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67/12/12 Oral Arguments before the US Supreme Court

Louis Stokes

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Earl Warren

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See next page for additional authors

JOHN W. TERRY,

Petitioner,

—vs.— No. 67

STATE OF OHIO,

Respondent.

Washington, D.C.
Tuesday, December 12, 1967

The above-entitled case came on for oral argument at 12:10 o'clock p.m.,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE: *Associate Justice*
ABE FORTAS, *Associate Justice*
THURGOOD MARSHALL, *Associate Justice*

APPEARANCES:

LOUIS STOKES, ESQ., *on behalf of Petitioner.*

REUBEN M. PAYNE, ESQ., *on behalf of Respondent.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: Number 67, *John W. Terry,* et al., Petitioners, versus *Ohio.*

Mr. Stokes?

ORAL ARGUMENT OF LOUIS STOKES, ESQ., ON BEHALF OF THE PETITIONER

MR. STOKES: Mr. Chief Justice, and may it please the Court:

State versus *Terry* comes to this Court by virtue of a writ of certiorari granted to the Ohio State Supreme Court. This case originally arose in the Common Pleas Court of Cuyahoga County, based upon the indictment for carrying a concealed weapon, in violation of *Ohio Revised Code,* Section 2923.01.

The defendant in this case filed a motion to suppress the evidence, and at the trial there was a hearing on the motion. After hearing the motion, the motion was overruled and the case proceeded to trial. This was a bench trial, jury having been waived.

After hearing the evidence, the motion originally filed was overruled again. The defendant was convicted of carrying a concealed weapon. The trial court ruled by opinion in this case, and we then appealed to the Court of Appeals for Cuyahoga County. This Court sustained and affirmed the conviction of the lower court. This Court also wrote an opinion.

Subsequently, application was made to the Ohio State Supreme Court, for review, and that court dismissed the application for review stating: no debatable constitutional question. This Court granted certiorari.

The facts in this case are these—and I think they are signally important, if we are to try to arrive at the proper verdict, with reference to this case: This incident occurred at 2:30 in the afternoon, in broad daylight in the downtown section of Cleveland, Ohio. The police officer in this case, one Martin McFadden, noticed two Negro males standing at the corner of Fourteenth Street, in the City of Cleveland, where Euclid Avenue and Huron Road intersect. These two streets, if the Court please, form a triangle at the apex of East Fourteenth Street. The police officer was approximately 100 feet away from where these two men were. He positioned himself—

MR. JUSTICE STEWART: What kind of neighborhood is that, generally, in Cleveland? A business neighborhood?

MR. STOKES: That is our downtown business section of the City, Your Honor.

MR. JUSTICE STEWART: Downtown retail stores, and offices, and so on?

MR. STOKES: Yes, Your Honor.

The testimony of the police officer was that there was business as usual in the downtown center of the City; stores were open and there were pedestrians on the street.

MR. JUSTICE STEWART: What time of day was it?

MR. STOKES: 2:30 in the afternoon.

MR. JUSTICE STEWART: On a weekday?

MR. STOKES: On a weekday.

The police officer stated that he positioned himself in the doorway of a department store by the name of Rogauffs. For a period of 10 to 12 minutes, he observed these two males at the corner. Alternately, each made five or six trips over to stores located on Huron Road. He said that he didn't know whether it was the United Airlines store, or the Diamond Store, but the stores were immediately adjacent to one another on Huron Street.

During these five or six trips that they made during the ten or twelve minute period, a third male came by—white male—who stood and talked with the two males for a moment or so and then the other male proceeded west, on Euclid Avenue, and the two males continued on this corner. After the ten to twelve minute period, the two men then walked west on Euclid Avenue, some several hundred feet down Euclid Avenue.

When they arrived at Zucker's Store, which is in the vicinity of Ninth Street, or Eleventh Street, there on Euclid Avenue, the three males then again met up, at which time the three of them—according to the police officer's testimony—were merely standing in front of Zuckers Store—

MR. JUSTICE STEWART: What kind of a store is Zuckers Store?

MR. STOKES: Zuckers is a haberdashery, Your Honor.

His testimony was that their backs were to the plate glass windows. They were facing the street. And when interrogated with reference to what they were doing, he said they were merely standing there talking. He described their gait away from Fourteenth Street as they walked down to the haberdashery as a

normal walk—nothing unusual about it.

The police officer then says, "I then went over to the three men. I said to them, 'I'm a police officer. What are your names?'" In the first instance, he said: "They gave it to me quick." In all other places in the record, he says: "They mumbled something." He said, at this: "I then reached out and got Terry. I spun him around, holding him in front of me. I then began to pat him down." Once he patted him—patted this man down—he says: "I felt inside of his top coat what felt to be the handle of a gun. I then reached inside the coat and tried to remove the gun. I could not remove the gun. I therefore took the entire coat off of him and then took the gun out of the coat."

At this point, he says: "I ordered the three of them into the store. As I walked through the doorway, I said to the store personnel, 'Order the wagon.'" He later explained that "ordering the wagon" means you are then under arrest. Once inside the store, the three men were ordered up against the wall, whereupon he then searched Chilton. Inside of Chilton's top coat, he also found a loaded revolver. He searched the third male, Katz, upon whom he found nothing.

He then calls these men to be removed from the haberdashery to the Cleveland Police Station. When they arrived at the police station, they were then booked for investigation. Some time late the next day, after having been interrogated the following morning, these men were then charged, officially late the second day, with carrying concealed weapons.

The police officer testified further with reference to questions propounded to him having to bear on the question of probable cause. We asked him, "Did you know any of these men?" "No." "Had you ever seen any of these men previously?" "No." "Had anyone given you any information regarding them?" "No."

