The Honorable Richard L. Burton
Commissioner
Department of Public Safety

April 22, 1991

663-91-0333

465-3428

Weapon searches
in courthouses

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By memorandum dated February 11, 1991, you have asked for our advice regarding the authority of officers to search persons entering the Anchorage court buildings for weapons. You have also inquired whether that authority could be increased by an "appropriately worded" sign.

Our brief answer is as follows: A person within a court building may be subjected to a "pat-down" search for illegally possessed weapons only at the specific direction of a judge or to the extent that such a search is authorized under Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Signs would not be effective to expand this limited authority.

Under certain circumstances, discussed below, entry of persons into a court building may be conditioned on their consent to having any packages or briefcases searched for weapons. Under these same circumstances, the persons' entry may also be conditioned on passing through a magnetometer (metal detector) to search for weapons.

I. INTRODUCTION

In October 1990, the United States Marshal performed a security survey of the Anchorage court buildings. Following that survey, the court system indicated that it intends to post signs at the buildings' entry doors warning that persons entering the facilities may be searched for weapons.

The court system, however, does not have its own security staff. Instead, it relies upon the protection provided by the judicial services section of the Alaska State Troopers Division of the Department of Public Safety.

As the commissioner of the department that would be performing these searches, you have identified several legal issues warranting consideration. In particular, you have asked:

1. Under what circumstances may officers presently search visitors?

2. Would an appropriately worded sign increase the department's authority to search visitors? If so, what wording should be used?

3. Would there be any greater authority to search persons entering particular parts of the building, such as floors on which courtrooms or judges' chambers are located?

Our answers are set out below.

II. DISCUSSION

It should be noted at the outset that our discussion is limited to the search for and seizure of unlawful weapons; i.e., concealed weapons, bombs, grenades, and other prohibited weapons, or firearms in the possession of an intoxicated person, etc. See AS 11.61.200, AS 11.61.210, AS 11.61.220. Under the present wording of the Alaska Constitution's right-to-bear-arms provision, 1/ the state could follow the example of other jurisdictions that have enacted laws prohibiting the possession of even unconcealed

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1/ Resolutions have been introduced this year in both the House and the Senate proposing amendments to the right-to-bear-arms provision that would restrict the state's ability to regulate the use and possession of firearms.

SJR 1 proposes that article I, section 19, of the constitution be amended to read: "Right to Keep and Bear Arms. The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state."

HJR 1 proposes that the same section be amended to read: "Right to Keep and Bear Arms. The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state. The use or possession of arms by individuals convicted of a crime and the carrying of concealed weapons on the person may be regulated by the legislature."

weapons in court buildings. See, e.g., section 16-23-420 of the South Carolina 1976 Code of Laws, discussed in State v. Shelton, 243 S.E.2d 455 (S.C. 1978). 1/ The state has not done so yet, however.

There is no exception to the general law governing searches and seizures for courthouse searches. 1/ As you are well aware, the Fourth Amendment to the United States Constitution protects persons against unreasonable searches and seizures. U.S. Const., amend. IV. Interpreting this amendment, courts have ruled that warrantless searches or seizures are per se unreasonable unless they fall within one of the judicially-recognized specific exceptions to the requirement that a warrant be obtained. 1/

In his treatise on search and seizure law, LaFave notes that, when courthouse searches have been upheld, the reviewing

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2/ Cf. 41 C.F.R. 101-19.3 (1969), the federal regulation prohibiting the possession within federal buildings of "firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, except for official purposes." As noted in Barrett v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971), the United States Constitution empowers the government to own, use, and control property (article I, section 8, and article IV, section 3), and Congress delegated this authority to the General Services Administration under 40 U.S.C. § 318 et seq.

3/ See Jesmore, The Courthouse Search, 21 UCLA L. Rev. 797, 808 (1974) ("The detention of each individual at the courthouse door, although merely for investigative purposes, must still meet constitutional standards").

4/ As one commentary states:

> It seems well established that a search of persons entering a public building, including searches into parcels, handbags, bundles, etc., carried by such persons is a warrantless search and is therefore unreasonable per se under the Fourth Amendment to the Federal Constitution unless it falls within one of the few specifically established and well-delineated exceptions to the warrant requirement.

53 A.L.R. Fed. 888 (1981) ("Validity, Under Federal Constitution, of Search Conducted as Condition of Entering Public Building").

courts "have utilized the balancing test of Camara v. Municipal Court, [387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967),] whereunder the question of whether an 'inspection is reasonable within the meaning of the Fourth Amendment' is determined 'by balancing the need to search against the invasion which the search entails.'" 4 W. LaFave, Search and Seizure § 10.7(a) at 38 (1987).

