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67/10/25 Brief of Attorney General of the State of New York as Amicus Curiae in Support of Appellees

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 63

NELSON SIBRON,

Appellant,

against

STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 74

JOHN FRANCIS PETERS,

Appellant,

against

STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 67

JOHN W. TERRY,

Petitioner,

against

STATE OF OHIO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Statement of Interest of Amicus State of New York

The instant cases, which will be heard together by this Court, all involve the constitutionality of questioning and limited protective searches for weapons by police officers who have reasonable ground to suspect that a felony has been committed or is about to be committed. These questions are of direct and substantial interest to the Attorney General of the State of New York. As the chief legal officer of the State (N. Y. Executive Law § 63), charged with the defense of the enactments of our State Legislature (Executive Law § 71), the Attorney General is concerned with maintaining an equitable balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice.

Section 180-a of the New York Code of Criminal Procedure, codifying the common law, establishes standards defining the circumstances under which citizens abroad in a public place may be questioned as to their activities. These standards serve the valid dual purpose of protecting the individual from being formally charged with crime without prior opportunity to explain his actions, and of permitting the prevention of crime before its commission. The statute permits a "frisk" for weapons only where the police officer not only has facts upon which to base a reasonable suspicion that a felony has or will be committed, but further facts upon which to base a reasonable suspicion that he may be attacked with a dangerous weapon.

We agree with and endorse fully the position taken by the District Attorneys filing briefs with respect to their defense of the New York Statute.

Questions Presented

1. Whether § 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments of the United States Constitution because it authorizes a police officer to stop a person whom he reasonable suspects is committing or is about to commit a felony and ask him for his name, address and an explanation of his actions.

2. Whether § 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments of the United States Constitution because it authorizes a police officer who has reasonable grounds to suspect that a felony has been or will be committed, to conduct a limited search of a person only where there are reasonable grounds to suspect that such person may threaten the officer with a dangerous weapon.

3. Whether § 180-a of the New York Code of Criminal Procedure is constitutional on its face, but was improperly applied to the cases of *John F. Peters* v. *State of New York*, and *Nelson Sibron* v. *State of New York*.

4. Whether a State court judgment permitting a police officer pursuant to common law to question persons reasonably suspected to be committing a felony or about to commit a felony and to conduct a limited search for weapons, evidence found being inadmissible in a subsequent criminal proceeding, violates the Fourth and Fourteenth Amendments of the United States Constitution.

Summary of Argument

I. Section 180-a of the New York Code of Criminal Procedure codifies the common law right of a police officer to question any individual in a public place where there is a reasonable suspicion that a crime has been committed or is about to be committed. *People* v. *Rivera,* 14 N. Y. 2d

441 (1964). This power to question is a necessary element in crime prevention; without it, investigative leads would be irreparably lost and emergency situations could not be properly handled.

The state and federal cases upholding this right under common law or statute make clear that a brief inquiry cannot be equated with an arrest. *Wilson* v. *Porter,* 361 F. 2d 412, 414 (9th Cir. 1966); *United States* v. *Vita,* 294 F. 2d 524 (2d Cir. 1961); *United States* v. *Bonanno,* 180 F. Supp. 71, 78 (S.D.N.Y. 1960), reversed on other grounds 285 F. 2d 524 (2d Cir. 1961); *People* v. *Rivera, supra; Cornish* v. *State,* 215 Md. 64, 137 A. 2d 170 (1957). Arrest, which requires an officer to have probable cause to believe a crime has been committed, necessarily entails being taken into custody to answer for a crime, with the charges permanently entered on police records. *Cannon* v. *State,* 53 Del. 284, 168 A. 2d 108 (1961).

A brief detention of a suspicious person enables the officer to evaluate the situation and in turn enables the individual detained to explain his actions without the embarrassment, inconvenience and expense of being formally charged with crime. *United States* v. *Thomas,* 250 F. Supp. 771 (S.D.N.Y. 1966); *United States* v. *Vita, supra; Cannon* v. *State, supra; Kavanagh* v. *Stenhouse,* 98 R. I. 252, 174 A. 2d 560 (1961).

II. A limited protective "frisk" of a suspect is permitted under Section 180-a only where there are facts upon which to base a reasonable suspicion that the person being questioned is armed and may use his weapon. The regulations issued by the New York State Combined Council of Law Enforcement Officials in connection with the statute specifically provide: "Not everyone may be searched; searches are only permitted when the officer reasonably suspects he is in danger."