He was then asked what had attracted his attention to them. He said, "Well, to tell the truth, I didn't like them. And I was attracted to their actions up there on Fourteenth Street."

MR. JUSTICE BLACK: He said what? "I didn't like—"?

MR. STOKES: In the record, Mr. Justice—

MR. JUSTICE BLACK: What was his answer?

MR. STOKES: He said, "Well, to tell you the truth, I didn't like them."

MR. JUSTICE BLACK: He "didn't like them"?

MR. STOKES: Yes. Then, he said further, Mr. Justice, that: "I was attracted to their actions there at Fourteenth Street."

This officer testified further, though, that he felt that they might be casing the place for a stick-up. We then—the Court then inquired of him, specifically, if he had ever—and by the way, this police officer had been a police officer for 39 years, and a detective for 35 years.

MR. JUSTICE BRENNAN: Was he in plain clothes?

MR. STOKES: He was in plain clothes, Your Honor. The Court specifically asked him if he had, during his 39 years as a police officer, previously observed anyone "casing a place." He said, "No," he had not. When asked if he had arrested anyone for "casing a place," in his 39 years, he said that he had not.

We should like to make reference, just briefly, to the decision of the lower court in this matter. Our court held, in that opinion, that "There is no evidence that any warrant had been issued for a search, or frisk, and I am not going to stress the facts and state that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension, and foolhardy, to say there was an unlawful arrest because there wasn't from the facts as presented."

Later, in this same opinion, our trial court said: "I believe, and I reiterate again, that search and seizure laws cannot be applied to this particular situation, although Mr. Reuben Payne endeavors to show there was a lawful arrest. But the Court cannot agree. If there was an arrest, it came subsequent to the frisk."

The Court then based its decision upon *Ker* v. *California*. The Court said that the *Ker* decision did not preclude the states from developing workable rules in order to bring about effective law enforcement in the states. The Court said, with reference to the acquisition of the gun, that the gun was the fruit of the frisk and that probable cause arose once the police officer had frisked, found the gun; he then had the probable cause to arrest.

Our Court of Appeals, in affirming the decision, stated that: "A policeman may, under appropriate circumstances, reasonably inquire of a person concerning his suspicious on-the-street behavior, in the absence of reasonable grounds to arrest." Our court admitted that in all probability this would lead to abuses by the police, but then went on to say that: "The Court would deal with the abuses as they arose before the Court."

The Court stated, further, that this of course was just a minor inconvenience with the personal liberty that is guaranteed, and that therefore each citizen ought to be willing to give up this amount of his personal liberty in order that they might have effective law enforcement in the community.

Our Court offered this definition of arrest: "That as the term is used in criminal law, it signifies the apprehension or detention

of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

They distinguished *Henry* v. *U.S.*, by saying that in that case the Government had made a concession, and therefore when this Court rendered *Henry* that it was rendering it on the unique situation where the government had come in and conceded that at the time the automobile was stopped, the arrest had occurred and they, therefore, said this Court had not, in that case, rendered an independent view of the facts; and, in fact, had held that this was an arrest in the absence of probable cause.

MR. JUSTICE FORTAS: I suppose that your contention here is that the policemen had—there is nothing in the record to indicate that the policeman had any reason to fear bodily harm to himself?

MR. STOKES: Well, we're saying that; and we're saying this, in addition to that, Your Honor. We are saying that, at the point this police officer approached these men, and at the point he laid his hands on the citizen, that he had—he did not have the probable cause that is required. He has stated that all he had, at that point, was this intuitive sixth sense, and that he had never in his long experience as a police officer ever arrested anyone for this purpose.

MR. JUSTICE FORTAS: I understand that. But we have to think about your case, and the preceding cases, in whatever relationship may be appropriate, one to the other. And here there is no suggestion, is there, that the policeman had any basis for fear as to his own safety? Am I right? Because there is nothing in the record to indicate that.

MR. STOKES: There is nothing in the record whatsoever, and we might add—

MR. JUSTICE FORTAS: What happened here, and perhaps it would be your contention that the policeman was engaged in a search for evidence when he spun Terry around and put his hand inside of his coat. Is that your position?

MR. STOKES: This is our position, Mr. Justice Fortas.

MR. JUSTICE STEWART: I don't understand your answer to Mr. Justice Fortas when you said there is "nothing in the record to indicate," that the policeman didn't have concern for his own personal safety, because I thought he said that, based on his intuition, he thought these people were casing the place in order to rob it. Isn't that what he said?

MR. STOKES: This is what he said.

MR. JUSTICE STEWART: Well presumably, then, they would be armed; and the minute he walked up to talk to them, he would quite reasonably be concerned for his own personal safety, I should think.

MR. STOKES: Well, if I understood Mr. Justice Fortas's question correctly, I understood him to say: Was there anything in the record which indicated he had any reason to be concerned with his own personal safety?

MR. JUSTICE STEWART: Well this is in the record, that he thought—whether with, or without, reasonable cause—he thought or suspected that these were armed robbers about ready to hold up a place. And I suppose that if you walk up to such people, and begin asking them embarrassing questions, you might have some little concern for your safety if you bona fidedly believe that they have weapons on them. Now that much is in the record.

MR. STOKES: Yes, Your Honor.

MR. JUSTICE FORTAS: Is that so? Excuse me? Does the record show that he had—or he thought these men were armed, before he put his hands on them?

MR. STOKES: Yes. He says—after he says he thought they might be casing the place—"and I felt that they might have guns". He did say that.

MR. JUSTICE FORTAS: He testified to that effect?

MR. STOKES: Yes, he did.

