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### State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts

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*St. John's University School of Law*

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#### Recommended Citation

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## APPENDIX B

# **STATE OF OHIO V. RICHARD D. CHILTON AND STATE OF OHIO V. JOHN W. TERRY: THE SUPPRESSION HEARING AND TRIAL TRANSCRIPTS**

EDITED BY JOHN Q. BARRETT\*

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Judge Bernard Friedman, Trial Judge

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\* Assistant Professor, St. John's University School of Law. The publication of this transcript was made possible by Congressman Louis Stokes, who retained his personal photocopy of the full transcript for 34 years and then generously made it available in early 1998 to St. John's University School of Law and to the participants in its April 1998 *Terry* conference. Thanks also to Mr. Reuben Payne, Judge Stuart A. Friedman of the Cuyahoga County Court of Common Pleas (his father's court), Tanya Hernández, Michael Simons and Susan Stabile for their editorial input on the case participant biographies; to Professor Veronica Dougherty of the Cleveland-Marshall College of Law, who helped me find talented research assistance in Cleveland; to Robert F. DiCello (Cleveland-Marshall College of Law '99), who combed Cleveland's newspaper morgues and historical archives; and to my excellent New York research assistants Lara C. Moynihan (SJU Law '98), Anne Marie Troiano (SJU Law '99) and Robert T. Langdon (SJU Law '00), who never expected to learn so much about one corner in Cleveland.

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*Biographical Information on the Participants in the Cases**Richard D. Chilton, Defendant*

Richard Chilton, a black male, was twenty-six years old when his case went to trial in 1964. According to his own testimony, he had some prior work experience as a printer and had moved from Chicago to Cleveland in 1962.<sup>1</sup> Chilton had no criminal record until he was arrested by Detective McFadden on October 31, 1963.<sup>2</sup> He was convicted of carrying a concealed weapon in the 1964 bench trial that is transcribed here. He served a 13-month sentence in the Ohio State Reformatory for this conviction.<sup>3</sup>

The United States Supreme Court granted Chilton and Terry's petition for a writ of certiorari to the Ohio Supreme Court on May 29, 1967.<sup>4</sup> A few weeks later, Chilton was killed during a shoot-out that erupted as he and three other armed men attempted to rob a drugstore in Columbus, Ohio.<sup>5</sup>

*John W. Terry, Defendant*

John Terry, unlike Chilton, did have a criminal record prior to his arrest by Detective McFadden.<sup>6</sup> Following his conviction for carrying a concealed weapon in the bench trial which is transcribed herein, Terry was sentenced to prison, served time and then was paroled.

In August 1966, Terry, a black male, was arrested again, this time on a charge of heroin possession. Although he faced return to the state penitentiary for violating his parole, Terry in-

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<sup>1</sup> See *infra* pp. 1487.

<sup>2</sup> See *infra* p. 1488. See generally Bus Bergan, *Illegal Search Is Charged at Concealed Weapons Trial*, CLEV. PRESS, Sept. 22, 1964.

<sup>3</sup> See E.J. Kissell, *Court Ruling Is Gratifying to Detective in Frisk Case*, CLEV. PLAIN DEALER, June 11, 1968.

<sup>4</sup> See *Terry v. Ohio*, 387 U.S. 929 (1967).

<sup>5</sup> See James T. Cox, *Bullets Write Finish to Chilton Case*, CLEV. PLAIN DEALER, June 18, 1967; *Prints in Getaway Car Checked in Columbus Holdup*, CLEV. PRESS, June 20, 1967.

<sup>6</sup> See *infra* p. 1522-23.

stead was confined, while his gun case was pending before the Supreme Court, in the State Hospital at Lima, Ohio, because he was a narcotics user.<sup>7</sup> His subsequent activities are largely unreported.<sup>8</sup>

*Detective Martin J. McFadden, Cleveland Police Department*

Martin McFadden, a white male, was born in Cleveland. After attending high school and working as a Cleveland Railway Company timekeeper, he joined the Cleveland Police Department in 1925.<sup>9</sup> In 1930, McFadden was promoted to the detective bureau. He joined its fraud unit in 1934, where he specialized in detecting pickpockets and other perpetrators of frauds against Cleveland's downtown department stores.<sup>10</sup> As a tribute to his years of service, he was selected to be Cleveland's representative to the security force at the inaugurations of Presidents Eisenhower (in 1957), Kennedy, Johnson and Nixon (in 1969).<sup>11</sup> Detective McFadden retired, after 46 years on the job, in 1970.<sup>12</sup>

Although McFadden's arrests of Terry and Chilton on Halloween 1963 produced the most notable court decision of the detective's career,<sup>13</sup> McFadden was more famous in Cleveland during his lifetime for his frequent arrests of Louis "Louie the Dip" Finkelstein, one of the city's most notorious pickpockets.<sup>14</sup> According to the *Cleveland Press*, its files are full of clippings detailing the countless McFadden-Finkelstein encounters, as during the Republican rally in 1948 and the St. Patrick's Day Parade in 1957. So persistent was McFadden that the Dip eventually started calling him "the persecutor." "I remember four straight years I arrested Louie at the Ice Capades," recalls Marty. "In those days all we had to do was see Louis in a crowd

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<sup>7</sup> See *High Court Decision Awaited in Police "Stop and Frisk" Case*, CLEV. PRESS, Feb. 14, 1968.

<sup>8</sup> One exception is a wire service report of Terry's May 7, 1990, arrest for breaking into a pharmacy in West Virginia. See *Noted Defendant Is Arrested Again*, BOSTON GLOBE, May 16, 1990, at 27, available in 1990 WL 5819851.

<sup>9</sup> See Jerry Kvet, *Nemesis of Downtown Desperadoes Retires*, CLEV. PRESS, Oct. 12, 1970.

<sup>10</sup> See Kvet, *supra* note 9; Bergan, *supra* note 2.

<sup>11</sup> See Kvet, *supra* note 9.

<sup>12</sup> See *id.*; George Condon, *Louie the Dip Sticks in Memory*, CLEV. PLAIN DEALER, Nov. 15, 1981.

<sup>13</sup> See Kvet, *supra* note 9.

<sup>14</sup> See Kissell, *supra* note 3.

and we arrested him."<sup>15</sup>

Detective McFadden took rightful pleasure in the *Terry* decision.<sup>16</sup> He said at the time, "I knew I was right, and I was, because the U.S. Supreme Court in Washington said I was."<sup>17</sup> McFadden died of cancer in 1981.<sup>18</sup>

*Reuben M. Payne, Assistant County Prosecutor*

Reuben Payne, a black male, who was born in Scio, Ohio, in 1922, served in the United States Army in North Africa, Sicily and Italy from 1942-1945. He worked for the Cleveland Transit system while attending Western Reserve University, graduating in 1949. Payne graduated with honors from Cleveland-Marshall College of Law in 1953. He then worked at varying times as a state parole officer, for the United States General Accounting Office, as assistant law librarian at his alma mater, and in private legal practice. He also was an active member of the

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<sup>15</sup> Kvet, *supra* note 9; accord Condon, *supra* note 12 ("The police book on Louie the Dip begins in 1909 and runs through 1959, with 121 arrests.").

By 1968, McFadden recognized that the rules of constitutional criminal procedure generally prohibited his proven methods of dealing with Finkelstein. See Kissell, *supra* note 3 ("McFadden yesterday reminisced about his late adversary, Louie the Dip: 'It used to be when he saw me he'd walk over, because he knew I was going to throw him in the klink overnight, preventing somebody from being taken by him. But times have changed, as you know, and the police can't do that anymore.'"); cf. *Pickpockets' Nemesis Retiring From His Beat*, CLEV. PLAIN DEALER, Oct. 14, 1970 ("When Martin J. McFadden first patrolled Euclid Avenue downtown, a policeman could arrest a character if he looked strange or was loitering. 'It was fundamental preventive detention,' McFadden said yesterday as he cleared the papers from his desk in the Hotel and Checks Unit of the Cleveland Police Department.").