Such a protective search, based upon self-preservation, cannot be unreasonable and thus cannot violate the stric-

tures of the Fourth Amendment. *Cf. United States* v. *Rabinowitz,* 339 U. S. 56 (1950); *Elkins* v. *United States,* 364 U. S. 206 (1959); *Carroll* v. *United States,* 267 U. S. 132, 147 (1924).

III. Since a precautionary search for weapons is valid, evidence obtained pursuant to it can be admitted in a criminal prosecution. *People* v. *Rivera, supra; People* v. *One 1958 Chevrolet,* 5 Cal. Reptr. 128, 133 (2d District, 1960). *Mapp* v. *Ohio,* 367 U. S. 643 (1961) is inapposite, since it is based upon the rationale that if evidence could be freely used regardless of how it was found, police officers might be encouraged to use unlawful crime detection methods. As to the instant statute, however, an officer who reasonably fears danger should not and cannot be deterred from "frisking" a suspect. Abuses of the right to conduct protective searches pursuant to "reasonable suspicion" can be checked by the courts in the same manner as abuses by officers claiming "probable cause" to believe a crime has been committed.

IV. However, assuming *arguendo,* that this Court should regard admission of evidence found in such limited searches as violative of the Fourth Amendment, it is respectfully submitted that the stop and defensive "frisk" authorized by Section 180-a should still be approved and upheld. Defensive searches are qualitatively different from any other kind of search, since they do not seek evidence of crime. They are merely a necessary adjunct to the well-established right to make inquiry pursuant to reasonable suspicion. Since this is a relatively new statutory conception, this Court could permit the reasonable limited search but fashion an appropriate rule concerning admissibility of evidence. This approach has been taken by the Court of Appeals in *State of Ohio* v. *Terry,* 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966).

POINT I

A police officer's power to question any person whom he reasonably suspects has committed or is about to commit a felony, has already been established as valid under State and Federal Law, and brief detention pursuant to this power is not an arrest.

As stated by the President's Commission on Law Enforcement and Administration of Justice in its Task Force Report on The Police (U. S. Government Printing Office, 1967), at page 1:

> "The heart of the police effort against crime is patrol—moving on foot or by vehicle around an assigned area, stopping to check buildings, to survey possible incidents, to question suspicious persons or simply to converse with residents who may provide intelligence as to occurrences in the neighborhood."

This common law right to question—in response to suspicious circumstances which may not be sufficient to create probable cause to believe that a crime has been committed—has been codified in Section 180-a of the New York Code of Criminal Procedure.

The legislative history of the statute indicates its dual function of facilitating reasonable crime prevention methods and protecting the individual:

> "Legalizing the questioning and searching of a suspect so that it does not constitute an arrest is to the advantage of both the police and the public. When an officer stops a person and questions him, he is often in doubt whether such acts constitute an arrest. If they do the officer is subjecting himself and his employer to the possibility of a suit for false arrest. Whenever an innocent person is arrested, charged with a crime, and brought before a magistrate, his reputa-

> tion is harmed, he is humiliated, greatly inconvenienced and put to considerable expense." N. Y. State Legislative Annual, 1964, A. I. 1859, Pr. 3025, page 67, Volker.

The rationale supporting police authority to question and investigate was clearly set out by the New York Court of Appeals in *People* v. *Rivera,* 14 N. Y. 2d 441, 444 (1964):

> "The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going on in the streets . . . If they were denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

It is not difficult to conceive of examples illustrating the urgent necessity for the power to inquire, even in circumstances where probable cause for arrest may not exist. If a police officer heard shots coming from a certain street and saw a man running from that direction, no reasonable person could doubt that it would be the officer's duty to stop the person running and determine his identity and the reason for his actions, rather than allow him to disappear. Or, if an anonymous telephone call warned a detective that a man with a red jacket would be setting off a bomb in a certain school, it would be the detective's obligation to question a man fitting the description seen on the school's premises.

This kind of emergency situation was incisively analyzed by the American Law Institute in "A Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1" 1965, pp. 96-97 [President's Commission on Law Enforcement

and Administration of Justice in its Task Force Report on The Police (U. S. Government Printing Office, 1967), at p. 184]:

> "If, as some have argued, the only power to restrain a person, even briefly, is by arresting him on reasonable grounds to believe him guilty of a crime, the police will be foreclosed from responding to confused emergency situations in the way that seems most natural and rational. For in such circumstances, where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to 'freeze' the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be too high a price in effective policing and in the police's respect for the good sense of the rules that govern them, in order to avoid brief inconvenience that most innocent persons would be prepared to undergo."