But, in both our lower court and in our Appellate Court, in stating that a police officer should inquire promptly into suspicious on-the-street activity, we brought out the fact—and the record will show—that there was no interrogation, there was no investigation in this case as a result of the officer approaching him. The court said he had the right to approach, to investigate, and to interrogate. But the only question in the record is: "What are your names?" At which point, he then grabbed Terry, spun him around, and began his search.

During the interim period while they were waiting for the other police to arrive, there was no conversation between the police officer—

MR. JUSTICE BRENNAN: But, Mr. Stokes, do you really think that if there is enough to suggest that he had reason to believe they had weapons—if that's so—and, if he is justified for that reason in asking them what they were doing, don't you think he would be justified in the first instance in confirming whether or

not they did have weapons before he went on further to interrogate them, or even to interrogate them at all?

MR. STOKES: Well, if I understand your question properly, Mr. Justice, you do preface it by saying "if there is enough"?

MR. JUSTICE BRENNAN: That is right, yes, in this colloquy you and Mr. Justice Fortas and Mr. Justice Stewart were having, on the premise that it was reasonable for him to think that they had weapons.

MR. STOKES: Well, if there was enough—if the constitutional criteria had been met, I would say: Yes, I have no quarrel with the fact that where one makes a valid arrest—

MR. JUSTICE BRENNAN: Well, did you quarrel with the fact that—or do you suggest there had to be more than appeared, before he could ask them a question?

MR. STOKES: No, I say if he wanted to, he had the right to ask them a question.

MR. JUSTICE BRENNAN: Well, now, if he had the right to ask them a question—lay that aside for a moment—and he also had reason to think they might have weapons on them, would he have to question before he frisked them for weapons?

MR. STOKES: If we are to say, first, that he has a right to question, I am saying that he can exercise a discretion if he chooses. I am not saying that, at that point, he has an absolute right to question them.

MR. JUSTICE BRENNAN: No. Would he, in your view, be abusing any right of the three of them in walking up to them and asking their names and what they were doing?

MR. STOKES: Yes, I am saying that, Mr. Justice. I am saying that where a citizen is on the streets, and where all of the criteria that we know of by way of the development of probable cause is absent, in that situation—

MR. JUSTICE BRENNAN: That, then, the officer has no right to stop and ask: What's your name? What are you doing here? Is that it?

MR. STOKES: Well, if we are going to use the absolute term "no right," and we're to be held to that, then I would just have to say he has no right. It seems to me that if he wants to exercise some discretion on his part, of walking up and posing a question—asking a name, asking an address—this is a right he has. By the

same token, the person whose liberty is being invaded, the person who has committed no overt wrong, and the person who is only a suspect, at that point—

MR. JUSTICE BRENNAN: Well, may we try to get at it, in this way, Mr. Stokes: Up to the point where he "spun Terry around," had he done anything outside what a policeman might properly do?

MR. STOKES: No. He had done nothing outside of what a policeman might ordinarily do.

MR. JUSTICE BRENNAN: Now, if then at that juncture he had reason to believe they might be armed, did he have to complete his questioning first? Or could he frisk them?

MR. STOKES: I would say that under the circumstances presented to me, he did not under those circumstances have the right to lay hands on this citizen and spin him around.

MR. JUSTICE BRENNAN: And this would be because you do not think the record shows that he had any reason to believe they had weapons?

MR. STOKES: No, I am saying that at the point that you lay the hand on the citizen, and you begin to exercise dominion on that citizen on the street by spinning him around, I am saying, in order for you to do this you must have the probable cause that is required to place a person under arrest, because if the person is substantially under your custody, your dominion—

MR. JUSTICE BRENNAN: Then you mean he can't frisk for weapons, without probable cause to arrest? Is that what you're saying?

MR. STOKES: Yes.

MR. JUSTICE BLACK: How long had he been observing?

MR. STOKES: A period of ten to twelve minutes, Your Honor.

It seems to us, and of course our position is in this case, that the *Mapp* exclusionary rule under the Fourth Amendment would apply to this situation. We're not here advocating any change with reference to the Fourth Amendment. It seems to us that the State is in the position of saying to the Court that they are not satisfied with the *Mapp* exclusionary rule. And, as we read the rule—as we read *Mapp*—we don't see where the Court carved out any exception with relation to a gun. It seems to us that the Court said that any arrest based upon anything other than a probable cause is an unreasonable arrest, and that all of the evidence must be excluded.

We think that the deterrent that *Mapp* affords us with respect to illegal searches and seizures is something that we are willing to continue living with. And although *Terry* is before you, we think it goes much farther than this. We think that when the State is saying that there is something called "reasonably suspects," "reasonable suspicion," as it is put in some jurisdictions, and they're asking this Court to relax the Fourth Amendment, as it is known, they are in effect asking this Court to nullify the Fourth Amendment and to overrule *Mapp* v. *Ohio*.

We think, therefore, that if this is to prevail, that it is for the State to be able to persuade this Court that this Court has somewhere in history permitted something other than probable cause to determine whether an arrest and a search and seizure is probable, or one that is impermissible. Some of the jurisdictions—

MR. CHIEF JUSTICE WARREN: Mr. Stokes, I wonder if that could be broken down a little? I wonder what you would say to this: Of course the police officer does have the right to investigate a crime; and this police officer, in this instance, had the right to investigate the crime. He did see what one might well say were suspicious acts on the part of the people whom he thought might be preparing to commit a crime.

He had a right, did he not, to pursue that further to determine whether or not he would have probable cause, perhaps, for an arrest? Pursuant to that, he went to talk to these men. Now, because of the nature of the crime that he suspected—a robbery—he felt that when he went into the company of these three men, against himself alone, that he was in a dangerous position; and, that, therefore, he had probable cause to see if they had weapons on them, not because he had proper cause to believe they had committed a crime, but because in investigative matters he had probable cause to believe that his life was in danger.