<sup>16</sup> While the case was pending, McFadden worried that the Court might rule that his conduct had violated the Constitution. See *High Court to Eye Frisk Case*, CLEV. PLAIN DEALER, Dec. 11, 1967 ("McFadden, like many policemen who fear the effects of recent Supreme Court decisions on law enforcement, is afraid the court may take away his right to stop and frisk suspicious persons. 'If they do that, there's no use in being a policeman,' [McFadden] said yesterday. McFadden thinks his case is clear cut.").

<sup>17</sup> Kissell, *supra* note 3; accord *Right to Frisk Gets Supreme Court OK*, CLEV. PRESS, June 10, 1968, at A12 ("McFadden said: 'The court couldn't have made any other ruling. As far as I could see, it was a perfect case. I watched Perry [sic] and Chilton for about 15 minutes. They made 14 or 15 trips back and forth in front of the jewelry store window. I suspected they were looking it over in preparation for a robbery.'"); *Police Won't Abuse Frisk Power Upheld by High Court, Says Blackwell*, Clev. Press, June 11, 1968 (quoting similar statements by McFadden).

<sup>18</sup> See *M.J. McFadden Dies, Pickpockets' Nemesis*, CLEV. PRESS, Nov. 3, 1981; *Martin McFadden, Detective in Top Court's Stop-Frisk Case*, CLEV. PLAIN DEALER, Nov. 3, 1981; Condon, *supra* note 12.

NAACP.<sup>19</sup>

After running unsuccessfully to become an Ohio State Senator<sup>20</sup> and later for State Representative,<sup>21</sup> Payne became an assistant county prosecutor in Cuyahoga County, Ohio, in 1957.<sup>22</sup> In 1962, Ohio Governor Michael DiSalle appointed Payne to serve on the State Personnel Board of Review, where he was one of three Board members who heard appeals by civil service employees and reviewed civil service job reclassification requests.<sup>23</sup>

By early 1964, Payne had returned to the Cuyahoga County Prosecutor's Office. He was assigned by happenstance to prosecute Messrs. Terry and Chilton. Payne successfully opposed their pretrial motions to suppress physical evidence, in which they had argued that they had been stopped and frisked by Detective McFadden in violation of the Fourth Amendment. Payne then obtained convictions and sentences of incarceration for Chilton and Terry at their bench trial before Judge Friedman. Both the pretrial hearing and trial transcripts are contained herein. Payne successfully defended the Chilton and Terry judgments of conviction and sentence in the Ohio Court of Appeals and the Ohio Supreme Court and, following Chilton's death, the *Terry* case in the United States Supreme Court.

In early 1968, having spent a total of 14 years in public service, during which he remained active in Democratic Party politics and ran for election to Cleveland's City Council and to the trial court bench in Cuyahoga County,<sup>24</sup> Payne left government and became one of Cleveland's leading criminal defense attorneys.<sup>25</sup> He relocated to Arizona in 1975 and now is retired

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<sup>19</sup> See *Reuben M. Payne*, CLEV. PRESS, Oct. 30, 1956; *Reuben M. Payne*, CLEV. PLAIN DEALER, Oct. 17, 1956.

<sup>20</sup> See Reuben Payne's Cleveland Press Candidate Questionnaire, 1956 (on file with *St. John's Law Review*).

<sup>21</sup> See *Attorney Put in Race for Conway Post*, CLEV. PLAIN DEALER, Aug. 23, 1956; *GOP Club Backs Democrat for Legislature*, CLEV. PRESS, Oct. 6, 1956.

<sup>22</sup> *Payne Is Named Prosecutor Aide*, CLEV. PRESS, Mar. 8, 1957.

<sup>23</sup> See *Reuben Payne Is Named to State Board*, CLEV. PRESS, Feb. 28, 1962, at F12; Brian Williams, *Negro Named to State Job Splits 'Rights,'* CLEV. PLAIN DEALER, Mar. 1, 1962.

<sup>24</sup> In 1965, Payne ran unsuccessfully for election to Cleveland's City Council. See *Ward 25's Payne Offers to Give Data on Finances*, CLEV. PRESS, Sept. 24, 1965. He then served as one of Cleveland's Democratic ward leaders. See *Dems Get Unity Plea*, CLEV. PRESS, June 17, 1966. In 1968, Payne ran unsuccessfully for election to the Cuyahoga County Court of Common Pleas. See Reuben Payne's Cleveland Press Candidate Questionnaire, 1968 (on file with *St. John's Law Review*).

<sup>25</sup> See Jim Marino, *2d Lawyer Fights Judge on Fee Cut*, CLEV. PRESS, May 11,

from legal practice.

*Louis Stokes, Defense Attorney*

Louis Stokes, a black male, who was born in 1925, attended Western Reserve University and received his law degree from the Cleveland-Marshall College of Law in 1953. He became a member of the Stokes, Stokes, Character & Terry law firm and was one of Cleveland's foremost criminal defense lawyers.<sup>26</sup> In late 1963, he agreed to defend Richard Chilton and John Terry against charges that they had been illegally carrying concealed weapons when they were stopped and frisked by Detective McFadden. Stokes represented them at trial and on appeal, including in the United States Supreme Court.

In 1967, Stokes helped his younger brother Carl B. Stokes win election as Mayor of Cleveland. The next year, within months of the Supreme Court's *Terry* decision, Louis Stokes was elected to represent Ohio's 21st Congressional District in the United States House of Representatives. He was reelected to Congress fourteen times.<sup>27</sup> Representative Stokes decided not to seek reelection in 1998 and will retire from Congress when his current term ends next January.<sup>28</sup>

*Judge Bernard Friedman, Trial Judge*

Bernard Friedman, a white male, was born in Poland in 1909. He immigrated with his family to the United States as a child. He graduated from a Cleveland high school and, in 1931, from Ohio State University. After obtaining his law degree from Western Reserve School of Law in 1934, Friedman served in a

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1973; Lou Mio, *Lawyers Are Sluggers in Trial*, CLEV. PRESS, March 1, 1972.

<sup>26</sup> See James M. Naughton, *Brother of Mayor Mulls 21st District*, CLEV. PLAIN DEALER, Feb. 3, 1968. Stokes' name partner in private law practice, James E. Terry, was not related to Stokes' client John W. Terry.

<sup>27</sup> After redistricting, the 21st Congressional District became the 11th during Stokes' tenure in office.

<sup>28</sup> See Tom Brazaitis, *Stokes Era Comes to an End: The 30-Year Representative Announces That He Will Not Run Again and Reflects on the Legacy of Accomplishments He Shares With His Brother*, CLEV. PLAIN DEALER, Jan. 18, 1998, at 1A; *Louis Stokes, Ohio Democrat, Plans to Retire From Congress*, N.Y. TIMES, Jan. 18, 1998, at 22; see also Statement by the President, Jan. 21, 1998 (praising Representative Stokes for his accomplishments on the occasion of his retirement announcement), available in 1998 WL 5046706.



variety of public positions. In 1936, he was Special Counsel to the Attorney General of the State of Ohio. From 1937-1938, he was a Public Works Administration attorney in Chicago and Columbus. He served from 1950-1960, on a part time basis, as City Appraiser in Cleveland's Law Department.<sup>29</sup> His private law practice focused on labor negotiations, including many years representing the Cleveland transit employees' union. From 1959 to 1963, he was Cuyahoga County's deputy registrar of motor vehicles.<sup>30</sup> He was appointed to the Cuyahoga County, Court of Common Pleas in 1963 and was assigned to try the *Chilton* and *Terry* cases the following year.

Judge Friedman said in 1968 that he was "very pleased" by the Supreme Court's *Terry* decision,<sup>31</sup> which effectively affirmed his original denial of the defendants' motions to suppress evidence on Fourth Amendment grounds. In response to the Supreme Court decision, he stressed that the stop and frisk practice he had approved was not unlimited:

The court's decision gives police a vehicle through which to properly stop and search a suspicious person.

In the [*Chilton* and *Terry*] trial, I limited this right to stop[ping and searching for weapons. This is necessary for the protection of the officer when he is acting on the basis of his experience and there is strong suspicion of wrong-doing.