And as was observed by the President's Commission on Law Enforcement and Administration of Justice in its Task Force Report: Crime and Its Impact—An Assessment (U. S. Government Printing Office, 1967) at p. 94:

> "If the police were forbidden to stop persons at the scene of a crime, or in situations that strongly suggest criminality, investigative leads could be lost as persons disappeared into the massive impersonality of an urban environment."

Some States have established by statute the right of police officers to stop and question suspects for a reasonable time. General Laws of Rhode Island § 12-7-1 (1956); New Hampshire Revised Statutes, Ch. 594, § 2 (1955); 11 Delaware Code, § 1902 (1953); Massachusetts General Laws, Ch. 41, § 98 (1961).

Case law also supports a common law as well as a statutory right to question upon reasonable suspicion. See *People* v. *Rivera, supra; People* v. *Martin,* 46 Cal. 2d 106, 293 P. 2d 52 (1956); *People* v. *Jones,* 176 Cal. App. 2d 265, 1 Cal. R. 210 (1959); *People* v. *Faginkrantz,* 21 Ill. 2d 75, 171 N. E. 2d 5 (1961); *State ex rel. Branchand* v. *Hedman,* 269 Minn. 375, 130 N. W. 2d 628 (1964); *State* v. *Hope,* 85 N. J. Super. 551, 205 A. 2d 457 (A. D. 1964); *State* v. *Bell* 89 N. J. Super. 437, 215 A. 2d 369 (A. D. 1965); *People* v. *Hennerman,* 367 Ill. 151, 10 N. E. 2d 649 (1937); *Huebner* v. *State,* 33 Wisc. 2d 505, 147 N. W. 2d 646 (1967); *Cornish* v. *State,* 215 Md. 64, 137 A. 2d 170 (1957); *Commonwealth* v. *Hicks,* 209 Pa. Super. 1, 223 A. 2d 873 (1966); *Goss* v. *State,* —— Alaska ——, 390 P. 2d 220 (1964), *cert. denied* 379 U. S. 859 (1964); *City of Portland* v. *Goodwin,* 187 Ore. 409, 210 P. 2d 577 (1949); *State* v. *Freeland,* 255 Ia. 1334, 125 N. W. 2d 825 (1964); *State* v. *Harris,* 265 Minn. 260, 121 N. W. 2d 327 (1963); *City of South Euclid* v. *DiFranco,* 33 Ohio Op. 2d 215, 206 N. E. 2d 432 (Mun. Ct., S. Euclid, Ohio, 1965); *State* v. *Hatfield,* 112 W. Va. 424, 164 S. E. 518 (1932); *Commonwealth* v. *Roy,* 349 Mass. 224, 207 N. E. 2d 284 (Sup. Ct., Norfolk, Mass., 1965); *State* v. *Moore,* —— Del. ——, 187 A. 2d 807 (Superior Court, Del., 1963); *De Salvatore* v. *State,* 52 Del. 550, 163 A. 2d 244 (1960); *State* v. *Chronister,* —— *Okla.* ——, 353 P. 2d 493 (1960); *Commonwealth* v. *Lehan,* 347 Mass. 197, 196 N. E. 2d 840 (1964); *Kavanagh* v. *Stenhouse,* 93 R. I. 252, 174 A. 2d 560 (1961); *People* v. *Beasley,* —— Cal. App. 2d ——, 58 Cal. Repor. 485 (1967); *State* v. *Dilley,* 49 N. J. 460, 231 A. 2d 353 (1967); *Wendelboe* v. *Jacobson,* 10 Utah 2d 344, 353 P. 2d 178 (1960).

Federal court decisions supporting the power to detain suspicious persons briefly for an explanation of their actions, have distinguished between such detentions and arrests. In *Wilson* v. *Porter,* 361 F. 2d 412, 414-415 (9th

Cir., 1966), the Court held:

> "While it is clear that at the time appellee's car was pulled over probable cause for an arrest did not exist, it is also clear that not every time an officer sounds his siren or flashes a light to flag down a vehicle has an arrest been made. The initial act of stopping appellee's car was not an arrest. Granting that the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention *without cause* and formal arrest *without cause,* there is a difference between that 'cause' which would justify informal detention short of arrest and the probable cause standing required to justify that kind of custody traditionally denominated an arrest.
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> * * *
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> We take it as settled that there is nothing *ipso facto* unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine investigations."

The court made clear that there must be a suspicion based upon facts from which it can determine that the detention was not arbitrary or harassing.