Now under those circumstances, would you think that he did, or did not have a right to ascertain whether he was in a position of danger, by seeing if they had weapons?

MR. STOKES: Only if we're going to relax the standard of probable cause, as we know it, under the Fourth Amendment. He didn't permit this situation to ripen into the point where it had ripened into a probable-cause-type of a situation. He was a little ahead of himself, in this situation, and our position would have to be that you don't have a right to protect a constitutionally impermissible arrest; and, consequently, this is the way we would have to answer it.

MR. CHIEF JUSTICE WARREN: Police officers are very often

in a position where they might not be able to make an actual arrest, but they are in a position of great danger. Now, where they are in a position of great danger, are they in a position to protect themselves from violence, by looking into the situation to see if anyone is armed to do them violence?

MR. STOKES: Yes, Mr. Chief Justice. He certainly has a right of self-defense, and he has a right to protect himself. But the product, once it has been removed—the danger has been removed—we are saying that in this case, since it was not based upon probable cause, we should not protect the constitutionally impermissible arrest, by permitting the yield of that arrest to come into evidence against the defendant.

MR. CHIEF JUSTICE WARREN: Take a situation of this kind, where a police officer sees someone acting very peculiarly. It might not be in connection with any information he has about any crime. Maybe the person is abnormal, mentally. Maybe he thinks he's insane and he wants to talk to him. But the man shows indications, he thinks, of violence and he wants to be sure he won't be attacked when he goes to talk to him. He goes up to speak to him, and also ascertains whether he has any weapon on him. Do you think he has a right to do that, as a matter of probable cause that he might be injured himself if he doesn't take precautions?

MR. STOKES: I think we are faced with this, Mr. Chief Justice: The average police officer would do this under these circumstances. If he felt himself to be in any type of danger, he would conduct a search, for the purpose of protecting his own life in a possibly dangerous situation. But I am saying that we cannot—merely because of that type of situation, and it not being what is required by the Fourth Amendment—we can't give sanctity to it by way of saying: Since you did find this product, we're going to permit it into the evidence.

MR. CHIEF JUSTICE WARREN: I'm not arguing with you. I'm just seeing how far we have to go in a situation of this kind. That's the only reason I put my question.

MR. STOKES: Certainly, Your Honor.

Another thing I think the Court has to take into consideration here, of course, is the impossibility that this Court has of standardizing such a subjective thing as "intuition." All the *amicus* briefs say: Permit us this standard that is less than probable cause; permit us to stop and frisk people on the streets. Now experience has already taught us, if the Court please, that policemen have had enough difficulty being able to grapple with and to determine for themselves what is tantamount to probable

cause, as it has been enunciated in the decisions by this Court. Now they're saying to this Court: Give us another standard. Give us this, "reasonably suspects," or "based upon suspicion," or whatever the standard is that's less than probable cause. And we think that we're just compounding the policeman's problems if the Court does permit this type of a thing to occur.

With reference to the basic guarantee that we are concerned about here, I don't think we are so much concerned, really, about *Terry,* because over the years it has been the person who has been involved in criminal activity that has come before this Court in order for this Court to again take a look at some of our basic constitutional guarantees. And I think, through *Terry*, that we look at the hundreds of people walking the street by the day, because police officers, or a police officer, finds himself observing a situation where he says, as he did in this case, "Well, to tell you the truth, I just didn't like them and then I began watching them." And then the fact that he wants to go further—and at that point, I think we're subjecting all of the people who have this inviolate right of privacy, to this type of activity on the public streets throughout our nation.

I would like to reserve five minutes of my time.

MR. CHIEF JUSTICE WARREN: Mr. Payne?

ORAL ARGUMENT OF REUBEN M. PAYNE, ESQ., ON BEHALF OF THE RESPONDENT

MR. PAYNE: Mr. Chief Justice, if it please the members of the Court:

At the outset, may I direct my attention to page 19 of my brief. There it is indicated that after the officer had testified that he observed the conduct of these men, and that he had concluded that they were casing an establishment for a robbery, we find this quote appearing from the record: "Question: Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?" "Answer: Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun." That is supported and substantiated in the record of this particular case.

A question has been asked here: What is the difference between "reasonable suspicion," and "probable cause"? In one instance, in the arguments of the case before this Court, the Court of Appeals in the *Peters* case, has said: "It is that cause which is somewhat below probable cause on the scale of absolute knowledge of criminal activity."

MR. JUSTICE BLACK: The question I had in my mind was this—I can understand why you have a difference of words—this "scale a little below." I can't, myself, see any difference in—I'm talking about conduct—in having a "reasonable suspicion" something is about to be done, and in "having probable cause to believe" something is about to be done.

MR. PAYNE: I cannot see any basic difference in having a reasonable suspicion and equating it with the term "probable cause," in and of itself. It has been indicated that we have asked for a different standard here, as to probable cause. I find no problem with this, particularly, because I do not ask for a different standard of probable cause, as it may relate to the right to lawfully arrest a person.

I think the quantum of evidence that is basic and essential under the circumstances to establish probable cause for the officer to arrest, or to stop a person and to ask him questions, may be somewhat lesser in degree but, by the same token, it is probable cause under any circumstances. The same circumstances are indicated—

MR. JUSTICE BLACK: What do you understand "probable cause" to mean?

MR. PAYNE: I understand "probable cause" to mean, for an arrest, that—

MR. JUSTICE BLACK: Wait a second. "Probable cause to believe something will happen." What do you mean when you say that?

MR. PAYNE: When a person is observed in circumstances which suggest that he has committed, or is about to commit a felony or a misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of the person's conduct; and the key word here is the "circumstances" at that particular time.

