at 586-87 (applying *Terry* and *Long*).

46. *See id*. at 592 (Thomas, J., concurring) (stating "context is key" in totality-of-circumstances consideration). In a concurring opinion, Justice Thomas carefully dispelled the blanket assumption that the observation of a bullet in a vehicle will justify a search. *See id*. (comparing situations where bullets would not supply officer with reasonable suspicion). For example, the observation of rifle shells in a pickup truck driven by a man in camouflage during hunting season will not have much effect in raising reasonable suspicion that the man is dangerous, based on the common sense assumption is that the man is going hunting. *See id*. In the present case, however, the totality of the circumstances pointed towards a more heinous purpose for the bullets, granting the officers the right to conduct a protective sweep of the vehicle for their own protection. *See id*. (finding reasonable suspicion of aggravated unlawful use of weapon). At oral argument, upon being asked whether the single bullet was enough for a *Terry* stop, the State responded: "Bullets are inextricably linked to firearms and a live pistol round has only one known purpose and upon seeing that in these circumstances it was incumbent on them to investigate." Oral Argument at 6:34, People v. Colyar, 996 N.E.2d 575 (Ill. 2013) (No. 111835), *available at* http://state.il.us/court/Media/On_Demand_2012.asp.

47. *See* 996 N.E.2d at 586-87 (following *Terry* progeny); State v. Garcia Garcia, 821 P.2d 191, 192 (Ariz. Ct. App. 1991) (suggesting cases involving bullets take totality-of-circumstances approach to determine reasonable suspicion); *see also* Terry v. Ohio, 392 U.S. 1, 29 (1968) (declining to issue bright-line rule for protective searches). The presence of the bullet aroused the officers' suspicion, and when nothing in the initial interaction served to dispel that suspicion, they were justified in conducting a protective sweep based on the totality of the circumstances. *See* 996 N.E.2d at 591-92 (considering totality of circumstances justifying protective sweep).

48. *See* Humphrey, *supra* note 35, at 1039-41 (demonstrating concern for officer safety shaped Fourth Amendment jurisprudence). Like a valid traffic stop, the present case developed from a valid police function, making the analysis and interest in officer safety the same. *See supra* note 30 (showing consensual encounter may escalate into investigatory stop).

49. *See* 996 N.E.2d at 592-93 (Thomas, J., concurring) (drawing attention to circuit split regarding consensual encounters). Adoption of Justice Thomas' approach would have hazardous implications insofar as permitting limitless searches of nearly any person in any context in which the officer can legally approach a person, escalate the encounter, and thereby articulate a belief that they may be armed even absent reasonable suspicion. *See* LAFAVE, *supra* note 30, at 839-43 (contemplating problem where officer approaches person intending to escalate encounter into investigatory stop).

majority opinion, and should not be given judicial credence.[50] The dissent misidentified the issue by exclaiming, "[a] bullet is not contraband."[51] Although a bullet is not per se illegal, common sense dictates that where there is a bullet, there is likely to be a gun nearby.[52] Fourth Amendment jurisprudence and earlier applications of *Terry* support this logical approach and shy away from a bright-line rule.[53]

Although hardly a departure from existing precedent, the decision in *Colyar* may have severe implications for lower courts analyzing police encounters presenting plain view ammunition or other cause to suspect a person is armed.[54] While not deviating from the rational approach adopted in *Terry*, the dissent rightfully points to the dangerous effect this case could have if applied too broadly.[55] Such a holding could have the negative effect of granting police too much latitude in determining on patrol whether or not a protective sweep is merited.[56] At its most extreme interpretation, this ruling could enable officers in any setting—consensual or otherwise—to conduct protective sweeps of persons and automobiles wherever they can articulate a belief that the person may be armed.[57] This could destroy the two-pronged requirement set forth in *Terry* by eliminating the requirement that the officer reasonably suspect criminal activity is afoot.[58]

In *People v. Colyar*, the Illinois Supreme Court determined the plain-view observation of a bullet in a car during a valid police encounter merited a

50. *See* 996 N.E.2d at 892 (limiting scope of holding).

51. *Id*. at 600 (Burke, J., dissenting); *see* Adams v. Williams, 407 U.S. 143, 146 (1972) (showing lawful item may nonetheless provide reasonable suspicion); *see also supra* note 42 and accompanying text (discussing how lawful acts can merit reasonable suspicion).

52. *See* 996 N.E.2d at 585 (making common-sense association between bullets and gun); *supra* notes 33 (showing logical inference of gun upon viewing bullets).

53. *See* Terry v. Ohio, 392 U.S. 1, 28 (1968) (holding "limitations will have to be developed in the concrete factual circumstances of individual cases"); *see also supra* note 46 (cautioning against blanket assumptions based solely on presence of bullet).

54. *See* Commonwealth v. Narcisse, 927 N.E.2d 439, 444-45 (Mass. 2010) (revealing problem of officers escalating consensual encounters to permit search).

55. *See* 996 N.E.2d at 601-02 (Burke, J., dissenting) (fearing majority result has broad sweeping implications). "The State's position would hold that . . . any time a bullet is in an occupied parked car, a police officer may reasonably assume that criminal activity is afoot and may, therefore, seize the occupant of the car. This is an unreasonable result that sweeps far too broadly." *Id*. at 602.

56. *See* LAFAVE, *supra* note 30, § 9.6(a), at 843-44 (discussing understandable concern where officers given too much discretion to search); *supra* note 30 (discussing thin line between consensual encounter naturally evolving into investigatory stop and one unconstitutionally created). Although police are advised to treat every person as if they are armed, this advice is not meant to permit officers to search in every case. *See* LAFAVE, *supra* note 30, § 9.6(a), at 843-44.

57. *See* LAFAVE, *supra* note 30, at 857-58 & n.79 (noting courts' refusals to second guess officer's belief of danger).

58. *See* LAFAVE, *supra* note 30, at 838-43 (stressing *Terry* requires reasonable belief of armed *and* dangerous suspect); *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968) (permitting search for weapons for officer protection where reason to believe suspect armed and dangerous); Speten v. State, 185 P.3d 25, 33 (Wyo. 2008) (requiring more than officer safety concerns to merit search).

protective sweep of the vehicle when nothing during the initial stages of the encounter served to dispel the officers' reasonable concern for safety. Although the dissent frames the case as having broad implications, it does no more than extend a common-sense approach to reasonable suspicion analysis. The court acknowledged that a reasonableness approach to protective sweeps requires paying attention to all surrounding circumstances and the context in which the facts present themselves. The court was mindful not to declare a blanket rule for ammunition observed in a vehicle, permitting future cases to be analyzed on a fact-specific, case-by-case basis.

Susan Campers