And in *United States* v. *Vita,* 294 F. 2d 524 (2d Cir., 1961), where appellant was asked to come to FBI headquarters to answer questions, and was told that he was not under arrest and could leave whenever he chose, the Second Circuit ruled:

> "Private citizens who are detained may not, of course, be compelled to answer the questions of the authorities if they wish to remain silent. And the reasonableness of the time for which a person is detained necessarily depends upon his continued willingness to cooperate in answering questions. Most persons, even hardened criminals, will not refuse to cooperate altogether; they

> are far more likely to talk and make a pretense of cooperation."

The District Court commented in *United States* v. *Bonanno,* 180 F. Supp. 71, 78 (S.D.N.Y., 1960), reversed on other grounds 285 F. 2d 524 (2d Cir., 1961):

> "I believe that the relative dearth of authority in point can be explained by the fact that few litigants have ever seriously contended that it was illegal for an officer to stop and question a person unless he had 'probable cause' for formal arrest.
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> * * *
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> . . . It cannot be contended that every detention of an individual is such a 'seizure'. If that were the case, police investigation would be dealt a crippling blow, by imposing a radical sanction unnecessary for the protection of a free citizen. See also *United States* v. *Thomas,* 250 F. Supp. 771 (S.D.N.Y., 1966; *Lipton* v. *United States,* 348 F. 2d 591 (9th Cir., 1965)."

The court in *United States* v. *Vita, supra,* notes the advantage to a citizen who may answer questions and give a satisfactory account of himself without being formally charged before his explanations are considered. The same conclusion was arrived at in *United States* v. *Thomas,* 250 F. Supp. 771 (S.D.N.Y., 1966), where the Court held at pages 794-95:

> "To the innocent person seeking to avoid the consequences of arrest, a reasonable period of detention during which he can explain his actions and vindicate himself is a welcome right and but a minor inconvenience as compared to arrest."

The New York courts have also upheld this distinction. The Court of Appeals in *People* v. *Rivera, supra,* 14 N. Y. 2d at p. 445 (1964), citing *People* v. *Marendi,* 213 N. Y. 600

(1915), ruled:

> ". . . the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. It is enough for the purposes of this case to rule that the police were justified in the record as here developed in stopping and questioning defendant."

This analysis accords with New York's definition of arrest as contained in § 167 of the N. Y. Code of Criminal Procedure, Supp. amended 1967:

> "Arrest is the taking of a person into custody that he may be held to answer for an offense."

Other jurisdictions are in accord. See e.g. *Cannon* v. *State,* 53 Del. 284, 168 A. 2d 108 (1961); *Cornish* v. *State, supra; Blager* v. *State,* 162 Md. 664, 161 A. 1 (1932); *Huebner* v. *State, supra; Commonwealth* v. *Hicks, supra.*

Nor do this Court's decisions in *Rios* v. *United States,* 364 U. S. 253 (1960), *Henry* v. *United States,* 361 U. S. 98 (1959), and *Brinegar* v. *United States,* 338 U. S. 160 (1949), equate a stop with an arrest. In *Henry* the prosecution conceded that an arrest took place when federal agents stopped a car in which cartons of whiskey were then found. Thus, the sole remaining question was whether the arrest took place pursuant to probable cause. Since this Court's language at page 103 ("for purposes of this case") appears to confine the decision to the circumstances concededly presented, there is no basis to infer that an arrest takes place whenever a car is stopped and the driver is asked to show a driver's license. Thus, the case cannot

support the proposition that no car may be stopped under any circumstances without probable cause.

The *Rios* case explicitly recognized the right to stop and question. At page 262 this Court noted:

> "But the Government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intention to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence. The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night."

It is apparent that the idea of detention for routine investigation was accepted as not amounting to an arrest, since this Court remanded the case for determination of the point at which arrest occurred.

In *Brinegar* probable cause was found and there was no need to discuss or consider the power to stop cars merely for investigatory purposes.

It is not difficult to predict that, if police officers are deprived of the right to question persons abroad in a public place upon reasonable suspicion, they will be compelled to deal with suspicious circumstances by making arrests which the courts might be reluctant to hold improper. Thus the standard of probable cause for arrest will be substantially diluted. Ironically, this is the result predicted by counsel for appellant Sibron if the police are *permitted* to investigate informally. Logic compels the analysis arrived at in *Gilbert* v. *United States,* 366 F. 2d 923 (9th Cir., 1966),

where the Court at page 928 notes that substantial considerations favor recognition of a carefully limited right of brief police detention on less than probable cause:

> "If even slight interference with freedom of personal movement is invariably conditioned upon a showing of prior probable cause, then either the standard of probable cause will be lowered, and with it the protection against formal arrests and substantial interferences with liberty . . . or police activity which appears perfectly proper when measured against a standard of reasonableness will nonetheless be forbidden."