MR. JUSTICE BLACK: Would you mind telling me, in your language—plain ordinary language—what you understand to be meant when somebody says, for that reason, says that a thing is "probable cause to believe that something will happen"?

MR. PAYNE: I understand that to mean the taking into consideration of the totality of the circumstances, as a responsible person views it, at that particular time in relation to his work. For example, the police officer here, in taking in the totality of the circumstances that he observed, under the conditions which he observed them, that the conduct that existed and the ideas that

maybe were flowing from the conduct which he observed here, would establish probable cause.

MR. JUSTICE BLACK: Do you understand it to mean reasonable grounds to believe something is going to happen?

MR. PAYNE: I understand—I believe that it does mean reasonable grounds that something is going to happen.

MR. JUSTICE BLACK: It does not mean, does it, that it's bound to happen?

MR. PAYNE: It does not mean that it is bound to happen.

MR. JUSTICE BLACK: Therefore, you've got to have something that is "reasonable grounds" for saying you believe it will happen.

MR. PAYNE: I agree with you, sir.

MR. JUSTICE MARSHALL: Mr. Payne, in this case this arresting officer testified, did he not, that he had never seen anybody "case a joint"?

MR. PAYNE: That is correct; he did so testify.

MR. JUSTICE MARSHALL: He also testified that he had been on that same area for some thirty years, doing the following things: Checking for pick-pockets, and shoplifters?

MR. PAYNE: That's correct.

MR. JUSTICE MARSHALL: So, where did he get his expertise about somebody about to commit a robbery?

MR. PAYNE: I think that he would get his expertise by virtue of the fact that he had been a member of the police department for forty years, and by being a member of the police department for forty years I am quite sure that, even if by osmosis, some knowledge would have to come to him of the various degrees of crimes—

MR. JUSTICE MARSHALL: Now we're getting intuition by osmosis?

[Laughter.]

MR. PAYNE: Not at all, sir. Not at all.

MR. JUSTICE MARSHALL: I'm sorry.

MR. PAYNE: I didn't mean to imply that; nor did I mean any

disrespect by so using that particular term. I think that, for example, if I as a lawyer am around a particular office for a number of years, that I certainly must gain knowledge about various concepts of law that may come about from time to time.

MR. JUSTICE MARSHALL: There are exceptions to this.

[General laughter.]

MR. PAYNE: I would agree with the Court, in the circumstances also.

MR. JUSTICE MARSHALL: Seriously, Mr. Payne, the point is that the only thing he noticed was: A man leaves from a position of talking to another man, and goes across the street, looks in a window, and goes back. Now, number one, you will agree that everybody who looks in a public window is not "casing the joint"?

MR. PAYNE: I agree.

MR. JUSTICE MARSHALL: But they did it twice, or three times. How many times?

MR. PAYNE: It was—

MR. JUSTICE MARSHALL: It is not too clear to me from the record.

MR. PAYNE: May I then, in response to the Justice's question, indicate first of all, and clarify this, his testimony was not that he "didn't like him." His testimony was that he "didn't like their looks." Now I don't think that he meant by that any reference to pigmentation or anything else. I think that he meant by that, when we take the entire record into consideration—the fact that this was in a downtown area, that these people were not continuing in the regular flow of commerce as were other people on the street—

MR. JUSTICE MARSHALL: That they "beared watching," you would say?

MR. PAYNE: I'm sorry. I didn't—

MR. JUSTICE MARSHALL: They "beared watching"?

MR. PAYNE: They beared watching.

They were standing on the corner conversing. Then, because of their not continuing in the flow of regular commerce, he observed one of the petitioners walk away from the other one and proceed approximately 100 feet west, up the street. He noticed the

unusual activity of this petitioner peering into the jewelry store, or the airline office there, that there was something in the vicinity of the airline office—or the jewelry store—which excited the petitioner's attention in some manner, or in some way. He then returned to his companion on the corner, had a conversation with his companion; his companion, in turn alternately proceeded up the street, and conducted himself in the very same manner; that they alternated in this way, four or five times; that, thereupon, a third man came from across the street and had a conversation with them and after having that conversation with them; that the third man returned back across the street and stationed himself there; that these individuals then engaged in the conduct which I have described previously, four or five additional trips after that.

And, that then after engaging in these additional trips, making a total of some ten to twelve trips, he observed that their interest was centered on the jewelry store or the airline office; that after so making the total number of trips, they then went across the street, and there again the three men came together, at which time they were having a conversation and at which time the officer had concluded that they were casing the establishment for a stick-up.

Under these circumstances, I say to the Court that the taking into consideration that an officer who is by himself, taking into consideration the number of persons involved—

MR. JUSTICE MARSHALL: But didn't your own court say they did not have probable cause to arrest, as of this point we are now talking about?

MR. PAYNE: The trial court indicated that, at this point, that there was not probable cause for arrest. The appellate court did indicate that there was probable cause for arrest, after the frisk took place.

MR. JUSTICE MARSHALL: No, I mean—well, we haven't frisked him yet.

MR PAYNE: That is correct.

MR. JUSTICE MARSHALL: So he didn't have probable cause to arrest, when he approached.

MR. PAYNE: I would agree with this.

MR. JUSTICE MARSHALL: And he didn't get probable cause until he put his hands on the butt of the gun.

MR. PAYNE: He didn't get probable cause to arrest—

MR. JUSTICE MARSHALL: —him until he put his hands on the butt of the gun, in his inside coat pocket.

MR. PAYNE: No, sir.

MR. JUSTICE MARSHALL: Is that right?

MR. PAYNE: No, sir.

MR. JUSTICE MARSHALL: When did he get probable cause to arrest?

MR. PAYNE: He received probable cause for arrest when he turned Terry around and ran his hands over the outside of his clothing and, feeling a gun in the upper left-breast pocket, and indicating emphatically at that time that, "What I felt was a gun, a weapon."

