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# CRIMINAL LAW UPDATE

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## **new jersey cases**

**P**at-down searches: more common than the common cold. These warrantless searches are permitted only when the police officer has reason to believe that he is dealing with an armed and dangerous individual. The test is not a subjective one, but rather whether a reasonably prudent person under the same circumstances would be warranted in the belief that his safety was imperiled. *Terry v. Ohio*, 392 U.S. 1 (1968). This search warrant exception has a "narrow scope" that the U.S. Supreme Court "has been careful to maintain." *Ybarra v. Illinois*, 44 U.S. 85 (1979). Factors militating in favor of such a search include when a violent or serious drug crime is suspected, if there is a tip suggesting weapons possession, or if the suspect has a known history of weapons possession. *State v. Thomas*, 110 N.J. at 680-82 (1988). Does nervousness qualify? Nah. "The presence of police officers tends to make most people somewhat apprehensive." *State v. Lund*, 119 N.J. 35 (1990). "The presence of three policemen at their threshold would excite many innocent occupants of a residence." *State v. Rice*, 251 N.J. Super. at 136 (App.Div. 1991). Here, when police *en masse* entered the residence on a search for evidence of a (non-violent) counterfeiting scheme, the defendant "stood up very abruptly" and appeared nervous. Naturally, that led police officers to search him. In his pocket they found a cigarette lighter, which could have been, argued the police, a knife *disguised* as a cigarette lighter, and some heroin. No way,

Jose, replied the Appellate Division in suppressing the search. *State v. Potter*, (App.Div. 12/16/05). Fun Facts: The door of this residence was opened by an adult female dressed only in a pair of boxer shorts and a t-shirt. Police testified that they "could clearly see that she did not have any weapons on her". (In a case of life imitating art, the facts here are reminiscent of the *Mad Magazine* spoof of *The Graduate*. In the movie, when Benjamin and Mrs. Robinson are in a hotel room for the first time, she enters the room completely nude, sees Benjamin's shocked expression and asks "What's the matter Benjamin? Are you afraid of me?" In the *Mad* version, Benjamin replies "Why should I be? I can see that you are not carrying any concealed weapons.") Here, the police also noted that the third person in the apartment was a "small child eating cereal [and] seated at a table." The detective testified that he "did not perceive the child to be a threat." *Well, then that just left the defendant to search.*

**P**rosecuting sex crimes is a delicate business. It deals with an area of life that is innately private, frequently involving allegations against family members, many victims are of very tender years, and the job involves as much protecting the falsely accused as actual victims of real assaults. Sometimes the facts are clear, but their consequences are not. In *State in the Interest of D.W.* (App.Div. 10/6/05), the court mandated a measure of reality and common sense in making these difficult judgments, finding that touching the victim's buttocks with the intent to embarrass does not meet

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## **A Publication of the Bergen County Bar Association**

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the requirement that it was done to “degrade or humiliate.” “Horseplay,” the court ruled, while inappropriate, does not “rise to the level of seriousness commensurate with the charge of criminal sexual contact.” In this highly charged area of human conduct, where passions reign and perceptions of the participants often widely vary, filtering allegations through a standard of “seriousness commensurate with the charge” would seem a rational starting point.

**N**ot indictment numbers, and not complaint numbers. The Bergen County Prosecutor’s Office would rather you identify cases in correspondence and telephone calls with the *docket numbers*. Okay, you can *also* put in the indictment number if you want.

**A**lcotest Update: The Supreme Court has appointed retired Judge King to act as special master in *State v. Chun*, the case challenging the accuracy of the new Alcotest breath testing machine, and has lifted the stay of prosecution in Middlesex County, but not in other counties that have entered one, such as Union and Morris. The Supreme Court has reminded courts of the plea bargaining guidelines, which, by the way, allow for plea bargains when the state cannot prove its case. Since municipal courts cannot possibly hold *Frye* hearings on the admissibility of Alcotest readings, pleas to three month suspensions (for first offenders), and even dismissals, would be permissible depending on the observations.

**C**omedian Steven Wright’s take on life is always...unusual. Some of his observations would seem to have application to criminal law. Here are some of his comments as they might apply to our crazy business:

*Legal argument:* A conclusion is the place where you got tired of thinking.

*Judges:* Half of the people you know are below average.

*Strength of case analysis:* If everything is coming your way, you are in the wrong lane.

*Reality of trial:* Experience is something you don't get until just after you need it.

*Brief writing:* To steal ideas from one person is plagiarism; to steal from many is research.

*Clients:* The problem with the gene pool is that there is no lifeguard.

*Trial preparation:* The sooner you fall behind, the more time you'll have to catch up.

*Client Recollections:* A clear conscience is usually the sign of a bad memory.

*Trial progress:* If everything seems to be going well, you have obviously overlooked something.

*Attorney publicity:* Eagles may soar, but weasels don't get sucked into jet engines.

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***T***he strength of the Constitution lies entirely in the determination of each citizen to defend it. Only if every single citizen feels duty bound to do his share in this defense are the constitutional rights secure.”-- **Albert Einstein.**