See in accord *United States* v. *Thomas, supra,* 250 F. Supp. at page 796:

> "If the police seek to justify their actions as an arrest based upon probable cause, the dangers are great. For if the concept of probable cause is expanded to cover these necessary though ambiguous cases, the effect will be to widen the power of the police to visit upon persons the consequences of arrest when such should not be done. Thus the constitutional standard of probable cause prior to an arrest, and the protection it affords, will be diluted to the point that situations warranting a stop, question and detention will be considered an arrest though such should not be the case."

Judicial proscription of the common law right to "stop" would thus create an intolerable dilemma. Either the public would be deprived of the right to be protected by brief police questioning of suspicious persons, or the rights of citizens whose questioning would be termed an arrest (and entered on police records) would be defeated. *Cannon* v. *State, supra.*

POINT II

The right to stop and inquire includes a corollary right to self-protection.

A recent study indicated that of the suspects questioned in a public place by police officers, 10% were armed with knives and 10% were carrying guns. Albert J. Weiss, Jr., "Personal and Property Searches in Radio Dispatched Police Work: An Overview of the Data from Three Cities" (Ann Arbor: University of Michigan, 1966) pages 4-6.

Professor Allen P. Bristow has conducted a study that has indicated that the failure to make a proper search is a circumstance in 19% of the cases in which police officers are shot. Bristow, Allen P. "Police Officer Shootings—A Tactical Evaluation" 54 Journal of Criminal Law, Criminology, and Police Science, 1963, page 95. Analysis of the particular circumstances under which police officers are in the greatest danger showed that where suspects were stopped in vehicles, the greatest hazard of a police officer's being shot occurred after his approach and while he was (1) issuing a citation, (2) interrogating or (3) using his radio (Bristow, pp. 93-94).

The risk of injury increases with the degree of urbanization in the community. As was found in the President's Commission on Law Enforcement and the Administration of Justice in its Task Force Report: Crime and Its Impact—An Assessment, *supra,* page 141:

> "Offenders from areas of slight or moderate urbanism in contrast to offenders from areas of extensive urbanism are not frequently definite criminal social types, characterized by criminal techniques, criminal argot and a definite progressive criminal life history, at least prior to prison experience."

Even without such studies and statistics, there can be no valid legal basis for depriving police officers, as opposed

to other categories of persons, of the right to self-defense. This right can best be implemented by permitting protective searches in cases where the officer has reasonable grounds to suspect that the person he is questioning is armed and might use a weapon against him. Counsel for appellant Sibron admits at the outset (brief, p. 34) that a police officer who feels threatened will search for weapons:

> ". . . He will frisk to protect his life no matter what a statute authorizes or what the court decisions say. His instinct for self-preservation will dictate his course of action."

It is difficult to conceive of how such a limited protective search can be called unreasonable—and unreasonableness is the sole basis upon which a search may be invalidated under the Fourth Amendment. *United States* v. *Rabinowitz,* 339 U. S. 56 (1950); *Elkins* v. *United States,* 364 U. S. 206 (1959); *Carroll* v. *United States,* 267 U. S. 132, 147 (1924).

It should be noted at the outset that, contrary to the erroneous implications in appellant Sibron's brief, the statute in question sets up a two-fold requirement. First it provides that the officer have facts upon which to base a reasonable suspicion that someone in a public place may be committing or be about to commit a felony. Second, he must have further facts upon which to base his reasonable suspicion that he may be in danger of life or limb if he does not search this person for a dangerous weapon. This suspicion can be based upon the suspect's actions, bulges in clothing, or sudden movements. Other factors are summarized in *Detection of Crime,* Lawrence P. Tiffany, Donald M. MacIntyre, Jr., and Daniel L. Rotenberg. (Little Brown & Co., Boston, 1967) at page 48:

> "Whether regular patrol officers conduct a frisk depends somewhat on the size and age of the suspect or suspects, the crime suspected, the relative isolation of the area in which the stop is made, the amount of light,

> whether the officer is alone, how many suspects are detained, and other similar factors."

To overcome the obvious difficulty in taking the position that officers may not prevent attack upon themselves by a weapons search, appellant Sibron contends that the statute in question authorizes not merely the limited "frisk" but all types of searches. The case of *People* v. *Taggart,* 20 N. Y. 2d 335 (1967), is cited as reversing the rule created in *People* v. *Rivera, supra,* and *People* v. *Peters,* 18 N. Y. 2d 238 (1966), carefully limiting the permissible "frisks" authorized under § 180-a.