MR. JUSTICE MARSHALL: Well, he didn't have it, as counsel for petitioner says, he didn't have it when he laid hands on him and turned him around?

MR. PAYNE: I would agree. He did not have probable cause to arrest.

MR. JUSTICE MARSHALL: Right.

MR. PAYNE: I would agree that he would have probable cause to frisk, or to lay hands on him, at this point.

MR. JUSTICE MARSHALL: Why?

MR. PAYNE: Because of the nature of the circumstances and protection of his own life.

MR. JUSTICE MARSHALL: He didn't say he saw the gun bulging, or anything like that?

MR. PAYNE: No, he did not say that he saw a gun bulging. He indicated that: "They were casing a joint for a robbery," which implies a crime of violence, which implies that they have a gun. That, coupled with the fact that after he made an identification of himself when approaching these men, and indicated to them that he was a police officer, that the response which they gave was in the manner of evading the question which he had put to them, under these circumstances I think that—

MR. CHIEF JUSTICE WARREN: What was the colloquy at that point?

MR. PAYNE: The question which was put to them by the officer: "What are your names?" As to this, there was a mumbled,

incoherent response made in reply to that particular question. And this, of course, coupled with his observations and conclusions which he had made previously, there was probable cause for this officer to further investigate for weapons, under these circumstances, to determine and to protect his own life here.

Now, it is my contention—

MR. JUSTICE BRENNAN: Mr. Payne, you have said repeatedly now, if I understand you, that "probable cause"—are you saying something like this: that while there may not have been probable cause to arrest, in the sense of taking him to the police station and booking him for some crime, that at least in these circumstances there was probable cause to "arrest," in the sense of asking them questions such as: Who are you, and what are you doing here? Is that what you're saying?

MR. PAYNE: I hesitate in the use of the term "arrest."

MR. JUSTICE BRENNAN: You are saying "probable cause," in these circumstances—and I gather what you must mean—is that if the detainment is an arrest, it was to be a detention only long enough to find out what they were doing. Is that correct?

MR. PAYNE: That is correct.

MR. JUSTICE BRENNAN: And that then, if the officer had probable cause to think they had weapons on them, that in those circumstances he was justified in frisking them for weapons. Is that it?

MR. PAYNE: That is correct. And, too, if I may put it in my own language, I am saying that there was probable cause for the officer to interfere with their freedom of action, at this point, and that such interference with their freedom of action is not in a significant way at this time.

MR. JUSTICE BRENNAN: Well that's what I understood to be your argument in the use of "probable cause." What you're really doing is saying you don't have to change the label; it's still probable cause, and it's still an arrest—but an "arrest," for the purpose merely of asking the question: Who are you and why are you here? And this is a different thing than an arrest for the purpose of taking them to the station house and booking them for a crime. Is that it?

MR. PAYNE: Under Ohio law, I could not agree with this concept because under Ohio law the definition of "arrest," is by statute.

MR. JUSTICE BRENNAN: Well, forgetting Ohio law for a moment, how about for the purposes of the Fourth Amendment?

MR. PAYNE: For the purposes of the Fourth Amendment, it would be reasonable action on the part of this officer—

MR. JUSTICE BRENNAN: But I thought you agreed with Justice Black before, that really, reasonable action and probable cause are pretty much synonymous terms?

MR. PAYNE: I do, Your Honor.

MR. JUSTICE BRENNAN: So we can stick to the jargon "probable cause" and make the distinction that way?

MR. PAYNE: I agree. I think that the Court can stick to the jargon of "probable cause" and make any distinctions under the circumstances in this respect.

MR. JUSTICE BLACK: As I see it, what you and your case are really substantially arguing is that to stop a man, or to ask him a question by an officer, is not an "arrest" under the Fourth Amendment description of an arrest?

MR. PAYNE: It is not an arrest.

MR. JUSTICE BLACK: It seems to me that that's the real basis of your argument. What you're talking about is an arrest, and you're saying it doesn't arrest him to ask him a question.

MR. PAYNE: It does not arrest him to ask him a question.

MR. JUSTICE BLACK: And I imagine you're saying, also, it doesn't necessarily arrest him to touch him?

MR. PAYNE: It does not arrest him to touch him.

MR. JUSTICE BLACK: It might be an assault, but not an "arrest," under the constitutional meaning?

MR PAYNE: It does not interfere with his freedom in a significant way.

MR. JUSTICE BLACK: He hasn't taken him into custody, you say?

MR. PAYNE: That is correct.

MR. JUSTICE BLACK: That is, under an arrest?

MR. PAYNE: That is absolutely correct.

MR. JUSTICE BRENNAN: Well, Mr. Payne, that's not quite the

same thing you said to me.

[Pause.]

MR. JUSTICE BRENNAN: I don't understand. I thought you said to me earlier that there might be an arrest, for some purposes; and an arrest for some other purposes—Fourth Amendment purposes; and that an "arrest," for the purpose of asking a chap his name—which follows from a detention—or, "what's he doing here," there might be probable cause for that sort of thing without any violations, even though it could not be in the same circumstances "probable cause" to take him to the station house and book him for a crime.

MR. PAYNE: I did not mean to imply—because I had indicated to the Court that certainly "arrest," in Ohio, is defined by statute. And I thought I did indicate to the Court that the detention of his freedom here, at that time, is not an "arrest" in the sense that we understand it to be—

MR. JUSTICE BRENNAN: It's certainly not an arrest in the sense of taking him to the station house and booking him for a crime; but, if he's detained, isn't it in the nature of an "arrest"?

MR. PAYNE: No.

