

City of Chicago
Civilian Office of Police
Accountability



Report on Advisory Letter Regarding
Log Number 1084795

March 11, 2019

I. Introduction

Pursuant to the Municipal Code of Chicago Section 2-78-120(m), the Chief Administrator of the Civilian Office of Police Accountability (COPA) is empowered and has the authority to make recommendations to the Superintendent of the Chicago Police Department (the Department) concerning Department policies. To fulfill the mission, as outlined in Section 4.4.1 of COPA's Rules and Regulations (effective September 15, 2017), the Chief Administrator may issue an Advisory Letter to the Superintendent if an investigation uncovered a problem that hinders the effectiveness of Department operations and programs or if the investigation has identified a verifiable potential liability or risk that warrants attention by the Department.

On December 21, 2017, COPA sent an Advisory Letter that included two recommendations relating to the Department's policies and procedures regarding protective pat downs during investigatory stops as they related to its investigation into Log Number 1084795.¹ The Department requested an additional 30 days to fully respond to COPA's recommendations, which COPA granted on February 14, 2018.² On February 21, 2018, the Department provided COPA with its initial response to COPA's recommendations, in which it again requested an additional 30 days to fully respond.³ COPA received the Department's final response on March 23, 2018.⁴ This report summarizes COPA's policy recommendations regarding conducting protective pat downs during investigatory stops, the Department's initial and final response to those recommendations, and the status of COPA's recommendations. We note that the Department has not yet responded to COPA's second recommendation and that herein we have invited them to do so.

II. COPA's Recommendations

In the incident COPA investigated under Log Number 1084795, the involved member stated he performed a protective pat down due to officer safety concerns.

¹ See Appendix A for a redacted copy of COPA's Advisory Letter.

² See Appendix B for a copy of COPA's letter granting the Department's extension request.

³ See Appendix C for a copy of the Department's initial response to COPA's Advisory Letter.

⁴ See Appendix D for a copy of the Department's final response to COPA's Advisory Letter.

In its Advisory Letter, COPA argued that the Department's language in Special Order S04-13-09(III)(C)(2) violates the Fourth Amendment to the United States Constitution to the extent it permits sworn members to perform a "Protective Pat Down" simply because the officer "reasonably suspects that the person presents a danger of attack to the sworn member or others in the area." COPA further argued that the language in the Special Order ignores that the Fourth Amendment to the United States Constitution requires that an officer reasonably believe that an individual is "armed and dangerous" before performing a protective pat down and that the exclusive purpose of performing a protective pat down during an investigatory stop is to search for weapons.

COPA recognized that Special Order S04-13-09(III)(C)(2) somewhat tracks the language of Illinois statute, 725 ILCS 5/108-1.01, which provides that "When a peace officer has stopped a person for temporary questioning pursuant to Section 107-14 of this Code and reasonably suspects that he or another is in danger of attack, he may search the person for weapons."

However, COPA noted that Special Order S04-13-09(III)(C)(2) differs from 725 ILCS 5/108-1.01 by using the disjunctive "or" to separate "armed and dangerous" from "danger of attack" which incorrectly suggests that officers may perform a protective pat down for two distinct reasons: (1) if they believe the person is armed and dangerous or (2) if they believe the individual poses a danger of attack.

Therefore, COPA recommended that the Department modify its written directives, specifically Special Order S04-13-09(III)(C)(2), to ensure that it complies with the constitutional standard provided in *Terry*.⁵ Additionally, COPA recommended that the Department modify Special Order S04-22-04(IV)(A), which appears to permit officers to conduct a protective pat down for contraband, to ensure compliance with the *Terry* constitutional standard.

III. The Department's Response

In its initial response to COPA's recommendations regarding Log Number 1084795, the Department disagreed with COPA's assertion that the Department's Special Order S04-

⁵ *Terry v. Ohio*, 392 U.S. 1, 27 (1967).

13-09(III)(C)(2) does not comport with the constitutional standard. Further, the Department noted that “the language at issue in S04-13-09 was vetted as part of the 2015 City/ACLU Settlement Agreement.” However, the Department agreed to review its order “in light of the issues raised in COPA’s Advisory Letter.”

The Department stated that it would review the language at issue with the City’s Department of Law and would provide COPA a full response to COPA’s recommendations within the next 30 days.

In their final response, the Department set forth that after review, Special Order S04-13-03(III)(C)(2) comports with the Fourth Amendment, Illinois statutory law, and *Terry v. Ohio*. Thus, the Department would not revise the order as COPA recommended. In its response, the Department cited case law that, in the Department’s view, supports its stance that Special Order S04-13-09(III)(C)(2) is neither misleading nor unconstitutional. The Department maintained that a protective pat down performed on the basis of reasonable articulable suspicion “that the subject presented a danger of attack or was armed and dangerous...is justified and in compliance with both United States constitutional law and Illinois state law.”⁶ Additionally, the Department noted that the Special Order at issue was implemented only after receiving input as part of the 2015 City/ACLU Settlement Agreement.