I don't believe there should be indiscriminate frisking for other contraband and I so indicated in this case.<sup>32</sup>

Judge Friedman was elected to a six-year term in 1964 and reelected in 1970 and 1976. He also was appointed by Ohio's Governor in 1971 to chair a Citizens Task Force that investigated conditions in Ohio's seven adult prisons.<sup>33</sup> Judge Friedman, who served on Cuyahoga County's trial court bench until

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<sup>29</sup> See generally Judge Friedman's Cleveland Press Candidate Questionnaire, May 1964 (on file with *St. John's Law Review*); Judge Friedman's Cleveland Press Candidate Questionnaire, 1976 (on file with *St. John's Law Review*).

<sup>30</sup> See generally Leslie Kay, *Judge Friedman Seeks Tougher Court Security*, CLEV. PLAIN DEALER, Mar. 22, 1975.

<sup>31</sup> *Police Won't Abuse Frisk Power Upheld by High Court, Says Blackwell*, CLEV. PRESS, June 11, 1968.

<sup>32</sup> *Id.*

<sup>33</sup> See generally *Judge Friedman Heads Pen Probe*, CLEV. PRESS, Jan. 30, 1971; *Friedman Stresses Pen Rehabilitation*, CLEV. PRESS, Feb. 1, 1971; *Task Force Urges Four Reforms for Ohio Prisons*, CLEV. PRESS, June 28, 1971.

1983, died in 1987.

*A Note on the Editing*

The following transcripts are the complete pretrial and trial proceedings in the 1964 criminal prosecutions of Richard Chilton and John Terry. The italicized headings in this appendix set off distinct portions of the proceedings; these headings were added to the headings in the original transcripts to create the organization reflected in the Table of Contents at the beginning of this Appendix. The footnotes were added to provide citations and, in a few instances, to clarify the text. Bracketed material was added to correct obvious slips of the tongue or the typing finger. Other basic typographical errors were corrected without indication. Internal quotations during arguments by counsel also were conformed without indication to the original quoted material.

The State of Ohio     )  
                            ) SS:                Friedman, J.  
 County of Cuyahoga   )

IN THE COURT OF COMMON PLEAS  
CRIMINAL BRANCH

State of Ohio,	)		
	)	Plaintiff,	
	)		
vs.	)		No. 79,491
	)		
John W. Terry,	)		
	)	Defendant.	

State of Ohio,	)		
	)	Plaintiff,	
	)		
vs.	)		No. 79,432
	)		
Richard D. Chilton,	)		
	)	Defendant.	

- - -

Appearances:

On behalf of the State of Ohio:  
 John T. Corrigan, County Prosecutor,  
 by Reuben M. Payne, Assistant County Prosecutor

On behalf of the Defendants:  
 Louis Stokes, Esquire

Al Romito  
 Official Court Reporter  
 Cuyahoga County Ohio

THE PRETRIAL HEARING ON DEFENDANTS' MOTIONS TO  
SUPPRESS EVIDENCE

DEFENDANT'S BILL OF EXCEPTIONS

- - -

BE IT REMEMBERED, that at the September, A.D. 1964, term of said court, to wit, commencing on Tuesday, September 22, 1964, this cause came on to be heard before the Hon. Bernard Friedman, one of the judges of said court, in the courtroom No. 5, upon the indictments heretofore filed herein.

Thereupon the following proceedings were had on Defendants' Motion to Suppress Evidence:

PROCEEDINGS ON DEFENDANTS' MOTION TO SUPPRESS

THE COURT: We have two matters here before the Court. One is the State of Ohio versus Richard Chilton, is that correct, case number 79432?

MR. STOKES: Yes, your Honor.

THE COURT: The other one is State of Ohio versus John Terry, case number 79491; in which counsel for each defendant has duly filed with the Court a motion to suppress evidence. Is that correct?

MR. STOKES: Yes, your Honor.

THE COURT: Proceed.

MR. STOKES: If your Honor, please, as I understand, we are proceeding with the matter of State of Ohio versus Richard Chilton at this time.

THE COURT: The State of Ohio—there are two motions here; where is the other?

MR. STOKES: There are two separate indictments, Judge, I didn't know whether the Court —

MR. PAYNE: Your Honor, there are two separate indictments involved here, two separate cases, numbered. For purpose[s] of this motion, and perhaps eventually for purposes of trial, I would move the Court to consolidate the two motions because they grow out, the two arrests grow out of the single incident, at the same time, in the same place, and for that reason both the evidence which would apply as to one would be applicable as to both, and therefore the question could be resolved as to both of the individuals in this particular case.

THE COURT: Only as to the motion to suppress?

MR. PAYNE: At this time only as to the motion.

MR. STOKES: We would join in that motion, your Honor.

THE COURT: All right. It is granted.

MR. PAYNE: There is, however, it being granted, the problem I presume is the absence of the other defendant at this time, your Honor.

MR. STOKES: We would make this statement for the record, the defendant John Terry was sent word yesterday to appear in court, this court, at 9:15 this morning; that I appeared in this court about 9:30 or quarter to ten this morning at which time the defendant John Terry was not present, and I made inquiry of the Court if I might take some time to attempt to locate the defendant.

The Court very graciously granted this time, and I did so locate him, at which time I was informed he could be here at 1:30 this afternoon.

I so advised the Court, and the Court again very graciously stated that the defendant might appear here at 1:30 this afternoon. It is now 2:00 P.M. The defendant is not here in court as of this time.

I would do this at this time, rather than to hold this Court up any further, we would enter on the record for purposes of this motion a waiver of the defendant John Terry's right to be present for purposes of this proceeding.

THE COURT: Mr. Payne? Well, before you make any statement, Mr. Payne, let me get the record clear.

You are representing, Mr. Stokes, having been retained both as to the defendant John Terry and Richard Chilton, is that correct?

MR. STOKES: Yes, I am, your Honor.

THE COURT: You have made an appearance here, is that correct?

MR. STOKES: Yes.

THE COURT: You have joined in the statement of counsel for the prosecution to the effect that the fact situation as to be adduced pertaining to this motion arises out of a similar occurrence at the same time where both parties were involved; is that correct?

MR. STOKES: That is correct, your Honor.

THE COURT: And the evidence in connection with the motion would be the same as to the defendant Richard Chilton and

John Terry, is that correct?

MR. STOKES: Yes, sir.

MR. PAYNE: Your Honor, I would have this statement to make for the record. Relying on Mr. Stokes' representation that the defendant John Terry was sent word yesterday, and that he personally notified the defendant Terry this morning to be present, under those circumstances, information supplied to the Court, I would first ask the Court since Mr. Terry is not present to issue a *capias* for Mr. Terry.

Just digressing from the main fact for a moment, if there was any incident to show why the *capias* could be recalled, there could be no objection at a later time, Mr. Stokes, but for the purpose of the record issuing a *capias* for Mr. Terry and then proceeding to try this question in his absence, under those circumstances, I think there are such provisions, the man having been notified and counsel having represented that he was notified, to proceed with the matter in his abstention.

I am a little reluctant on the grounds simply of the waiver of his right to be present. I believe he can be tried in his abstention with the representation that Mr. Stokes made to the Court that he was notified, and his not being present. I do think the record should show a *capias* being issued, and the Court ordering the matter to proceed on this motion in his abstention.

MR. STOKES: I have no objection at this point as to any manner in which this Court would want to proceed, because I think the Court has extended itself fully.

THE COURT: Before we issue a *capias*, the Court will instruct the bailiff to go out in the hall and call out the name of John Terry and see if he is around the hallways.

(Thereupon the bailiff left the courtroom.)

THE BAILIFF: Mr. Terry just came in, your Honor. Sit down.

MR. PAYNE: Your Honor, the only question, would the Court summarize the proceedings for the benefit of Mr. Terry thus far, since he just came into the courtroom, as to the granting of the motion to be tried jointly?

THE COURT: Mr. Terry, you are represented by Mr. Stokes, is that correct?

MR. TERRY: Yes, sir.

THE COURT: He is your counsel?

MR. TERRY: Yes, sir.

THE COURT: Your lawyer has filed a motion to suppress evidence in this case. We are ready to proceed with the hearing on this particular motion, and we didn't find you in the courtroom, and the Court was ready to issue a *capias* for you.