There are three general types of searches that may be conducted at courthouses. They are: the inspection of packages, the use of metal detectors, and the pat-down search. In accordance with the Camara standard, their validity turns upon the need for the search compared with its intrusiveness. Generally speaking, package inspections and metal detectors have been upheld when conducted in an unintrusive manner and when instituted in response to bombings or bomb threats directed at the court facilities. Pat-down searches, however, are considered intrusive and have been upheld only in limited situations.

A. Package Inspections

The inspection of packages and bags at courthouse entries was first approved of in In re Trials of Pending and Future Criminal Cases, 306 F. Supp. 333 (N.D. Ill. 1969). Rather summarily, the court noted that the searches were performed "with a minimum of inconvenience and with utmost courtesy," and were initiated only after repeated threats had been made to bomb the particular courthouse. 306 F. Supp. at 337.

A more considered analysis was offered in Barrett v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971), in which the court upheld the decision of the General Services Administration to implement "certain protective procedures" in federal courthouses in response to "threats and acts of violence." 331 F. Supp. at 269. The GSA placed signs at the entrances to the building, notifying entrants that all "packages, briefcases, etc." must be opened for inspection at a desk in the lobby. Entrants with packages could either: (1) open the package for a visual inspection; (2) leave it in the custody of the attendant, unopened; or (3) retain the package unopened, but be accompanied by a guard. 331 F. Supp. at 270.

The court upheld these practices, emphasizing the minimally intrusive nature of the inspections and contrasting them with "the quality of insult felt by an individual in his own home or on the public street who is stopped and searched." 331 F. Supp. at 274. The court noted that, inasmuch as all persons with

packages were required to submit to the inspection procedure, "the persons whose packages are inspected generally fall within a morally neutral class. . . . [T]he inspection is not accusatory in nature and the degree of insult to the entrant's dignity is minimal." Id. In upholding the searches, the court also relied upon the availability of reasonable alternatives offered to persons submitting to the inspection. Id. 1/

B. Metal Detectors

The use of magnetometers (metal detectors) at entrances to court buildings has been challenged and upheld in four cases. See McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978); Justice v. Elrod, 649 F. Supp. 30 (N.D. Ill. 1986), aff'd on appeal, 832 F.2d 1048 (7th Cir. 1987); Commonwealth v. Harris, 421 N.E.2d 447 (Mass. 1981); Rhode Island Defense Attorneys Ass'n v. Dodd, 463 A.2d 1370 (R.I. 1983).

5/ See also Downing v. Kunzig, 454 F.2d 1230, 1233 (6th Cir. 1972) (similarly upholding GSA's practices, relying upon the imminent danger to federal property and personnel posed by bomb threats, which it characterized as an "emergency" situation).

Another factor relied upon by the court in Barrett was that the building belonged to the federal government, which it concluded could prevent entry or make such reasonable conditions as it deems proper. 331 F. Supp. at 272. Similarly, in Davis v. United States, 532 A.2d 656 (D.C. App. 1987), the court upheld the practice of inspecting packages in a local federal building, relying in large part upon the defendant's "implied consent" to the inspection. Both of these analyses, however, have been persuasively criticized because they overlook the public's right of access to government officials and to public trials. See 4 W. LaFave, Search and Seizure § 10.7(a) (1987):

> [Judges] should not uphold ... [intrusive searches] upon the oversimplified notion that the government may bar entry just "as could any private citizen with his home" [Barrett v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971] or upon the troublesome doctrine of implied consent, for citizens may not be barred access to government officials, nor may the public be effectively excluded from the trial of criminal cases.

Id. at 41-42 (footnotes omitted).

The McMorris court emphasized that the warrantless searches were constitutional only because, first, they were "clearly necessary to secure a vital government interest," and, second, the searches were "limited and no more intrusive than necessary to protect against the danger to be avoided." 567 F.2d at 899. 6/ With respect to the need for the searches, the court took judicial notice of then-recent bomb threats and the slaying of a judge at a nearby courthouse. 567 F.2d at 900. As to the second factor, the court noted that using a metal detector is "a relatively inoffensive method of conducting a search, and it is less intrusive than alternative methods." 567 F.2d at 900. Finally, it concluded that "implied consent," which it deemed necessary, existed because a person could leave rather than submit to being searched. 7/

C. Pat-down Searches of Individuals

Courts have not upheld the general use of pat-down searches to determine whether persons entering or found within a court building are in possession of weapons. Instead, pat-down searches have been allowed only if either ordered by a judge as to a particular person or as to all persons attending a particular trial or if grounds exist for a Terry-type frisk. 8/

1. Searches Ordered by a Judge

6/ As the appellate court noted in Elrod, the United States Supreme Court has recently stated that "[t]he reasonableness of a search depends not only on the need to search but also on how intrusive the search is in relation to the need." 832 F.2d at 1049 (citing O'Connor v. Ortega, 480 U.S. 709, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987)).