IV. Recommendation Status

Based on the Department’s response to its Advisory Letter, COPA assessed the Department’s response to the recommendations contained therein. COPA classifies the status of recommendations into three categories:

- **Agrees:** The Department agrees with COPA’s policy recommendation and indicated that they have taken steps to implement or plan to implement such recommendation in full.
- **Agrees In Part:** The Department partially agrees with COPA’s policy recommendation and may or may not have indicated that they have taken steps to implement such recommendation.

⁶ See Appendix D.

- **Does Not Agree:** The Department does not agree with COPA's policy recommendation and has not taken steps to implement such recommendation.
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Recommendation 1: *Modify Special Order S04-13-09(III)(C)(2), to ensure that it complies with the constitutional standard provided in Terry.*

Status: **Does Not Agree.** In its March 23, 2018 response, the Department stated "S04-13-09(III)(C)(2) comports with Fourth Amendment law, and...does not cause confusion or misunderstanding with respect to the appropriate legal standard by which officer's [sic] shall conduct protective pat downs during *Terry* stops." The Department also reiterated that this language had been implemented, "only after receiving input from Judge Arlander Keys..., his police practices expert and the ACLU." While COPA commends the Department for soliciting expert legal opinion in crafting its directives, COPA notes that soliciting such input does not preclude the Department from making further revisions to improve clarity. The Department has an ongoing obligation to review, and as appropriate, revise its policies to align the Department with best practices.

COPA maintains officers must have reasonable cause to believe a person is armed **and** dangerous to conduct a protective pat down for weapons, and merely believing that a person is a threat of attack, alone, is insufficient to justify a protective pat down under the Fourth Amendment to the United States Constitution. As the Department expressly recognizes, a protective pat down is not a general exploratory search for evidence of criminal activity; rather the only legitimate purpose of a protective pat down is to search for weapons which the officer has reason to believe are in the possession of the individual. An officer who does not reasonably believe a person is armed has no legitimate basis to perform the protective pat

down because there is no reasonable basis to believe a weapon will be recovered.

Nonetheless, COPA recognizes that the Department believes case law and Illinois statutory law, 725 ILCS 5/108-1.01, support its position, and the issue has yet to be expressly resolved by the courts. COPA notes, however, that the Department may revise its policy at any time to reflect best practices and Department data reflects that Department members rarely recover weapons when conducting protective pat downs.

Recommendation 2: *Modify Special Order S04-22-04(IV)(A), which appears to explicitly require officers to conduct protective pat downs for contraband, to ensure compliance with the Terry constitutional standard. This section states:*

“IV. PROCEDURES

Department members issuing an ANOV citation to MCC violators using the Mobile ANOV Processing Unit pilot program will:

A. perform a *protective pat down for weapons/contraband* and escort the violator without the use of restraining devices to the Mobile ANOV Processing Unit.” (*Emphasis added.*)

Status: **Does Not Agree.** The Department did not specifically address COPA’s recommendation relating to Special Order S04-22-04(IV)(A).

In its response, the Department set forth its argument for disagreeing with COPA’s recommendation with respect to a different Special Order—S04-13-09(III)(C)(2)—but did not

provide similar analysis with respect to S04-22-04(IV)(A). Therefore, the response does not include, “a description of the actions the Superintendent has taken or is planning to take, if any, with respect to the issues raised” nor a reason for declining to take such action, as set forth in the Municipal Code of Chicago Section 2-78-130(b).

Special Order S04-22-04(IV)(A) is clearly inconsistent with Special Order S04-13-09 which expressly provides that the purpose of a protective pat down is to recover weapons. Special Order S04-13-09 expressly provides that a protective pat down is not a general exploratory search for evidence of criminal activity. COPA believes the Department must remove the reference to “contraband” contained in Special Order S04-04(IV)(A) to comply with the Fourth Amendment to the United States Constitution.

If the Department inadvertently failed to respond to COPA’s recommendation with respect to Order S04-22-04(IV)(A) it may issue a supplemental response.

Appendix A



Eddie T. Johnson
Superintendent
Chicago Police Department
3510 S. Michigan Avenue
Chicago, Illinois 60653

December 21, 2017

Re: Advisory Letter Regarding Log Number 1084795

Dear Superintendent Johnson:

Pursuant to the Municipal Code of Chicago Section 2-78-130, the Chief Administrator of the Civilian Office of Police Accountability (COPA) is empowered and has a duty to make recommendations to the Superintendent of the Chicago Police Department (the Department). To fulfill the mission, as outlined in Section 4.4.1 of COPA's Rules and Regulations (effective September 15, 2017), the Chief Administrator may issue an Advisory Letter to the Superintendent if an investigation uncovered a problem that hinders the effectiveness of Department operations and programs or if the investigation has identified a verifiable potential liability or risk that warrants attention by the Department.