But in light of the fact you are now here, that won't be necessary, and we will proceed with the hearing on this motion to suppress evidence.

All right, you may be seated.

Are we now ready?

MR. PAYNE: I am ready to proceed, your Honor.

THE COURT: All right.

MR. STOKES: If your Honor, please, at this time we should like to call Detective McFadden for purposes of cross-examination.

MR. PAYNE: I don't think you meant cross-examination, did you?

THE COURT: Let the record show he is being called for examination.

MR. PAYNE: For examination, yes, your Honor.

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THEREUPON, the Defendants, the issues on their part to be maintained, called as a witness DETECTIVE MARTIN MCFADDEN, who, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Stokes:*

Q. Sir, would you state your name for the record?

A. Martin McFadden.

Q. Your occupation is what?

A. Cleveland Police Department, Detective Bureau.

Q. How long have you been a police officer?

A. Oh, 39 years and four months.

Q. How long have you been assigned to the Detective Bureau, sir?

A. Thirty-five years.

THE COURT: Is it 35 years as a detective?

THE WITNESS: Yes, 35 years.

Q. Now, sir, calling your attention to the 31st of October, 1963, did you have occasion to see one John Terry and one Rich-

ard Chilton that day?

A. I did.

Q. Where did you first see them?

A. I first noticed them standing at the corner of Huron Road and Euclid Avenue. That is about 13th and Euclid.

Q. I see. About what time was that, Mr. McFadden?

A. Oh, I imagine around 2:20, 2:25, 2:30, something in that vicinity, P.M.

Q. Pardon?

A. P.M.

Q. Would you tell us what they were doing at that time?

A. At that time when I first noticed them they were standing there at the corner talking.

Q. Just standing there talking?

A. Yes.

Q. Was anyone else with them at that time?

A. Not at that time, no.

Q. Where were you standing, sir?

A. I was walking northeast on the south side of Huron Road.

Q. You would have been approximately how far from the two of them?

A. Well, that would be maybe, oh, maybe three or four hundred feet.

Q. I see. Now, how long did they remain where you first observed them?

A. You mean the whole time that I observed them?

Q. Well, so that I have it clear for you, after you made your first observation, how long did they then remain where they were standing where you first observed them?

A. Well, one or another was in the same spot, oh, between ten to twelve minutes.

Q. Now, did you position yourself there on the street, in a standing position, or did you continue walking?

A. No, I positioned myself in the doorway down near 14th Street on Huron Road.

Q. I see, and it is from —

A. As a matter of fact, I was in the lobby of Rogoff's.

Q. Lobby of what, sir?

A. Rogoff's.

Q. Now, is it from this point that you continued to observe



them for say ten to twelve minutes?

A. That's right?

Q. Now, after this ten to twelve minute period what next occurred with respect to these two men?

A. One would stay on the corner. The other walked up Huron Road. Several stores up from the corner he would look in through the window for a second or so, and then continued west on Huron Road to pretty near Halle Brothers.

And then he would walk down and at the same spot again he would peer in the window, come down to the corner and meet the other man, and they would talk there for a second or two. Then the other man would do the same thing.

THE COURT: Let me get this straight. You are talking about the other man twice. Were there three men?

THE WITNESS: I am thinking either of the two men would leave one another.

THE COURT: You are referring only to the two parties involved?

THE WITNESS: Just these two men.

Q. How long did they continue this, Mr. McFadden, this one leaving and then the other leaving?

A. Well, I would say in that ten to twelve minutes it must have been at least four or five times apiece.

Q. So that we understand, you first made reference to this ten to twelve minute period?

A. That's right.

Q. During this ten to twelve minute period, is this when they are leaving one another and then returning?

A. That's right.

Q. I see. Now, after this ten to twelve minute period, then what happened?

A. They walked west on Euclid Avenue.

Q. Together?

A. That's right.

Q. How far did they go there on Euclid Avenue?

A. They went to I think it is 1120 Euclid which is right opposite the Statler Hotel, Zucker's.

Q. Now, on their way down to Zucker's there, what manner were they conducting themselves?

A. Like anybody else.

Q. Just walking naturally?

A. That's right.

Q. Then after arriving at Zucker's did something occur there?

A. Yes, they met a white man.

Q. Do you know his name, sir?

A. His name is Katz. K-a-t-z, Carl Katz.

Q. Did they meet him there in front of Zucker's?

A. That's right.

Q. After they met him what occurred?

A. After they met him?

Q. Yes, sir.

A. They were standing there talking to him, and I approached them.

Q. The three of them?

A. That's right.

Q. Now, how much time would you say elapsed between the time they left 14th and Euclid, or 13th, wherever it was where they were standing together, and arrived at Zucker's?

A. You mean in the whole time, you mean the twelve minutes combined or just—

Q. No.

A. From the time they left the corner until they got to Zucker's?

Q. Right.

A. Well, I imagine around, it would take three minutes anyway.

Q. When you approached the three of them, what were the three of them doing?

A. They were talking.

Q. To one another?

A. That's right.

Q. Well, when you approached them did you speak to them first or did they speak to you?

A. I approached them and I told them I was a police officer.

Q. You were speaking to the three of them?

A. All three of them.

Q. Will you tell us exactly what you said to them, Detective McFadden?

A. I said I was a police officer. I asked each one their name, and they gave it to me quick. I got Chilton then, not Chilton but Terry, and I turned him around and I stood in the back of them,

and I searched them, and in his upper left-hand pocket of his topcoat I felt a gun and I went in for it and I had a tough time getting it, so I took the coat off.

I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store. When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left-hand pocket of his topcoat I found a gun, a '38, and searching Katz I found nothing. In examining the gun, they were all loaded, both guns were loaded.

Q. Now, taking you back for a moment to the point where you said you were a police officer and you asked their names, did each of them give you their names?

A. They said something.

Q. Was this the point at which time you grabbed Terry and spun him around as you described?

A. That's right.

Q. Now, had you said, other than saying to them, "I am a police officer," and further saying to them, "What are your names?" Did you say anything else at all to them before you spun Terry around?

A. No, I didn't, but I will say this —

Q. No, wait a minute, you have answered my question.

A. All right, okay.

Q. Now, this gun that you found on Terry was located where?

A. In his upper left-hand topcoat pocket.

Q. It was not visible to you just looking at him, was it?

A. No.

Q. Did you remove the gun from his pocket?

A. I removed the coat and the gun.

Q. What type of gun was it, sir?

A. An automatic, .38.

Q. And it was loaded?

A. Yes, it was.

Q. After you took the gun from him what did you do to him?

A. I ordered the three of them into the store, Zucker's Store. The three of them went in, Zucker's Men's Store, 1120 Euclid.

Q. The three of them obeyed your order and went into the store?

A. That's right.

Q. After they went into the store you followed them into the store?

A. That's right.

Q. Then what happened, sir?

A. At that time I told them to face the wall and keep their hands away. I then went to Chilton, and the first place I tapped I found that he had a gun, and I went in his pocket and got it. That was a .38 revolver.

Q. Did he have on a topcoat, also?

A. Yes, he did.

Q. The gun Chilton had was found in his left topcoat pocket?

A. That's right, inside.

Q. On the inside?

A. And the other one was on the outside.

Q. Wait, so I understand.

A. The coat, in the outer coat on the outside pocket.

THE COURT: Which one of the defendants had it on the outside pocket?

A. Terry, the first one, had it in his inside pocket of his topcoat. The other fellow had it in the outside pocket of his topcoat.

Q. I see. Now, did you remove the gun from Chilton's pocket, also?

A. I sure did.

Q. What type of gun did he have?

A. He had a .38 revolver.

Q. And was it also loaded?

A. That's right.

Q. Then did you proceed to search Katz?

A. I did.

Q. And did you find anything on Katz?

A. I found no weapons.

Q. Now, did you at that point say anything further to these three men?

A. Not at the time, no.

Q. Did you have occasion to call the Police Department?

A. I informed the store to call the Police Department.

Q. Did the other police arrive?

A. They did.

Q. Between the time you removed this gun from Chilton, and the arrival of the other members of the Police Department,

did you have occasion to say anything further to either Chilton or Terry?