However, *Taggart* has not removed the restrictions on the kinds of searches permissible under the statute. The case involved unusual circumstances which the concurring opinion of Justice Van Voorhis compared to an officer's reasonable suspicion that someone is carrying a bomb on an airplane. In *Taggart,* a detective had received an anonymous telephone call exactly describing a young man who would be at a certain corner with a revolver in his left-hand jacket pocket. The detective observed a man at the location indicated, fitting the complete description given and standing in the middle of a group of children. The officer reached into the pocket described and found the revolver. The Court based its decision permitting more than a "frisk" upon the unusual circumstances—the telephone call indicating the exact location of the weapon and the danger to the children:

> "It would seem unreasonable to require an officer in that situation to engage in a preparatory and undoubtedly dangerous frisk—particularly in view of the fact that the defendant was standing in the middle of a group of children at the time of the search." (at p. 343).

Moreover, the corroboration provided by the suspect's location and appearance was virtually tantamount to sup-

plying "probable cause" to believe that he possessed a revolver. See *Draper* v. *U. S.*, 358 U. S. 307 (1959).

The purpose of a weapons search and the method of carrying it out were well summarized in *People* v. *Rivera, supra,* 14 N. Y. 2d at page 447:

> "Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act.
>
> The fact that the police detective actually found a gun in defendant's possesion is neither decisive nor material to the constitutional point in issue. The question is not what was ultimately found but whether there was a right to find anything."

As was found by Richard Kuh, "Reflections on New York's 'Stop and Frisk Law' And Its Claimed Unconstitutionality," 56 Journal of Criminal Law C. & P. S. 32 (1965), p. 37:

> "Customary police *self-protective* practice is all that is authorized by the 'Stop and Frisk' law: A 'patting down' for bulky objects that may be guns or knives, followed by a reaching into clothing or a turning out of pockets only when such solid bulges have been located. Concealed non-bulky contraband is not ordinarily legally discoverable in such a search; there would be no way of discovering it other than the rare off-chance of its being jointly pocketed with the weapon-like bulge."

The regulations issued by the New York State Combined Council of Law Enforcement Officials at the time Section 180-a was enacted permit only an external frisk. It is further provided that "Not everyone stopped may be

searched; searches are permitted only when the officer reasonably suspects he is in danger." The officer cannot compel an answer to his questions, cannot compel the suspect to produce proof of his identity, and must explain with particularity how a suspect's attitudes and answers were unsatisfactory if he chooses to make an arrest on the basis of these answers or attitudes. An officer attempting to stop a suspect may not use his weapons or nightstick in any fashion, but may only interpose his own body.

Similarly, recent additions to Section 35.30 of the New York Penal Law restrict and define the situations in which an officer who has reasonable cause to believe that someone has committed a crime may use physical force to prevent attack or escape. These regulatory and penal law provisions, read together with the statute at bar, all attest to the good faith and effectiveness of the State's attempt to develop crime prevention methods which will pose minimum hazard or inconvenience to the innocent and maximum standards of due process for law-breakers.

In view of the proscription in New York law against police use of armed force in "stop" cases, it would be totally unreasonable and unwarranted to impose upon such officers the additional burden of being forbidden to engage in defensive searches. As was said by Glanville Williams in "Police Detention and Arrest Privilege—England", 51 J. Crim. L., C. & P. S. 413, 418 (1960), in relation to the power to frisk:

> "It might be regarded as a reasonable extension of the existing law of self-defense, or as an application of the doctrine of necessity . . ."

POINT III

Evidence obtained pursuant to Section 180-a is admissible in a criminal prosecution.

Appellant Sibron admits, at pages 42-43 of the brief, that it is difficult to argue that the statute in question is unconstitutional based upon its text and the regulations issued when the statute was enacted. However, he argues that the decisions of the New York Court of Appeals in *Peters* and *Sibron* have construed the statute in such a manner that it violates the Fourth Amendment. Whatever the merits of appellants' contentions that the statute was improperly applied to them, the fact cannot be obscured that this Court has before it the validity of the statute on its face, not only instances of its application to particular convictions. See *Lovelace* v. *United States,* 357 F. 2d 306 (5th Cir., 1966); *Shuttlesworth* v. *Birmingham Board of Education,* 162 F. Supp. 372 (N. D. Ala. 1958), aff'd 358 U. S. 101 (1958); *Capooth* v. *United States,* 238 F. Supp. 583 (S. D., Texas, 1965).