Unconstitutional Protective Pat Downs

In Log Number 1084785 an officer performed a protective pat down of an individual during an investigatory (*Terry*) stop. The officer stated he performed the protective pat down for officer safety purposes because the individual placed himself in a bladed stance and was loud and "combative." [REDACTED]

[REDACTED]

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[REDACTED]

Special Order S04-13-09(c)(2) provides in relevant part, “For a Protective Pat Down, a sworn member must possess specific and articulable facts, combined with rational inferences from these facts, that the suspect is armed and dangerous or reasonably suspects that the person presents a danger of attack to the sworn member or others in the area.” Special Order S04-13-09(c)(2) violates the Fourth Amendment to the United States Constitution to the extent it permits Sworn Members to perform a “Protective Pat Down” simply because the officer “reasonably suspects that the person presents a danger of attack to the sworn member or others in the area.” This superfluous language ignores that the Fourth Amendment to the United States requires that an officer reasonably believe that an individual is **“armed and dangerous”** before performing a protective pat down and that the exclusive purpose of performing a protective pat down during an investigatory stop is to search for weapons. *See Terry v. Ohio*, 392 U.S. 1, 27 (1967) (“There must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”) (emphasis added).

COPA recognizes that Special Order S04-13-09(c)(2) somewhat tracks the language of an Illinois statute, 725 ILCS 5/108-1.01, which provides in relevant part that “When a peace officer has stopped a person for temporary questioning pursuant to Section 107-14 of this Code and reasonably suspects that he or another is in *danger of attack*, he may search the person for weapons.” However, Illinois courts have consistently interpreted 725 ILCS 5/108-1.01 to adhere to the United States Supreme Court’s Fourth Amendment jurisprudence which requires that an officer believe the individual is **armed** and dangerous before performing a pat down during an investigatory stop. *See, e.g., People v. Walker*, 2013 IL App (4th) 120118. Any other interpretation of 725 ILCS 5/108-1.01 would be unconstitutional and completely disconnect the justification of the protective pat down from the purpose of the protective pat down: to search for **weapons**. Importantly, Special Order S04-13-09(c)(2)

differs from 725 ILCS 5/108-1.01 by using the disjunctive “or” to separate “armed and dangerous” from “danger of attack” which incorrectly suggests that officers may perform a protective pat down for two distinct reasons: (1) if they believe the person is armed and dangerous or (2) if they believe the individual poses a danger of attack.

COPA understands the importance of ensuring the safety of Department members, but this cannot justify unconstitutional protective pat downs. “No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Terry*, 392 U.S. at 9 (citing *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 251 (1891)). When an agent of the government places his or her hands on a citizen without legal justification, trust is shattered and the involved citizen’s dignity is destroyed.

Furthermore, compliance with the United States Constitution will not impact the safety of Department members. The United States Constitution permits officers in appropriate situations to take protective measures during a lawful investigatory stop including handcuffing a suspect and/or placing a suspect in a police vehicle for officer safety purposes.¹ An officer may also arrest an individual when he or she has probable cause to believe a person “without lawful authority, . . . knowingly engages in conduct which places another in reasonable apprehension of receiving a battery” and then search that person incident to arrest.” 720 ILCS 5/12-1.

Recommendations

Therefore, COPA recommends that the Department modify its written directives, specifically Special Order S04-13-09(c)(2), to ensure that it complies with the constitutional standard provided in *Terry*. In addition, Special Order S04-22-04(IV)(A) appears to permit officers to conduct a protective pat down for contraband. This does not comply with *Terry*, either, and we recommend that the Department modify that directive to ensure compliance with the constitutional standard.

¹ COPA notes that officers should not resort to handcuffing a suspect in the typical investigatory stop because “handcuffing is the type of action that may convert an investigatory stop into an arrest because it heightens the degree of intrusion.” *People v. Johnson*, 408 Ill. App. 3d 107, 113 (2d Dist. 2010).

Thank you for your time and consideration of these issues. We respectfully request a response to these recommendations within 60 days. COPA will publish this letter and the Department's response, if any, on the COPA website after the 60-day response time has passed.

Respectfully,

A handwritten signature in black ink that reads "Patricia Banks". The script is cursive and fluid.