7/ The court in Rhode Island Defense Attorneys Ass'n v. Dodd, 463 A.2d 1370 (R.I. 1983), similarly found that "the element of voluntariness minimizes the intrusiveness of the procedure." Id.

8/ See W. Ringel, Searches & Seizures, Arrests and Confessions § 16.4 at 16-34 (2d ed. 1990) (distinguishing "administrative searches," conducted by inspecting packages and using metal detectors at the entrances to courthouses, from searches directed at particular persons, which are based on the authority of a judge to "preserve order in his court").

Courts have traditionally claimed inherent authority to exercise control over their premises. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 358, 16 L. Ed. 2d 600, 618, 86 S. Ct. 1507 (1966) (in a case relating to media access to judicial proceedings, the Court summarily stated that courtrooms and courthouse premises are "subject to the control of the court"); Combined Communications Corp. v. Finesilver, 672 F.2d 818, 821 (10th Cir. 1982) (same); Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486, 494 (W.D. Pa. 1957) (same). It is a small step from these cases to those upholding the authority of a judge to order searches for weapons.

Judges, however, are not empowered to order searches or seizures that are unreasonable under the fourth amendment. 9/ Accordingly, some factual basis is necessary to justify their ordering a security officer to perform a pat-down search.

As indicated in State v. Shelton, 243 S.E.2d 455 (S.C. 1978), a judge is warranted in ordering a particular person searched when the judge has a reasonable suspicion that the person may be armed and dangerous. In that case, the judge ordered the defendant searched because he had been advised that the defendant carried a gun and had threatened various persons with it.

Similarly, there may be a basis for a judge to order that all persons attending a particular trial be searched. Thus, for example, in United States v. Bell, 457 F.2d 1231 (5th Cir. 1972), the court upheld a judge's order that all spectators at a particular trial be searched each time they entered the courtroom because the trial judge had been advised of a possible courthouse escape attempt by the defendant. 457 F.2d at 1235-36.

In contrast to these situations, however, it is difficult to imagine a factual basis that would support a judge ordering random pat-down searches. Similarly, it is unlikely that there is a factual basis for issuing a standing order that all persons entering the building or entering a designated courtroom be subjected to a pat-down search.

2. Searches Not Ordered by a Judge

9/ See notes 3 & 4 supra.

Authorities are divided as to when pat-down searches are permissible in the absence of a specific order by a judge. In People v. Alba, 440 N.Y.S.2d 230 (N.Y. Sup. Ct. 1981), appeal dismissed, 450 N.Y.S.2d 787 (N.Y. Ct. App. 1982), a defendant moved to suppress a handgun found on his person in a courthouse. Because of prior bomb threats, signs had been posted warning that all persons entering the courthouse and/or courtrooms were subject to being searched. A divided court upheld a pat-down search of the defendant on the basis of his "implied consent." 440 N.Y.S.2d at 232. The dissenting opinion took issue with this analysis:

> Consent will not be implied from the posting of signs. (See Chenkin v. Bellevue Hospital Center, 479 F. Supp. 207, 213; ....) "If this argument were accepted, the government and quasi-public institutions would gain broad power to refashion the contours of the Fourth Amendment merely by proclamation." . . . .
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> In recognition of the citizen's lessened expectation of privacy upon entering such premises and the state's legitimate interest in maintaining security therein, courthouses, like airports, schools, military installations and prisons, have been deemed special areas in which warrantless security searches under somewhat diminished Fourth Amendment requirements are permitted. . . .
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> We are unaware, however, of any decision which has treated the courthouse as a special enclave where random non-consensual searches are permitted on the basis of mere hunch or suspicion, instead of requiring consent or the traditional showing of justification -- probable cause or reasonable suspicion that an individual is armed and dangerous.