The care with which the rights of the public are protected by the statutory language is evident in the previously described requirement that a police officer not only have a reasonable suspicion that a felony has been or is about to be committed, but also that he may not conduct a "frisk" without facts upon which to base a reasonable suspicion that he is in danger of attack. Thus there is no relation to the arbitrary general searches condemned in *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), which appellant Sibron fallaciously attempts to cite as apposite to this case.

It is clear from this Court's decisions in such cases as *Brinegar* v. *U. S., supra, Carroll* v. *U. S., supra,* and *U. S.* v. *Rabinowitz, supra,* that the reasonableness of a search must be tested by the circumstances which have

occasioned it. Where these circumstances include demonstrable elements of personal danger to a police officer, it is obvious from the standpoint of law and logic that a protective search is not only proper but inexorably necessary. *State* v. *Dilley, supra; People* v. *Machel,* 234 Cal. App. 2d 37, 44 Cal. Reptr. 126, 130-32 (1965), cert. denied 382 U. S. 839 (1965); *Commonwealth* v. *Hicks, supra.* Since such a search is valid there is no reason to require officers to discard contraband which may accidentally be found in the course of such a search.

As was held in *People* v. *One 1958 Chevrolet,* 5 Cal. Reptr. 128, 133 (2d District, 1960):

> ". . . the finding of the [marijuana] cigarette was incidental to the precautionary search for weapons. The officers had the right to make such precautionary search, and they were not required to overlook marijuana which came to their notice during such search."

See in accord *People* v. *Rivera, supra.*

Appellant Sibron uses the case of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), as a springboard in his attempt to change New York law so that such contraband cannot be admitted into evidence against a defendant regardless of the necessity for the search through which it was obtained. However, the rationale of *Mapp* is inapplicable to this case. An officer who—in good faith based upon particular facts—fears danger to himself should not and cannot be deterred from "frisking" a person detained. Thus, inadmissibility of evidence so obtained would not serve as a deterrent to such a "frisk." *Mapp* was predicated upon the fact that if evidence could be freely used regardless of how it was found, police officers would be encouraged to utilize unlawful methods of crime detection. Such considerations cannot be present here and, therefore, the only result of excluding contraband found pursuant to "frisks" would be to permit continuation of violations of State law

by suspects without changing the pattern of police defensive measures.

Appellant Sibron contends (at p. 36) that some police officers will search in the absence of any need for self-protection, in spite of the specific prohibition against such conduct in the regulations issued by the New York State Combined Council of Law Enforcement Officials. It should be noted at the outset that such an occurrence could not invalidate the State's right to provide for "stops" and "frisks". As was said in *United States* v. *Vita, supra,* 294 F. 2d at page 530:

> "But the possibility that powers given to law enforcement officers may be abused does not require Government agents to be left powerless to make reasonable inquiry."

The crux of the question is whether the standard contained in the instant statute is sufficiently definite to provide a basis for court review which customarily and traditionally checks abuses and misuses of authority by police officers. Appellant Sibron repeatedly asserts that while the standard of "probable cause" to believe a crime has been committed is distinct and precise, the term "reasonable suspicion" in the context of Section 180-a lacks such precision. Analysis demonstrates precisely the contrary—both standards are capable of similar review and affirmation by the courts.

In *Brinegar* v. *United States, supra,* this Court defined "probable cause" as follows (338 U. S. at 175):

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is correlative to what must be proved."

The criterion of "reasonable ground for belief of guilt" is adopted with approval at page 175, citing *Carroll* v. *United States, supra,* 267 U. S. at p. 161; *Husty* v. *United States,* 282 U. S. 694, 700-701 (1931); *Dumbra* v. *United States,* 268 U. S. 435, 441 (1925); *Steele* v. *United States* No. 1, 267 U. S. 498, 504-505 (1925); *Stacey* v. *Emery,* 97 U. S. 642, 645 (1878).

And in *Henry* v. *United States, supra* (361 U. S. at p. 102), the particular circumstances are again emphasized:

> "We turn then to the question whether prudent men in the shoes of these officers (Brinegar v. United States, supra (338 U. S. at 175)), would have seen enough to permit them to believe that petitioner was violating or had violated the law."

The statute before this Court can be judged and approved by substantially the same criteria as used in *Rabinowitz* and *Henry:* would a prudent man in the shoes of a particular police officer have seen enough to permit a *reasonable suspicion* that petitioner was violating or about to violate the law. This standard is not "vague and unworkable" nor does it leave the permissible conduct to the unfettered discretion of the police officer.