Patricia Banks
Interim Chief Administrator

Appendix B



February 16, 2018

Eddie T. Johnson
Superintendent of Police
Chicago Police Department
3510 S. Michigan Avenue
Chicago, Illinois 60653

**Re: Advisory Letters Regarding Log Numbers: 1086022, 1084795, and
1081642 Request 30-day Extension to Review and Response
Period (MCC 2-78-130)**

Dear Superintendent Johnson,

Receipt of your letter dated February 14, 2018, requesting a 30-day extension to review, is hereby acknowledged. COPA has no objections to your request for an additional 30 days to review policies of use of force, body worn cameras, recruit training, and protective pat-downs regarding log numbers 1086022, 1084795, and 1081642.

Patricia Banks
Interim Chief Administrator
Civilian Office of Police Accountability

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Appendix C



Rahm Emanuel
Mayor

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Eddie T. Johnson
Superintendent of Police

February 21, 2018

Patricia Banks
Interim Chief Administrator
Civilian Office of Police Accountability
1615 West Chicago Avenue, 4th Floor
Chicago, Illinois 60622

Re: Advisory Letter Regarding Log Number 1084795

Dear Chief Administrator:

The Chicago Police Department (CPD) received an Advisory Letter regarding Log Number 1084795. With respect to Log Number 1084795, COPA states "an officer performed a protective pat down of an individual during an investigatory (Terry) stop. The officer stated he performed the protective pat down for officer safety purposes because the individual placed himself in a bladed stance and was loud and 'combative.'" COPA indicated the officer lacked legal grounds to perform the protective pat-down, but did not impose discipline under the circumstances. Specifically, COPA stated that it "found it untenable to impose discipline against the officer because of the misleading language contained in Chicago Police Department Special Order S04-13-09(c)(2)." CPD respectfully disagrees with COPA's judgment in this instance, but is willing to review its Special Orders in light of the issues raised in COPA's Advisory Letter.

In accordance with the response and reporting provisions of Municipal Code of Chicago Section 2-78-130(b), the Superintendent reports that CPD is in the process of consulting with the City's Department of Law, which is currently administering the agreement, *Investigatory Stop and Protective Pat-Down Settlement Agreement (2015)*, between the Chicago Police Department, the City of Chicago, and the American Civil Liberties Union of Illinois ("ACLU"), and will provide within the next 30 days CPD's response to COPA's request that CPD modify Special Orders S04-13-09(c)(2) and S04-22-04(IV)(A).

In the interim, CPD requests that COPA defer publicly posting COPA's December 21, 2017 Advisory Letter and this response until the City and CPD provide a complete response to the Recommendations set forth in the Advisory Letter. CPD notes that there is no language in the City's ordinance that (a) sets a timetable for posting an Advisory Letter or (b) prohibits COPA from deferring the posting of the Advisory Letter and any responses thereto. Moreover, COPA's rules and regulations do not state any timing requirements for posting Advisory Letters.

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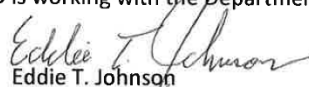
Eddie T. Johnson
Superintendent of Police

Without limiting CPD's ability to accept or reject COPA's Recommendations, CPD states that the language at issue in S04-13-09 was vetted as part of the 2015 City/ACLU Settlement Agreement. CPD implemented the new written policy regarding investigatory stops and protective pat downs only after receiving input from Judge Arlander Keys (the parties' independent consultant), his police practices expert and the ACLU. Specifically, S04-13-09(II)(B) defines a protective pat down as "[a] limited search during an Investigatory Stop in which the sworn member conducts a pat down of the outer clothing of a person for weapons for the protection of the sworn member or others in the area." The Order later adds "[f]or a Protective Pat Down, a sworn member must possess specific and articulable facts, combined with rational inferences from these facts, that the suspect is armed and dangerous or reasonably suspects that the person presents a danger of attack to the sworn member or others in the area." S04-13-09(II)(C)(2). S04-13-09 is modeled after *Terry* and 725 ILCS 5/108-1.01.

Terry authorizes "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* "The sole justification of the search . . . is [protecting] the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29. See also *People v. Moss*, 217 Ill.2d 511 (2005), *People v. Galvin*, 127 Ill.2d 153 (1989).

Similarly, Section 108-1.01 provides, "When a peace officer has stopped a person for temporary questioning pursuant to Section 107-14 of this Code and reasonably suspects that he or another is in danger of attack, he may search the person for weapon...." Section 108-1.01 "codified" *Terry*, and the language of the statute has not been found unconstitutional by any court.

CPD's policy, and in particular the provisions related to protective pat downs, were drafted to comport with the Fourth Amendment, Illinois statutory law and *Terry v. Ohio* and its progeny. Notwithstanding CPD's position that S04-13-09 is not misleading or unconstitutional, CPD is working with the Department of Law to assess and fully respond to the Recommendations.