MR. JUSTICE MARSHALL: Well, Mr. Payne, couldn't you say that when he laid hands on him and swung him around that the petitioner's freedom of movement was arrested?

MR. PAYNE: I would agree that his freedom of movement was arrested.

MR. JUSTICE MARSHALL: But that's not an arrest.

MR. PAYNE: I do not agree that his freedom of movement was arrested "in a significant way."

MR. JUSTICE MARSHALL: You mean because he only turned him around? It didn't take long to turn him around?

MR. PAYNE: No. I mean in the sense of the circumstances involved at that particular time.

MR. JUSTICE MARSHALL: Well, in this particular case he laid hands on him, and swung him around. How many days later was he free to go, from that moment on, in this case?

MR. PAYNE: If there had been no more—

MR. JUSTICE MARSHALL: No. In this particular case, when

did he next get out? When did Terry get his freedom?

MR. PAYNE: Some time after he was convicted of the crime of carrying a concealed weapon.

MR. JUSTICE MARSHALL: So his freedom was arrested, for quite a while.

MR. PAYNE: Not on the basis of his swinging him around; but on the basis of the concealed weapon which he was carrying, and the crime that he was committing in the presence of the officer at that time.

MR. JUSTICE BLACK: You don't deny he was arrested; you're arguing about that time before he was arrested.

MR. PAYNE: That is correct.

MR. CHIEF JUSTICE WARREN: When did the arrest take place? Just speaking in ordinary terms, now, not "little arrest," or "big arrest," but speaking in ordinary terms, when was he arrested?

MR. PAYNE: Speaking in ordinary terms, he was arrested after the officer felt the weapon and ordered them into the interior of the store. And it was not until that time, after he felt the weapon on the outside—he did insert his hand and feel the butt of the gun afterwards, and after taking them on the inside and they were placed against the wall; when the coat was pulled from his shoulders and then the gun was taken from out of the pocket of Terry; he then went to the other petitioner and patted him on the outside of his clothing and thereupon felt a weapon that he had testified to—it was after patting on the outside of his clothing, that he inserted his hand into his pocket and removed the weapon from the second individual, or person involved here.

So, the arrest took place the moment that he ordered them into the store itself. Their freedom of movement was interfered with, significantly, at that time so that they could not—

MR. JUSTICE BRENNAN: Let's use the Fourth Amendment language, then. When was the first "seizure" of the person?

MR. PAYNE: The first seizure of the person was at the time that he ordered them into the store.

MR. JUSTICE BRENNAN: You mean when he took Terry and swung him around there was no seizure of the person?

MR. PAYNE: I think there was a "temporary detaining," or "interference" with his person.

MR. JUSTICE BRENNAN: Well, he had his hands on him and he switched him around. Surely—there was no seizure of the person?

MR. PAYNE: But here again we're dealing with simple semantic words.

MR. JUSTICE BRENNAN: That word is in the Fourth Amendment, isn't it?

MR. PAYNE: I agree that it is, sir.

MR. JUSTICE BLACK: What is the difference between "seizure" and "arrest"? You know, a seizure—you don't seize a man—I mean, you may seize him because you "seize" something tangible, but that's not what you are talking about in a seizure in the Fourth Amendment. I thought it was an arrest?

MR. PAYNE: It is an arrest that I understand we are discussing in this matter.

MR. JUSTICE BLACK: Also, you could very easily turn a man around, without arresting him, couldn't you?

MR. PAYNE: I agree with this—

MR. JUSTICE BLACK: It might not be "easy," depending on his size—

MR. PAYNE: —that he could very easily turn the man around, and some may term that as a "seizure of the person" himself; but I would not term it as a seizure of the person himself unless he has the intention of taking that person into custody, even though he may lay hands on him at that particular time.

MR. JUSTICE BLACK: Well he undoubtedly did this when he ordered them to get into the store and turn their palms towards the wall and stand there. At that point, there can be no doubt about an arrest, I guess.

MR. PAYNE: I would agree. I think that the affirmance of the conviction of the petitioners on the law in the instant case is reasonable, is necessary, and is appropriate to secure the safety and the welfare and the best interest of the public of the State of Ohio, because we are asking here—and I am, perhaps, bound to indicate that the Court of Appeals has suggested in this particular case—that we authorize the stopping under these circumstances where there are these surrounding circumstances, for the protection of the officer's life and for the protection to the community that will exist if this is not permitted in this manner and this way,

depending upon the circumstances that exist at this time.

The means that is selected, as enunciated by our trial court and the Court of Appeals in this case, have a direct substantial relationship to the concept of the safety and the welfare sought to be obtained in the affirmance of this particular case here. If we consider the comments of the trial judge at the time that he gave his opinion in connection with this matter, the trial judge made these remarks: "I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years and given to us under the Fourth Amendment and other amendments of the Constitution."

Secondly, the trial court said, "At the same time, a police officer cannot, as far as this Court is concerned, and will not be permitted to stop and frisk an individual simply because he has a suspicion—a mere suspicion—unless there are reasonable circumstances justifying the frisk."

Three. "When the circumstances justify, and there is reasonable suspicion, and for his own personal protection, he may frisk to determine if there are weapons—for his personal safety."

Four. "The officer assigned in the area in which he had been placed, doing the job he had been doing, and had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action."

Five. "There was reasonable cause in this case for the officer to approach these individuals and pat them down."

Here is a decided attempt on the part of the trial judge to equate and balance the rights of the individuals with the rights of the public and the safety that is involved herein as it pertains to the officer in this particular case. What are the "reasonable cause circumstances" that existed in the mind of the officer at that particular time?

One, we have a police officer in his particular area, on duty, and his duty is to maintain law and order. His duty, too, is to prevent crime if he can so do.

Second, he has 39 years of experience herein.