As in "probable cause" cases, the officer must indicate the facts upon which his reasonable suspicion was based (See also regulations cited *infra* at Point II), both as to his reason for stopping a suspect *and* as to his reason for frisking him. Since the standard is entirely factual and situational, appellant Sibron's contention that the courts would always permit a policeman to conduct a defensive search must be rejected. The courts would require the officer to justify the "frisk" on the basis of the particular situation in which he was involved and the particular suspect's acts.

Appellant Sibron argues that (brief, p. 26):

> ". . . The only possible conduct not held reasonably suspect is the perfectly normal."

The implication is that the statute permits invasions of privacy occasioned solely by non-conformity—that any unusual factor in appearance or behavior may be the basis for harassment.

The fallacy in this argument is apparent. To say that normal behavior *would not* give rise to questions does not mean that the converse is true. Many forms of behavior, such as singing operatic arias while strolling down Fifth Avenue, might be unusual and unconventional, but would certainly not lead to a reasonable suspicion that a felony was about to be committed. Ultimately, the police officer's judgment, while built upon greater experience than the average person's, will be checked against the court's standard as to what other prudent men might have done.

POINT IV

The right to stop and question can be reviewed independently of the question of the admissibility of contraband.

The Fourth Amendment cases which have held that in order to be admissible in a state or federal prosecution, evidence must have been obtained pursuant to probable cause, were predicated upon searches wholly different from that envisioned by the instant statute. *Mapp* v. *Ohio, supra; Hoffa* v. *United States,* 385 U. S. 293 (1967); *Carroll* v. *United States, supra; United States* v. *Rabinowitz, supra.* However, these cases clearly emphasize the reasonableness of the search as the crucial factor and, therefore, their rationale leads to the conclusion that evidence accidentally found as a result of a lawful protective search by a police officer must be admissible in evidence.

Assuming *arguendo,* however, that the above cited cases were read to require probable cause in addition to reasonableness before evidence can be admissible in a criminal proceeding, regardless of the grounds for the limited search

in question, it is respectfully submitted that this Court should still approve and uphold the stop and defensive search authorized by Section 180-a.

Protective searches are qualitatively different from any other kind of search. They do not seek evidence of crime or the fruits of crime, but are merely a mechanical adjunct to the well-established common law right to make inquiry where there is reasonable suspicion to believe that a felony has been or will be committed. The searches previously considered by this Court have been intricately connected with gathering evidence. Searches incident to arrest are sometimes categorized as protective, but they serve the equally important function of preventing destruction of the evidence of crime by the arrested person. See, e.g. *Carroll* v. *U. S. supra; Agnello* v. *U. S.*, 269 U. S. 20 (1925).

No such motivation or purpose is contemplated in the instant statute. Search is permitted and provided for only because it is a necessary corollary to the right to stop. Police officers cannot question without being secure in their own safety. Since this is a relatively new statutory conception, this Court could permit the reasonable search but develop an appropriate rule concerning admissibility of contraband found.[1] *Cf. Musselman Hub-Brake Co.* v. *Comm. of Internal Revenue,* 139 F. 2d 65 (6th Cir., 1943), where two contradictory provisions of the Internal Revenue Code were construed; *Shapiro* v. *United States,* 335 U. S. 1 (1948), rehearing denied 335 U. S. 836 (1948); *Clouse* v. *American Mutual Liability Insurance Co.,* 232 F. Supp. 1010 (E. D., S. Car., 1964).

This approach has been taken by the Court of Appeals of Ohio in the decisions below in *State of Ohio* v. *Terry.*

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[1] Even under this rationale, an indictment for illegal possession of weapons (as opposed to other forms of contraband) would not violate the spirit of the rule this Court would fashion.

The reasoning of the Court (214 N. E. 2d at p. 120) was as follows:

> "However, we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment and probable cause is essential. White v. United States (1959), 106 U. S. App. D. C. 246, 271 F. 2d 829. Therefore, we hold that, on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts."

The Court added at pages 121-122:

> "The States are not precluded from developing 'workable rules' governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement, provided those rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. Ker v. State of California (1963), 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726; Beck v. State of Ohio (1964), 379 U. S. 89, 85 S. Ct. 223."

It is respectfully urged that no possible balancing of interests could lead to the conclusion that vital investigatory functions must be suppressed by the courts, or that the police officer should be required to pursue his questioning without disarming a suspect who in the particular circumstances would give a prudent man reasonable suspicion to believe that his life was endangered.

CONCLUSION

For all the foregoing reasons, the constitutionality of Section 180-a of the New York Code of Criminal Procedure should be upheld, and the common law right to stop and disarm pursuant to reasonable suspicion should be affirmed.

Dated: New York, New York, October 25, 1967.

Respectfully submitted,

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