Eddie T. Johnson
Superintendent of Police
Chicago Police Department

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Appendix D



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Eddie T. Johnson
Superintendent of Police

March 23, 2018

Patricia Banks
Interim Chief Administrator
Civilian Office of Police Accountability (COPA)
1615 West Chicago Avenue, 4th Floor
Chicago, Illinois 60622

Re: Advisory Letter Regarding Log Number 1084795

Dear Chief Administrator:

The Chicago Police Department (CPD) received an Advisory Letter, dated December 21, 2017, from COPA regarding Log Number 1084795. CPD provided a preliminary response on February 21, 2018, requesting until March 23, 2018, to review and comment further on COPA's recommendations. COPA granted CPD's request. Upon further review and research, CPD respectfully disagrees with COPA's recommendations and will not revise S04-13-09(III)(C)(2).

In Log Number 1084795, an officer performed a protective pat down of an individual during an investigatory (Terry) stop. The officer stated he performed the protective pat down for officer safety purposes because the individual placed himself in a bladed stance and was loud and "combative." COPA indicated the officer lacked legal grounds to perform the protective pat down, although COPA reached a final determination that the allegation of an improper pat down was "unfounded" because CPD's orders, as written, do not allow for a sustained finding. Accordingly, COPA recommended that CPD modify its written directives, specially Special Order S04-13-09(III)(C)(2), to ensure that it complies with the constitutional standard established in *Terry v. Ohio*, 392 U.S. 1 (1967). CPD recognizes and appreciates that COPA shares its concern for constitutional, effective policing; however, after careful consideration and review, CPD's Special Order S04-13-09(III)(C)(2) comports with the Fourth Amendment, Illinois statutory law, and *Terry v. Ohio* and its progeny.

I. Relevant Case Law, Statute and Department Order

Terry authorizes "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent



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Superintendent of Police

man in the circumstances would be warranted in the belief that his safety or that of others was in danger. [citations omitted] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27. "The sole justification of the search . . . is [protecting] the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29.

725 ILCS 5/108-1.01 provides, "[w]hen a peace officer has stopped a person for temporary questioning pursuant to Section 107-14 of this Code and reasonably suspects that he or another is in danger of attack, he may search the person for weapons...."

CPD's Investigatory Stop System Special Order S04-13-09 in Section (II)(B), defines a protective pat down as "[a] limited search during an Investigatory Stop in which the sworn member conducts a pat down of the outer clothing of a person for weapons for the protection of the sworn member or others in the area." S04-13-09(II)(C)(2) adds "[f]or a Protective Pat Down, a sworn member must possess specific and articulable facts, combined with rational inferences from these facts, that the suspect is armed and dangerous or reasonably suspects that the person presents a danger of attack to the sworn member or others in the area." Officers are required to complete an investigatory stop report (ISR) to ensure, among other things, that sworn members document the facts and circumstances of a Protective Pat Down or other search, including a statement of the facts establishing Reasonable Articulable Suspicion to pat down an individual for potential weapons. S04-13-09(III)(D)(1)(c).

II. CPD's Assessment

A. Section 108–1.01 codified the protective pat down standard in set forth in *Terry*.

Section 108-1.01 of the Code of Criminal Procedure, together with Section 5/107-14, codifies the "*Terry*" principles. *People v. Sorenson*, 196 Ill. 2d 425, 433 (2001); see also *People v. Claypool*, 2014 IL App (3d) 120468 ¶ 17; *People v. Morgan*, 138 Ill. App. 3d 99, 484 N.E.2d 1292 (4th Dist. 1985); *People v. Surles*, 2011 IL App (1st) 100068, ¶ 35. Importantly, Section 108–1.01 has never been overturned or criticized and remains good law today.

B. COPA's criticism of S04-13-09 is misplaced.

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Superintendent of Police

COPA asserts that the Fourth Amendment “requires that an officer reasonably believe that an individual is armed and dangerous before performing a pat-down during an investigatory stop” citing *People v. Walker*, 2013 IL App (4th) 120118. COPA then argues “[i]mportantly, Special Order S04-13-09(c)(2) [sic] differs from 725 ILCS 5/108-1.01 by using the disjunctive ‘or’ to separate ‘armed and dangerous’ from ‘danger of attack’ which incorrectly suggests that officers may perform a protective pat down for two distinct reasons: (1) if they believe the person is armed and dangerous or (2) if they believe the individual poses a danger of attack.”