A. Not that I remember, no.

Q. Do you recall ever saying to them, "You are under arrest"?

A. No, I don't.

Q. Well, now, they were not free to go, were they?

A. That's right.

Q. So then they were placed under arrest by you, weren't they?

A. Automatically when I call the wagon they are under arrest.

Q. I see. Then in this situation you considered them to be under arrest when you ordered the store people to call for a wagon?

A. That's right.

Q. I see. Now sir, as a result of the arrest of these two men that day, has any other charge other than carrying a concealed weapon been placed against them?

A. You mean at that time?

Q. As a result of your arrest.

A. Or since?

Q. I mean from —

A. From my arrest was there any other cleanups made, is that what you mean?

Q. No, I am asking you with reference to these two men, your having arrested them that day, have you placed or caused to be placed any charge against these two men other than carrying a concealed weapon?

A. No myself, no, personally no.

MR. STOKES: I think I have no further questions, your Honor.

THE COURT: Mr. Payne?

CROSS-EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Payne:*

Q. Detective McFadden, when your attention was directed to this person or persons at the original outset, how many persons did you observe?

A. Two at first.

Q. Now, sir, I want you again to reiterate to the Court from the moment you first observed them what then did they do, the two persons?

A. Well, I observed them as they were walking northeast on Huron Road, about catty-corner away from the corner on the other side of the street, and they were, the two of them, they were standing on the corner talking. One, as I started down to get a place to observe them, one man had left the other man, and I noticed that as he went by this window he stopped and looked in, proceeded again west pretty near as far as Halle's, and then coming back stopped at the same place and looked in, and then proceeded to the corner where he talked to the man that was standing on the corner for a second or so. Then that man would do the same thing.

Q. The other man would do the same thing?

A. The other man who made the first trip would stand on the corner. The man who was standing on the corner while the other man was making the trip, he would make the trip, and vice versa.

Q. Now, to the best of your recollection, approximately how many times did you see them do that, that particular occasion?

A. Well, I seen them do it maybe two or three times, and then as they were standing on the corner —

Q. Was the same mode of conduct engaged in the stopping and looking in the window, as they did it on the subsequent occasions?

A. That's right.

THE COURT: May I interrupt?

MR. PAYNE: Yes.

THE COURT: You are talking about looking in a window. Can you be more specific as to what particular window, what particular store window?

THE WITNESS: From my point of view, your Honor, the only thing I could say, it would be either the Diamond Store or the United Airlines, either one of those two, from the position I was in.

THE COURT: You may proceed.

Q. Did they stop and look in the window each time they made the trip?

A. That's right.

Q. Can you tell me whether there were any other persons

who came to the corner there at that time, or in that proximity of time that they were there?

A. Yes. There was a man, a white man, short white man, came down the north side of Huron Road, and came directly over to where these two men were at, after one of them had come back, and it wasn't half a second, and this white man came over and talked to these two colored men, and he was there for about a minute or so talking to them, and then he left. He went west on Euclid.

Q. After he left, then what did these two men that you observed do, if anything?

A. They proceeded to each make two or three trips back and forth.

Q. In the manner that you described originally?

A. That's right.

Q. Was the mode of conduct the same, did they stop and look in the windows?

A. That's right.

Q. Did they alternate?

A. That's right.

Q. Now, these two men that you observed doing this, are they in the courtroom now?

A. They are.

Q. Would you point them out to the Court?

A. Well, there is Chilton, the first man, and Terry the second man.

Q. All right. Now, after they proceeded to do this on the second occasion, after the white man left, what then did they do if anything?

A. They proceeded to do the same thing two or three times apiece.

Q. After that what did they do?

A. After that they left the corner and proceeded west on Euclid.

Q. And then what happened?

A. On the south side of the street, where they met the same white man that talked to them at the corner of Huron Road and Euclid, they met him standing in front of Zucker's Store at about 1120 Euclid.

Q. Approximately how long were they talking to this same white man there at that time?

A. Oh, I imagine a minute or two.

Q. Now, Detective McFadden, you have been a police officer how long?

A. Thirty-nine years.

Q. When you observed the pattern of conduct that you observed and have described to us, and the length of time that you observed it, did you consider it as suspicious activities?

MR. STOKES: Objection.

THE COURT: Objection sustained.

MR. PAYNE: This is cross-examination, your Honor.

THE COURT: I know, but you are asking for a conclusion, Mr. Payne.

MR. PAYNE: On the basis of his experience, yes.

THE COURT: The Court would have to draw the conclusion from the facts.

Q. You have been a police officer how long?

A. Thirty-nine years.

Q. You had observed these men for some ten to twelve minutes?

A. That's right.

Q. You observed the mode of conduct that you have described to us?

A. That's right.

Q. Did you, sir, as a police officer consider that you should investigate it?

A. I sure did.

Q. What then did you do if anything when you observed them in front of Zucker's?

A. What did I do?

Q. Yes, after they left the corner and you observed them then again in front of Zucker's, what then did you do?

A. I stopped them and went over and talked to them.

Q. When you went over and talked to them, what did you say to them?

A. I told them I was a police officer. Those were the first words I said.

Q. And then what happened?

A. Then I said, "What is your name?" and they mumbled something and I turned—

Q. All right, they mumbled something. Now, Detective McFadden, I would like for you to get down from the witness



stand, please.

(Witness steps down.)

Q. As you approached them, at Zucker's, allowing myself to represent one of the men—Officer, would you step over here?—and the officer representing the other man,<sup>34</sup> I would like for you to place us in the position that the men were and that you were as you approached them.

A. Facing the sidewalk up against the display window, Zucker's —

Q. Up against the display window?

A. And facing Euclid Avenue.

Q. Were both men facing the display window?

A. That's right, the three men.

Q. The three men, all right.

A. Katz was here, Chilton was here.

Q. I will be Chilton.

A. And Terry was here.

Q. The officer will be Terry.

A. Yes.

MR. STOKES: Excuse me, Reuben, can we have this described in the record as you [go] along?

MR. PAYNE: Yes.

Q. Were you facing them as we are facing now, or how?

A. I came over at an angle, like.

MR. PAYNE: May the record show and indicate that the officer is describing the three men with their backs to a display window.

THE WITNESS: That's right.

MR. PAYNE: And that he is standing at the angle which would be to the left of the man, Terry, I guess it is.

THE WITNESS: That's right.

THE COURT: Let the record furthermore show it has been stated that Zucker's is at 1120 Euclid Avenue, and I think it is on the south side of the street.

THE WITNESS: On the south side of the street.

THE COURT: And the display window faces the avenue, is that correct, Euclid Avenue, on the south side of the street?

THE WITNESS: That's right.

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<sup>34</sup> At this point, Mr. Payne apparently had Detective McFadden use Payne himself and another police officer who was present in the courtroom to reenact the October 31, 1963, scene on the street in front of Zucker's store.

THE COURT: And Chilton was —

THE WITNESS: Chilton was in the middle.

THE COURT: And Terry was on the right side.

THE WITNESS: That's right.

THE COURT: Proceed.

Q. Now, I want you to demonstrate to the Court precisely and exactly what you did, after you asked them your name and they responded something.

A. Then I pulled what's his name over in front of me and I searched them, that is Terry.

MR. PAYNE: Just a minute. May the record show and indicate the officer turned the individual represented as Terry around.

THE WITNESS: That's right.

Q. Now, when you turned him around I want you to show us exactly what you did.

A. Well, I patted him down and up in here I felt something.

MR. PAYNE: May the record show that the officer is patting on the outside of the individual.

Q. Officer, at that time did you go into the inner pockets of any of the men, or were you patting them on the outside of their clothing?

A. I was patting them on the outside of their clothing.

Q. And when you were patting them on the—the man Terry, on the outside of his clothing as you are demonstrating to us at this time, what if anything did you notice?