Fourth, the observations of the suspicious activity which he observed, which may be determined as pre-detention conduct.

Five, he concludes from the observations and the conduct of these men that a crime of violence with the use of weapons in probability may be committed under these circumstances.

Six, he decides to investigate and to interrogate, and the record indicates and shows that at this particular time, "Why did you go over to these men?" "I went over to them to ask them some questions."

Eight, when he asked their names, he received this mumbled

incoherent response, which further gave rise to the circumstances that he had concluded previously that a stick-up was possible here.

At this point, taking into consideration the nature of the crime which he has concluded—a stick-up—and the use of weapons as they are characteristically used in a stick-up, there is only one course of conduct then open to a prudent police officer. And that is, to frisk or pat for weapons, for the protection of his life. This is why we consider it in the interest of safety and public welfare in the State of Ohio.

Seven—or, not seven, but—ten, there was the absence of assistance to this officer, at this time, in relation to the number of individuals involved here. There was one police officer and three men. The type of clothing, also, he considered at this particular time because they were wearing overcoats, and the possibility that they might have concealed weapons, as they did exist here; the sex of the subjects, also, I think he had to take into consideration, at this particular time. There were three agile, young men that he was confronting, and he was by himself at this particular time.

Under these circumstances that he was confronted with at this time, I believe it was in the interest of public safety; I believe it is in the interest of the welfare of the community and society, that he have the right, based on these probable cause circumstances, to frisk this man, to temporarily detain him, to ascertain that which he has observed, and to confiscate any weapons which he might find on his person at that particular time; and, that they are admissible in the evidence of his trial subsequent thereto.

I think that if, as the question was placed by one of the Justices of the Court, that after the probable cause that exists here in this particular case, I feel that the judgment in the case should be affirmed.

MR. CHIEF JUSTICE WARREN: You may have three more minutes to finish.

MR. STOKES: Thank you, Your Honor.

MR. CHIEF JUSTICE WARREN: Your time had expired.

REBUTTAL ORAL ARGUMENT OF LOUIS STOKES, ESQ., ON BEHALF OF PETITIONERS

MR. STOKES: Thank you very much, Mr. Chief Justice:

We would just ask the Court to consider that, on the state of the record, this police officer is acting upon the suspicion he has that these two men are casing a place; that the stores where they

are supposedly casing, are located on Huron Avenue at Fourteenth Street at the apex. These men have gone down Euclid Avenue, where Huron Avenue cannot even be seen. They are standing in front of a store there that has not, on the state of this record, been cased at the time they are approached and subjected to the arrest.

We would ask this Court to be mindful, also, of the fact that if this Court does affirm this decision, it will in effect be affirming the decision rendered by the Court of Appeals, in which they have established the fruit-of-the-frisk doctrine for the State of Ohio. I would ask you to keep in mind that the State of Ohio's legislature has just considered, a few months ago, and rejected a stop-and-frisk bill similar to that of the State of New York.

Lastly, we would ask you to consider, in accordance with decisions such as *DeRay*, where this Court has said a search is either good or bad when it starts, and it does not change character thereafter; and, that the after-the-event justification does not relate back to justify the original, initial unlawful search.

Thank you.

MR. JUSTICE BLACK: Let me ask you if this is not what you're really asking us to hold—I'm not saying we shouldn't. You ask us to hold, as I understand it, that no officer has a right to interrogate people, and expect to get an answer, unless he already has in his possession, or in his mind, evidence sufficient to show probable cause that that person has committed a crime, or is about to commit one?

MR. STOKES: I can't take it that far.

MR. JUSTICE BLACK: Well, how far would you take it?

MR. STOKES: I'm saying that where the police officer chooses, with reference to whatever his determination has been, to interrogate or to investigate further with respect to citizens lawfully on the street, that in order to exercise dominion or custody or control over that citizen, and thereby deprive him of his rights under the Fourth Amendment, that he must have before approaching him that probable cause which this Court has made reference to in its decisions.

MR. JUSTICE BLACK: Well, what about asking him questions and expecting him to answer?

MR. STOKES: He has the right to approach him and ask his questions.

MR. JUSTICE BLACK: Does he has a right to expect an answer, and to do anything whatever if he doesn't get it?

MR. STOKES: I think that in the absence of this person having committed any crime of any sort, and where the approach is based on suspicion alone, the person being subjected to the interrogation has the right to refuse to answer, or to turn away.

MR. JUSTICE BLACK: What you're saying is that a policeman does not have the right to ask a person a question on the street and get an answer, or to keep him, or do anything else except just ask him a question, unless he's in possession of sufficient facts to know that he has probable cause to believe that that man has committed a crime or is about to commit a crime?

MR. STOKES: Mr. Justice, I'm sorry if I'm giving you the impression that a police officer cannot ask him a question.

MR. JUSTICE BLACK: I said, "can ask him a question," but cannot get an answer, and do nothing about it.

MR. STOKES: He can arrest him, if he chooses.

MR. JUSTICE BLACK: He can arrest him. But supposing he doesn't choose to arrest him? Suppose he wants to do something short of arresting him?

MR. STOKES: Then I don't think he has that right.

MR. JUSTICE BLACK: Then the man can go on off, not answer the question because the officer doesn't have at that time a sufficient amount of evidence to make a case of probable cause that he has committed a crime?

MR. STOKES: That is precisely what I'm saying, because otherwise the Fourth's inviolate right of privacy is being invaded.

MR. JUSTICE BLACK: Well, that's all. I thought that was it.

MR. STOKES: Yes, sir.

MR. CHIEF JUSTICE WARREN: Very well, Mr. Stokes.

MR. STOKES: Thank you.

[Whereupon, at 2:05 p.m. the oral argument in the above-entitled matter was concluded.]