However, *Walker*, the primary case relied upon by COPA, also applies an analysis similar to CPD's special order. As shown below, *Walker* uses the disjunctive “or” to separate the terms “armed and dangerous” and presents a danger:

Terry permits a protective search only when the suspect “is armed and *presently* dangerous.” (Emphasis added.) *Terry*, 392 U.S. at 24, 88 S.Ct. 1868. **Here, the officers had no reason to believe defendant was armed or presently dangerous at the time of the search.** This stop was made in midday on a street with busy traffic. Defendant, a 90-pound woman, was in handcuffs and seated on the bumper of her car, and three police officers were on the scene. The purse was behind her on the trunk. According to Sergeant Rein's uncontroverted testimony, defendant was unable to reach the purse at that time and she made no attempts to do so. In the context of this *Terry* stop, the officers were entitled to ensure their own safety, even in the absence of reason to believe defendant was armed and dangerous, by preventing defendant from accessing her purse during the encounter. They properly took that precaution. Thereafter, the interest of officer safety had been satisfied and Rath's search of the purse, which consisted of opening the purse and inspecting its contents, could have done nothing to further it. See *People v. Brown*, 2013 IL App (1st) 083158, ¶¶ 18, 27, 371 Ill.Dec. 524, 990 N.E.2d 712 (“Once defendant had been handcuffed, he could not reach the items in his jacket pocket.” This fact “eliminated the need to frisk him for officer safety.”). **While the *Terry* stop was constitutionally authorized, the *Terry* search was not, because it was objectively unreasonable for the officers to believe they were in danger or defendant was armed with a weapon.**

People v. Walker, 2013 IL App (4th) 120118, ¶ 47. [emphasis added.]

The logic of COPA's “disjunctive” argument is unsupported by the *Walker* court's analysis and application of the law to the facts of the case. Moreover, the facts in *Walker* fail to substantiate that the defendant was either “armed and dangerous” or presented a danger of attack to the officers at the time of the protective pat down of defendant's purse. Critical to the court's assessment was the fact that the safety interest of the officers was satisfied when the defendant was handcuffed and unable to reach her purse at the time of the search. Therefore, COPA's



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reliance on *Walker* fails to warrant a conclusion that the language of the special order violates the Fourth Amendment.

C. Special Order S04-13-09 comports with the Fourth Amendment, Illinois statutory law and *Terry v. Ohio* and its progeny.

S04-13-09(II)(B) defines a protective pat down as “[a] limited search during an Investigatory Stop in which the sworn member conducts a pat down of the outer clothing of a person for weapons for the protection of the sworn member or others in the area.” The Order further qualifies “[f]or a Protective Pat Down, a sworn member must possess specific and articulable facts, combined with rational inferences from these facts, that the suspect is armed and dangerous or reasonably suspects that the person presents a danger of attack to the sworn member or others in the area.” S04-13-09(II)(C)(2). S04-13-09 is modeled after *Terry* and 725 ILCS 5/108-1.01.

Prior to issuance of S04-13-09, the special order was vetted as part of the 2015 City/ACLU Settlement Agreement. CPD implemented the new written policy regarding investigatory stops and protective pat downs only after receiving input from Judge Arlander Keys (the parties’ independent consultant), his police practices expert and the ACLU.

The policy, and in particular the provisions related to protective pat downs, comport with the Fourth Amendment, Illinois statutory law and *Terry v. Ohio* and its progeny. In support of this contention, we have identified a sampling of cases where officers had reasonable suspicion that the objective, articulable facts supported that the subject presented a danger of attack to the officer sufficient to justify the protective pat down.

- *People v. McGowan*, 69 Ill. 2d 73 (1977). The supreme court held that where the officer was aware that burglary was common in the neighborhood, it was reasonable for the officer to suspect that he was “in danger of attack” as the basis for the search for weapons because “it is not unlikely that a person engaged in stealing would arm himself against the possibility that another person would appear unexpectedly and object strenuously.” *Id.* at 79. The supreme court predicated its decision on the *Terry* standard, stating:

Thus, the issues may be restated as follows: (1) Whether it was reasonable for Officer Fulton to infer that defendant had committed or was about to commit a burglary; and, if so, (2) whether it was reasonable for Officer Fulton to suspect that he was *in danger of attack* upon stopping the defendant. *Id.* at 77. [Emphasis added.]

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- *People v. Claypool*, 2014 IL App (3d) 120468. The court held that the police officer had reasonable suspicion to conduct a frisk of defendant for weapons during an investigatory stop; the officer had observed the defendant attempting to gain access to a vehicle in early morning hours in an area where burglaries were not uncommon, and the officer testified that his safety was in danger—"it would not be unexpected to find people who break into cars having some burglary tools or screw drivers that could be used as a weapon," and it was not unreasonable to suspect that a burglar could have a knife or firearm concealed on his person. The court noted:

The only questions before us are: (1) whether it was reasonable for Benoit to infer that defendant had committed or was about to commit a burglary; and, if so, (2) whether it was reasonable for Benoit to suspect that *he was in danger of attack* upon stopping defendant. *People v. Claypool*, 2014 IL App (3d) 120468, ¶ 17. [Emphasis added.]