A. I felt a gun.

Q. You felt a gun?

A. That's right. Something—I felt something that seemed like a gun.

Q. Where did you feel this?

A. In his topcoat pocket on the inner pocket, on the inner pocket on the left-hand side.

MR. PAYNE: May the record show that the officer in demonstrating is standing to the rear of the person being designated as Terry, and that he was patting underneath the arms of the person represented and designated as Terry, and indicates that he felt something in the left breast pocket.

THE WITNESS: That's right, yes.

Q. All right. Upon your feeling that something which felt like a gun in the left breast pocket, what then did you do?

A. I pulled the coat back, put my hand in there, and I couldn't get the gun. I felt the handle of the gun.

Q. At any time before that, Detective McFadden, before putting your hand in, had you gone into any of the men's pockets?

A. No, I hadn't.

Q. Was the only time that you went into the men's pocket [sic] after you first patted them down?

A. That's right.

Q. Then, after putting your hand on the inside and feeling the handle, what then did you do?

A. I tried to take the gun out of the pocket, and I couldn't get it out, so I pulled the coat off the man.

Q. And then what happened?

A. Then I ordered the three of them inside the store and told them to keep their —

Q. When you took their [sic] coat off did you recover the object that was in the pocket?

A. After we got in the store I took the gun out of the pocket.

Q. Then when you ordered them into the store what then did you do?

A. I told them to face east towards the wall, that would be facing east, and I told them to keep their hands up.

Q. In what manner, will you step over here, Officer, and place us or tell us or show us how, you told them to face where?

A. That would be east.

Q. Assuming this is east, what did you tell them to do?

A. I told them to face the wall and keep their hands away.

Q. They had their hands up like this?

A. Yes.

MR. PAYNE: May the record show and indicate that the officer is describing that the individuals had their hands in the air.

THE WITNESS: Yes.

Q. Did they have their hands in the air or were they leaning against anything?

A. No, they weren't leaning against anything.

Q. Then what did you do?

A. I then searched—I went over and I patted —

Q. All right, I am Chilton now; show the Court what you did.

A. I felt an object —

Q. Show it on me, because I am representing Chilton.

A. I felt an object in his outer topcoat pocket.

Q. Did you pat him on the outside?

A. I sure did.

Q. At any time up to that point had you gone into any of the men's pockets?

A. I had gone —

Q. With the exception of —

A. Into Terry.

Q. Had you gone into Chilton's pocket at any time before that?

A. No, I hadn't. This is the first time.

MR. PAYNE: May the record show and indicate the officer demonstrated by patting the person represented as Chilton.

Q. When you patted the person, when you patted Chilton did you feel something?

A. I did.

Q. Where?

A. In his left-hand outer coat pocket, that is, of his topcoat.

Q. After feeling that then what did you do?

A. I put my hand in his pocket and I came out with a gun.

MR. PAYNE: You may be seated, you may resume the witness stand, Detective.

(Witness resumes witness chair.)

Q. These men then were in your custody, is that correct?

A. Pardon?

Q. These men then were in your custody?

A. That's right.

Q. Was a police wagon called?

A. That's right.

Q. Were they subsequently booked at the Police Station?

A. They were.

Q. And were they charged with the offense—what offense, if any?

A. They were.

Q. Of carrying a concealed weapon?

A. That's right.

Q. Officer McFadden, after these men, well, anytime during your checking of these men or in the police station subsequently, did you have the occasion to inquire of these men if they were employed?

MR. STOKES: Objection.

MR. PAYNE: I would like to be heard on it before the Court rules, your Honor. I have this thought in mind. The charge here is one of carrying a concealed weapon. The motion has been filed for a suppression of the evidence.

MR. STOKES: Judge, excuse me just one moment, Reuben, I am sorry. I am wondering if this argument might not take place then out of the presence of the witness, if you are going to argue this?

MR. PAYNE: Well, perfectly well, I don't think it makes—it is a legal point I am going to establish on the basis of the question. I don't think it would have any bearing on the factual situation. Well, maybe it is better if we should exclude him for just a moment.

THE COURT: Step outside a moment.

(Thereupon the witness left the courtroom.)

MR. PAYNE: The motion for suppression of the evidence has been filed. I further direct the Court's attention to the fact that one of the escape clauses under this Statute for the carrying of a concealed weapon is that the man is engaged in a legitimate business or occupation with large sums of money, and had the right to carry such a weapon.

Now, your Honor, I further submit that the question that I have asked as to whether or not he questioned these men as to their employment, if he questioned them as to their employment and they indicated that they had some legitimate employment which maybe they could take refuge in the savings clause under the concealed weapon, then they probably would not be in violation of the law.

The second proposition, which is most important here, is this, that if they have no legitimate employment or reason for carrying the gun, then the carrying of a concealed weapon, a pistol, falls into that category of a breach of the peace, and, therefore, it being a breach of the peace would give the officer every right in the world to arrest them for the protection of society and the community.

Therefore, I submit that the question should be allowed to be answered.

THE COURT: Mr. Stokes?

MR. STOKES: Thank you, your Honor. The question, as I recall the question, your Honor, was did he after taking these

men into custody and over at the police station, subsequently have occasion to question them regarding their employment.

And then counsel has advanced one of his reasons for asking such a question, the fact that these men can avail themselves of that part of the carrying concealed weapons statute which relates to justification.

I submit to your Honor, we are not now in trial. We are here merely on a motion to suppress the evidence, the sole question being before this Court was the search an illegal search, in accordance with constitutional standards, so that it then becomes admissible upon the trial of this matter, which will or will not take place subsequent to the hearing of this motion.

Now, let me advance this, he is going further unconstitutionally with this question, because we are now—the men have been taken into custody, have evidently been taken to the police station, and we are now getting into conversation which took place between the police officer and some men who have now been arrested and have become accused men, and we do not know whether they have been availed of the opportunity for counsel, whether they have ever been instructed as to their legal rights, and they are about to get into some conversation that does not even relate to the motion here at all.

I say to your Honor that the question is constitutionally wrong twice.

MR. PAYNE: Let me submit this, first of all, this witness was called as the defendant's witness, and I am in the present position of cross-examining the witness.

Number two, one of the incidents of unlawful search and seizure is the question of valid arrest, of the officer making the arrest, and so forth, etcetera [sic], and one of the very circumstances and one of the very rules of law that an officer has to make an arrest is as to whether or not there is a breach of the peace, and if there is a breach of peace an officer can make an arrest and such subsequent arrest is valid all the way.

THE COURT: Mr. Payne, you must realize that if there was a breach of the peace, the breach of the peace occurred after the incident.

MR. PAYNE: No sir, that is the point and that is the law I am trying to make, because I have case law on it, your Honor.

If he in effect is carrying a weapon all along, all the time, and he has no legal right to carry that weapon, then he is in

breach of the peace whether the officer knows it or not, and I can provide the Court with cases on such.

THE COURT: Mr. Payne, may I ask you this, let's assume that I have a gun in my possession, and I am walking down the street, and an officer for some reason best known to himself decides to stop and frisk me, would you say that I have committed a breach of the peace?

MR. PAYNE: Yes, your Honor, that is the cases I have read.

THE COURT: I have committed a breach of the peace, only on one condition, of the stopping and the frisking of me, of the individual, me.

MR. PAYNE: Your Honor, I will like to differ with the Court in this respect.

THE COURT: Let me say this to you, Mr. Payne, be that as it may, to me the problem arises, the question of whether or not the circumstances surrounding this situation in this case, an officer who has had long experience as a detective is justified based upon what he saw and observed to stop and frisk an individual.

Another question comes to my mind, in spite of the fact what counsel, Mr. Stokes, has stated, whether or not stopping and frisking is a search, or whether or not there isn't a different meaning, the stopping and frisking and searching.

Those are the problems.

MR. PAYNE: I agree, your Honor, and I humbly submit to the Court —

THE COURT: I think your questions pertaining, as to the questions that were asked or interrogation by the officer after he stopped and frisked them and found the so-called guns on their person, I think any evidence pertaining to the questions as to employment or other things of that nature would have to go to the merits of the charge with which these gentlemen are faced, if the Court finds that the search or frisking is lawful.