440 N.Y.S.2d at 237 (citations omitted) (footnotes omitted).

The dissent's analysis is supported by commentators. One writes:

> Public submission to an indiscriminate, offensive search is a frequent and improper condition of entry into many courthouses. A printed sign may confront prospective admittees at

> the courthouse door informing them that they will be subject to a search of their persons and effects if they decide to enter. To condition the public's exercise of the right of public access to trials upon an implied consent to such an unreasonable search is untenable:
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> > [T]he rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution. [United States v. Chicago, M., St. P. & P.R.R., 282 U.S. 311, 328-29 (1931).]

Jesmore, The Courthouse Search, 21 UCLA L. Rev. 797, 816 (1974).

Similarly, LaFave states in his discussion of courthouse searches:

> [M]ore intrusive measures than those contemplated by the GSA program would be justified in response to a threat to bomb a particular building in some general time frame or in order to prevent violence at the trial of a "polemic defendant."
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> . . . .
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> . . . It would seem, however, that when there is such a tightening of security to deal with a particular problem, a judge should be expected to pass in advance upon the contemplated procedures. In doing so, he should not uphold such harsh procedures upon the oversimplified notion that the government may bar entry just "as could any private citizen with his home" [Barrett v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971] or upon the troublesome doctrine of implied consent, for citizens may not be barred access to government officials, nor may the public be effectively excluded from the trial of criminal cases.

4 W. LaFave, Search and Seizure § 10.7(a) at 39-42 (1987) (footnotes omitted).

We conclude that pat-down searches are permissible, but only when ordered by a judge as a security measure or when their use falls within the guidelines established by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968):

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

As Jesmore relates:

> A pat-down search is a very serious "intrusion upon cherished personal security. It must surely be an annoying, frightening, and perhaps humiliating experience," [Terry v. Ohio, 392 U.S. 1, 25, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968),] and should not be employed unless the circumstances are exceptionally compelling. Normally it should be used only following a lesser intrusion that has focused reasonable attention upon suspicious individuals. But where a serious threat has been received promising immediate violence, or where violence has just occurred in the courthouse, or where the overt actions of certain individuals lead the officer to reasonably conclude that they have violent intentions, a pat-down search may constitute the initial intrusion. Without such justification it would be unreasonable, and thus unconstitutional, to initiate a courthouse investigation with a pat-down search or examination of effects.

Jesmore, The Courthouse Search, 21 UCLA L. Rev. 797, 824 (1974) (footnotes omitted). 10/

10/ See also Davis v. United States, 532 A.2d 656, 661 (D.C. App. 1987) (package inspection permissible because it "did not rise to the level of a full-blown Terry frisk which, in the absence of a reasonable articulable suspicion, is unconstitutional"); People v.

III. CONCLUSION

We conclude that pat-down searches cannot be employed against all persons entering court buildings. Similarly, an officer may not pat down a particular person to search for weapons unless directed to do so by a judge or unless the officer has reason to believe that "criminal activity may be afoot" and that the person with whom the officer is dealing may be armed and presently dangerous; i.e., the same justification as is necessary to "stop and frisk" a person in any other place. Finally, posted signs cannot expand an officer's authority to conduct pat-down searches.

On the other hand, it may be possible to require people to pass through metal detectors and/or surrender their packages for inspection or holding, if there is a factual basis supporting the need for such security precautions. We have not been advised as to whether any acts of violence have occurred or been threatened at the Anchorage court facilities. If there is a factual basis for precautionary measures, the inspection of packages and the use of metal detectors would be permissible if implemented in an unintrusive manner.

This could be done by using the following procedures: First, signs should be posted, alerting building entrants to the use of the precautionary methods. Second, entrants should be given the opportunity to check their packages, bags, or briefcases, rather than have them inspected. Third, if a metal detector is used, persons who set it off should be given the opportunity to remove any metal items for inspection. If they continue to set off the detector, they should be given the opportunity to leave, rather than be searched. Those who still set it off, however, and wish to enter, should be advised that they may only do so if they consent to being subjected to a pat-down search.

These procedures should be applied uniformly to persons entering the court building. Nonetheless, it would probably be permissible to exempt a class of persons, such as court personnel or attorneys, if this were desired. Similarly, it would permissible to restrict these procedures if desired to only certain floors or parts of the court building (such as areas where judges' chambers or courtrooms are located).

Alba, 440 N.Y.S.2d at 238 (reciting Terry standard for pat-down searches at courthouses) (Sullivan, J., dissenting).

I believe that this answers your inquiry. If you have any further questions or comments, please do not hesitate to contact us.

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