- *People v. Austin*, 365 Ill. App. 3d 496 (4th Dist. 2006). The court held that the pat down search conducted by the officer for safety reasons was justified when he knew defendant's history of prior arrests for unlawful use of a weapon and his involvement in cocaine distribution. The officer testified that: people working in the narcotics trade often carry concealed weapons; the defendant was "a large individual," and outweighed him "by several pounds." *Id.* at 506. The court indicated:

Under the totality of the circumstances presented here, we find Detective Meyer was warranted in his belief that a pat down of defendant was necessary for officer safety. Meyer did not need to be absolutely certain that defendant was armed to conduct a frisk under the *Terry* exception. Instead, Meyer knew Young could be transporting drugs, defendant had engaged in drug dealing, and those involved in the drug trade are known to carry weapons. Although "the mere fact that an officer believes drug dealers carry weapons or narcotic arrests involve weapons is insufficient alone to support reasonable suspicion to justify a *Terry* frisk" (*People v. Rivera*, 272 Ill. App. 3d 502, 509, 209 650 N.E.2d 1084, 1090 (1995)), Meyer was aware of additional facts justifying the frisk. When Meyer realized he had stopped defendant, he was aware defendant had prior arrests for weapons offenses and had been involved in distributing cocaine. Considering defendant's size, prior weapons history, and participation in dealing narcotics, a reasonably prudent person under the circumstances would be warranted in the belief that his safety was in danger. See *People v. Freeman*, 219 Ill. App. 3d 240, 245, 579 N.E.2d 576, 579 (3rd Dist. 1991) Thus, we find the pat-down search of defendant was proper here. *Id.* at 506-07.

- *People v. Freeman*, 219 Ill. App. 3d 240 (3rd Dist. 1991). "Defendant seems to suggest that there was no reasonable justification for Ulrich to fear for his safety since defendant had not

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displayed a weapon to the complaining witness and Ulrich had back-up assistance from another officer, Officer Needham, before Ulrich conducted the pat-down. These facts do not undermine the fact that Ulrich had knowledge through official police channels that defendant had a reputation for carrying weapons. Such knowledge, coupled with the attending circumstances of the evening in question, was sufficient to place a reasonably prudent person in fear for his personal safety and justify a protective frisk.” *Id.* at 579.

- *People v. DeLuna*, 334 Ill. App. 3d 1 (1st Dist. 2002). The court noted that an officer might fear for his safety even if he only suspected that the defendant possessed drugs, and not a weapon, after seeing defendant place of package of what he suspected to be drugs, in his waistband. The court did not mention Section 108-1.01, but applied the same standard and held that the search was proper:

Furthermore, before touching defendant, officer Lewellen asked him who he was and how he arrived at the apartment. Officer Lewellen testified that defendant responded he took public transportation. Because this was in direct contradiction to what he had just witnessed, officer Lewellen had further reason to infer that defendant was lying and was involved in some kind of dangerous criminal activity, putting his safety at risk. Moreover, officer Lewellen testified that he saw a “bulge” under defendant's shirt. Further indicative that officer Lewellen's search was for protective purposes rather than to find drugs is his testimony that after discovering the brick package during the search and removing it from defendant's waistband, he continued to pat defendant down. He testified that the first object he found on defendant's person was the package, and that upon continuing the pat-down, he found a pager and a set of keys. The trial court could well have reasoned that officer Lewellen was not just searching for drugs, since he continued and completed the pat-down search after finding and removing the package. Officer Lewellen testified that before touching defendant, he had seen him hide what he believed, through his experience, to be a kilo of suspect cocaine in his waistband. This, however, along with his testimony that he did not see a gun and that the crime of possession of a controlled substance with intent to deliver may not necessarily indicate the presence of a gun, does not nullify officer Lewellen's testimony that he feared for his safety based on the circumstances. See *Sorenson*, 196 Ill.2d at 434 (“[t]he fact that the officer may have also believed that the defendant possessed illegal drugs did not negate the officer's concern for his safety”). 334 Ill. App. 3d at 12.

- *People v. Sorenson*, 196 Ill. 2d 425 (2001). The supreme court held that officer was justified in telling a defendant to remove his hiking boots during a *Terry* stop where officer feared for his safety. *Id.* at 12. The frisk of defendant was proper, because the evidence showed that the officer feared for his safety based on the combination of all the factors that confronted him at the time of the stop. Those factors were: (1) the location of the stop, a dark road; (2) the

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fact that the officer was alone facing three persons in a vehicle, which had come from a known drug house; and (3) the fact that, in the officer's experience, persons involved with illegal drugs were known to carry weapons. The defendant argued that there was not a sufficient nexus between illegal drug activity and a reasonable belief that a suspect is armed and dangerous. The supreme court disagreed:

More importantly, however, Officer Cordery, unlike the officers in *Flowers* and *Galvin*, did not testify that he did not believe the defendant was armed. Instead, the officer testified that he felt particularly threatened at the time he made the traffic stop. The officer noted that his concern for his safety arose out of the location of the stop—that it was a dark road, that he was alone facing three persons in a vehicle who had come from a known drug house, and that, in his experience, persons involved with illegal drugs are known to carry weapons. In contrast, in both *Flowers* and *Galvin*, multiple officers were present at the time of the frisks, and, therefore, the officers did not have the same concern for their safety as did Officer Cordery, who was alone on a dark road. The possible sources of harm to officers is increased by the presence of passengers, and this is particularly true where an officer is alone in conducting a traffic stop. See *Gonzalez*, 184 Ill. 2d at 416, 420, 704 N.E.2d 375.

Additionally, the record did not show that Officer Cordery had a routine policy of frisking persons stopped for investigatory questioning, as did the officer in *Flowers*. Instead, the evidence showed that the officer feared for his safety in this case based on the combination of all the factors that confronted him at the time of the stop. We find no merit to the defendant's contention that the officer's reliance on the cited factors for the search amounted to a policy of searching every person pursuant to a routine traffic stop. *Id.* at 437-38.

The *Sorenson* court did not specifically mention the words “danger of attack,” but indicated that the *Terry* principles were codified in the Code of Criminal Procedure and cited to 725 ILCS 5/107-14, 108-1.01, stating:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909, 88 S. Ct. at 1883. In determining whether the officer acted reasonably in such circumstances, due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909, 88 S. Ct. at 1883. The *Terry* principles have now been codified in our Code of Criminal Procedure of 1963. See 725 ILCS 5/107-14, 108-1.01. *Id.* at 433.



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In contrast to the cases above, in which Illinois courts upheld protective pat downs in circumstances where the facts supported that the officers were confronted with a danger of attack sufficient to warrant that their safety or the safety of others was in danger, our survey of Illinois case law identified some common themes in cases where Illinois courts held officers did not have a reasonable basis to conduct a pat down. For example, improper pat downs have been found when the testimony of the officer indicates that he or she frisked the subject, not because of any particularized suspicion that subject was armed, but simply because it was his or her routine to frisk persons stopped for investigatory questioning. *People v. Flowers*, 179 Ill. 2d 257, 259 (1997). In addition, pat downs have been ruled unlawful when the officer fails to identify specific, articulable facts that the subject was armed and dangerous or presented a danger to the safety of the officer or others. *People v. Galvin*, 127 Ill. 2d 153, 168-69 (1989); *In re F.R.*, 209 Ill. App. 3d 274 (1st Dist. 1991). Additionally, when the facts amount to nothing more than a subjective fear, the pat down was deemed illegal. *In re Mario T.*, 376 Ill. App. 3d 468 (1st Dist. 2007). Finally, when no grounds existed that would justify the officer's belief that he was likely to be attacked by defendant because there was no indication that defendant was likely to attack the officer, the pat down was held unconstitutional. *People v. Morgan*, 138 Ill. App. 3d 99, 484 N.E.2d 1292 (4th Dist. 1985)(holding that the trial court erred in denying defendant's motion to suppress, in part, because the court did not believe that a bag of marijuana could produce a bulge in defendant's jacket resembling a weapon and the officer had already dispelled the reasonable suspicion for the stop); see also *People v. Walker*, 2013 IL App (4th) 120118. These themes are not exhaustive, but rather illustrative, of circumstances in which courts found the officer's pat down violated the Fourth Amendment.

III. Conclusion

The reasonableness of a protective pat down is measured in objective terms by examining the totality of the circumstances. As such, in circumstances where a reasonably prudent officer establishes reasonable articulable suspicion that the subject presented a danger of attack or was armed and dangerous, a limited protective pat down for weapons is justified and in compliance with both United States constitutional law and Illinois state law.

Special Order S04-13-09 is not misleading or unconstitutional. To the contrary, the special order directs officers that they may only conduct a protective pat down during a valid investigatory stop; the pat down must be based on specific, articulable facts that the subject presented a danger of attack or was armed and dangerous; and the pat down is solely for hard objects that could be used as weapons and is not to search for evidence. A pat down conducted solely for the safety of the officer, without the articulation of reasonable suspicion, would violate the Fourth Amendment, Section 5/8-1.01 of the Code of Criminal Procedure, and CPD's special order, S04-13-09.

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For these reasons, S04-13-09(III)(C)(2) comports with Fourth Amendment law and, in our considered estimation, does not cause confusion or misunderstanding with respect to the appropriate legal standard by which officer's shall conduct protective pat downs during *Terry* stops.

Thank you for your input.


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