MR. PAYNE: If the Court so rules, but I humbly submit to the Court that in a research of cases only as recently, some of them which I read only as recently as this morning, your Honor, sustains the proposition that the carrying of a concealed weapon falls in that kind of a category which constitutes a breach of the peace.

THE COURT: I am not arguing that.

MR. PAYNE: And therefore, your Honor, goes to the essence

of a question of this problem, of this nature.

THE COURT: Mr. Payne, I am not arguing with you at all, although I am in agreement with you that it may constitute a breach of the peace.

But we are not faced with that question, because we are faced with an entirely different situation.

MR. PAYNE: All right, your Honor.

THE COURT: Whether or not this search and frisking was reasonable or unreasonable.

MR. PAYNE: I will abide by the Court's ruling, whatever —

MR. STOKES: Did the Court rule, how did the Court rule?

THE COURT: I have ruled that the question is improper.

MR. PAYNE: All right.

THE COURT: I have sustained your objection.

(Thereupon the witness resumed the witness stand.)

MR. PAYNE: I have forgotten what my line of questioning was.

(Last question was read by the reporter.)

*By Mr. Payne:*

Q. Detective McFadden, you recovered a gun from the person —

A. Pardon?

Q. You recovered a gun from the person of each of these two defendants, is that right?

A. That's right.

Q. The man [sic] that you recovered the guns from, the person of each of them, are they in the courtroom?

A. Yes.

Q. Will you point them out to the Court?

A. Number two man is Chilton, and number three man is Terry.

MR. PAYNE: May the record show and indicate the witness is identifying the persons that he recovered the guns from.

THE COURT: Yes.

Q. Did you do anything with those guns subsequently, Detective?

A. Pardon?

Q. Did you do anything in reference to those guns subsequently?

A. What do you mean by that?

Q. All right, let me come back to it in just a moment, Detec-



tive McFadden.

When you first approached the men in front of Zucker's and you turned Terry around and patted him down, can you tell us why you did that?

A. In the first place, I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up. That's the reason.

Q. Why did you pat them down?

A. Just to see whether they were—to see what they had, if they had guns.

Q. All right. When you ordered them into the store and you patted Chilton down, can you tell us why you patted him down?

A. The same reason I patted the first man down.

Q. Now, after recovering those guns did you check the guns out at the police station or anywhere else?

MR. STOKES: Objection.

THE COURT: Objection sustained.

MR. PAYNE: Your witness.

THE COURT: He has had him. Do you have anything to ask further?

MR. STOKES: Yes, your Honor.

RE-DIRECT EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Stokes:*

Q. Mr. McFadden, you just said you suspected them of casing a job, is that correct?

A. That's right.

Q. You were basing this —

A. Pardon?

Q. You were basing this, suspecting them of casing a job, upon your observations of them, sir?

A. That's right.

Q. Now, you had had no one come up to you and given [sic] you any information regarding them, had you?

A. Nobody said anything to me.

MR. PAYNE: Objection.

THE COURT: Objection sustained.

MR. STOKES: That is all right, it was leading and improper.

Q. Had anyone come up to you and given you any information regarding these two men?

MR. PAYNE: I am going to object and state to the Court my reason for objecting is this is counsel's witness, and therefore cross-examination would be improper.

THE COURT: Well, he is leading him somewhat as his own witness. Will you read the question?

(Last question was read by the reporter.)

THE COURT: You may answer.

A. Absolutely no.

Q. Did you know these two men previously, sir?

A. I do not, I didn't know the men from Adam.

Q. This would include the white fellow, Officer?

A. I did not know the white man either. I never seen the three men before.

Q. Now, you told Mr. Payne that in patting John Terry you felt a gun.

Now, when you first had this feeling did you know at this time that this was a gun?

A. You mean when I felt it?

Q. When you felt it from outside.

A. Well, I had some idea, yes.

Q. When did you first know that it was definitely a gun?

A. When I got my hand on the handle.

Q. And at this point it was still within the coat, wasn't it?

A. That's right.

Q. Now, by patting a person down, will you tell the Court what you mean by patting?

A. Well, I don't go into their pockets. I just—the man is standing and I will pat him down (indicating) any place on his body, just pat him, see whether he has anything.

Q. You pat with both hands simultaneously on all parts of the body?

A. Oh yes. You can pat with both hands, you can pat with one hand.

Q. Prior to removing guns from both men's coats you patted them down, after which you removed a gun from the coats?

A. That's right.

Q. But when you walked up to these men and you first spoke to them you did not know that these men had guns on them, did you?

A. Absolutely not.

MR. STOKES: Thank you, Mr. McFadden.

THE COURT: Anything further?

MR. STOKES: I have nothing further of this witness.

MR. PAYNE: Nothing further.

THE COURT: The Court would like to ask you a few questions, Mr. McFadden.

#### THE COURT'S EXAMINATION OF DETECTIVE MCFADDEN

*By the Court:*

Q. You have mentioned about casing a place. In ordinary language what do you mean by casing?

A. I mean waiting for an opportunity.

Q. Of doing what?

A. Of sticking the place up.

Q. In your thirty-nine years of experience as an officer, and I believe you testified thirty-five years as a detective—is that correct?

A. That's correct.

Q. Have you ever had any experience in observing the activities of individuals in casing a place?

A. To be truthful with you, no.

Q. You never observed anybody casing a place?

A. No.

Q. But you have had the experience of a detective in apprehending, and doing your police job as assigned?

A. That's right, and observing.

Q. What caused you to be in that particular neighborhood?

A. I am assigned to stores in the downtown, to downtown stores, and pickpockets in the downtown area.

Q. How long have you been assigned to that area?

A. Thirty years, from 14th Street to the Square.

Q. And I presume you have had a lot of experience in that direction over thirty years, is that correct?

A. That's right.

Q. What has been the activity in the downtown area, particularly as to stores, pertaining to criminal activities in the past few years, has it been on the up-grade, normal?

A. You mean in the stores?

Q. Yes, around the stores, in that area?

A. Well, we have always got shoplifters. We always got thieves. There are always thieves downtown, and there has been quite a few.

Q. What caused you specifically to be attracted to those two individuals at the location that you have mentioned, or let me put it to you this way:

Supposing those two defendants here that are now in court were standing across the street from here, and doing the same activities that you observed them on Huron and Euclid, would you have had any cause for suspicion?

A. I really don't know.

THE COURT: Anything further, gentlemen?

MR. PAYNE: Nothing further.

MR. STOKES: We have nothing further of this witness, your Honor.

THE COURT: You may step down.

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#### INITIAL LEGAL ARGUMENTS BY COUNSEL ON DEFENDANTS' MOTIONS TO SUPPRESS

MR. STOKES: If your Honor, please, we rest with respect to this motion.

MR. PAYNE: I don't have any witnesses to present, your Honor. I do have argument that I would like to make to the Court.

THE COURT: All right.

MR. STOKES: I am wondering if—your Honor, I might make this request of the Court. It seems to me there are some pretty serious legal questions involved in this particular matter, notwithstanding the fact that we only had one witness here.

In my opinion there is some very serious constitutional questions arising out of the matter in which this arrest was made, and as an aid in order to be of service to this court, I wonder if we might be given an opportunity to submit to the Court briefs regarding this particular motion prior to the Court making its ruling.

THE COURT: Mr. Stokes, let me say this to you, the Court has had this file on its desk for a number of days.

I was apprised of the question that is being presented to the Court. I therefore took the time out to do a little research, and I think I have covered pretty well as to the law. I was very much interested as to what the facts would disclose here.

I presume you have had this case for some time and you know the problems involved, and I am sure you know the law,

and so does Mr. Payne.

I will do this, however, in light of the facts that have been disclosed—and there is no further evidence I presume —

MR. STOKES: Not on this motion, no.

THE COURT: Not on this motion. I would suggest, however, and I am willing to go to this extent, of mulling over the situation overnight, as far as the facts are concerned, and you folks can come in the morning and argue the legal aspects pertaining to the facts.

The Court has the law, I believe I have the law, unless you can present me with some additional law that I don't have, and the Court will apply the law to the facts and make his decision tomorrow morning.

MR. PAYNE: If it please the Court, I would like to take some argument and perhaps give the Court a case or two additional in connection with this matter, and then if there is additional argument required in the morning, we could present it then at that time, because I have some cases that I don't know whether the Court has had the opportunity to take them into consideration or not, your Honor.

THE COURT: Yes.

MR. STOKES: Well, you could still give them to the Court. The Court is just giving us an opportunity to prepare some argument.

THE COURT: I think you should have some opportunity to prepare, in light of the facts, to present some appropriate argument. What cases do you have?

MR. PAYNE: One of them is *Ellis versus the United States*.<sup>35</sup>

THE COURT: *Ellis*?

MR. PAYNE: Yes.

THE COURT: I believe I am familiar with it. Go ahead.

MR. PAYNE: 264 Federal, 2nd, 372.

THE COURT: I am quite sure I am acquainted with it.

MR. PAYNE: It is also found in 355 United States 998.

The other one is *Green versus United States*, 259 Federal, 2nd, 180; and 31 Law Weekly, Number 2226.<sup>36</sup>

Now, your Honor, I submit those two cases only on the theory and the proposition of an officer's right to stop and question

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<sup>35</sup> *Ellis v. United States*, 264 F.2d 372 (D.C. Cir. 1959).

<sup>36</sup> *Green v. United States*, 259 F.2d 180 (D.C. Cir. 1958).

an individual.

Now, I think that the argument as it unfolds here must unfold in several phases, on the right of the officer to stop and arrest, number one, a distinction as it may be made between frisking and searching an individual, and then the constitutionality of the whole thing coupled with that.

So I submit those two cases only on that original proposition of the officer's original right to stop individuals on the street and inquire of them in performance of their duty.

I would like to submit to the Court *Ballard versus State* in 43 Ohio State 340, and then referring to 92 American Law Reports, and I refer to page 493, in which it covers the case of *Ballard versus the State*, also, in that.<sup>37</sup>

Now, for purposes of an analogous argument, your Honor, I wanted to direct the Court's attention to Revised Code Section 2935.041,<sup>38</sup> and I say for analogous argument that particular statute of the Code has been enacted giving a merchant the right to detain persons that they have suspected of shoplifting, and I only want to use it for analogous reasons in summing up my argument there.

There is also another case in Ohio, your Honor, I couldn't find it in—I couldn't find the Reports, but it is found in 140 Northern at page 112, and that is *Houck versus State*.<sup>39</sup> The question of searches and seizure and the right to stop an individual is also in there. It is an Ohio case and that is why I cite it to you, even though I am relying mainly on the two Supreme Court cases, United States Supreme Court cases.

There are several others and there being no need I don't think to get into them.

I also would direct the Court's attention, I don't know whether the Court is researching the question has available the New York case which was decided with reference to the —

THE COURT: There is a California case and New York.

MR. PAYNE: And there is another one, your Honor, a Massachusetts case, but I would have to get you the citation. That is all I have.

THE COURT: What have you got, Mr. Stokes?

MR. STOKES: Well, Mr. Payne here has so much, Judge, I

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<sup>37</sup> *Ballard v. State*, 1 N.E. 76 (Ohio 1885).

<sup>38</sup> OHIO REV. CODE § 2935.041.

<sup>39</sup> *Houck v. State*, 140 N.E. 112 (1922).

don't want to overburden the Court.

I am sure you have *Preston versus United States*,<sup>40</sup> though, and *Fahy versus Connecticut*.<sup>41</sup>

THE COURT: I don't know if I have *Fahy versus Connecticut*.

MR. STOKES: That is 375 U.S. 85. *Preston* you said you have, 376 U.S. 364.

And I probably will have some citations, which you may have a copy of, written by Judge Nathan Sobel, Kings County Criminal Bar in New York, in which he has done a very scholarly and masterful job that is being accepted by courts all around the country as though being authoritative on this subject.

THE COURT: I would be interested in having that.

MR. STOKES: All right.

THE COURT: Now, I understand that you have a little problem tomorrow morning as to the particular time?

MR. PAYNE: Yes, your Honor.

THE COURT: You have to be in the Court of Appeals at what time?

MR. PAYNE: Nine o'clock it says, your Honor.

THE COURT: We will adjourn until ten o'clock. If you need a little extra time —

MR. PAYNE: I will call and notify the Court.

THE COURT: Is that all right?

MR. STOKES: Yes, sir, fine. Thank you.

THE COURT: Ten o'clock tomorrow morning, we are adjourned.

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(Thereupon an adjournment was taken to 10:00 a.m., September 23, 1964, at which time the following proceedings were had:)

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<sup>40</sup> *Preston v. United States*, 376 U.S. 364 (1964).

<sup>41</sup> *Fahy v. Connecticut*, 375 U.S. 85 (1963).

## ADDITIONAL ARGUMENT BY COUNSEL

*MORNING SESSION, 10:00 A.M., Wednesday, September 23, 1964*

THE COURT: Are we ready to proceed?

MR. PAYNE: We are ready to proceed, your Honor.

MR. STOKES: Yes, your Honor.

THE COURT: Mr. Stokes?

MR. STOKES: May it please your Honor, this being one of those rare occasions where the defense gets the opportunity to open and close, I would at this time waive opening argument on my motion, and reserve the right to close argument.

THE COURT: All right.

MR. PAYNE: I have no objection, your Honor to that, none whatsoever.

If it please the Court, just briefly, reviewing the facts in this case to start with, we have the testimony of Detective McFadden that he is a member of the force for some 35 years, 34 years and nine some odd months, or 35 years, I forget the exact time, but while in the pursuit of his duties assigned to the downtown area he observed two persons in the vicinity of East 13th and 14th Street.

Observing these persons his attention was attracted to them by the manner in which they were conducting themselves, that they were first talking to each other, then one man would leave the other one and go and look in a window, a window which was in the vicinity of a little jewelry place there, or the Airlines office there, would go up the street and look up and down the street and come back and talk to his companion.

Then his companion would perform the same kind and type of conduct. This series of events of this nature took place three or four times.

After it had taken place three or four times, and the alternating of the individuals, the two gentlemen were approached by another man and a conversation was held with this other man, the other man then leaving the scene which was being observed by Detective McFadden at that time.

Then the two men that he observed first continued to engage in the same kind and type of conduct, thereupon making three or four trips, and looking into the window of the jewelry store or the



airline office there, alternating and making three or four trips on this subsequent occasion.

Thereafter the two men left the immediate area and proceeded to the area of what is known as Zucker's Men's Store and were talking with the third man that they had previously been observed talking with.

Whereupon Detective McFadden approached the men, and approaching the men asked them for identification or their names. They gave their names.

He then turned one of the men around, patted him down, and upon patting him down felt an object which appeared to be a gun.

And upon feeling that object then entered his hand into the inside coat pocket of that man, and took the coat off of him, and found therein to be a gun.

Then taking the two men—taking the three men inside the store, and patting the other man down and feeling an object in his outer coat pocket, whereupon he then placed his hand into the inner coat pocket and took from the inner coat pocket a gun.

The same procedure was followed with the third man, and the third man found to have nothing upon his person.

Now, your Honor, in the very first analysis the question is raised, the right of the police officer to stop and question any person in a public place whom he reasonably suspects is committing or has committed or is about to commit a felony, or certain misdemeanors.

Now, I use the word "certain misdemeanors." I use the word "certain misdemeanors" for a specific reason. But we have that basic question which arises here.

I would say to this Court that there can be no question about the right of a police officer to prevent crime if they can, and prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban municipalities.

This being true, your Honor, there have been a number of cases, and I refer the Court to the case of *Ellis versus United States*,<sup>42</sup> and *Green versus United States*,<sup>43</sup> the previous citations which I have already given to the Court, which establishes the

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<sup>42</sup> *Ellis v. United States*, 264 F.2d 372 (D.C. Cir. 1959).

<sup>43</sup> *Green v. United States*, 259 F.2d 180 (D.C. Cir. 1958).

right of the police officer to stop and question individuals because it is a necessary function of the Police Department in the prevention of crime to make prompt inquiry into suspicious conduct and activity which they observe.

This being true, your Honor, and I rely on these cases for establishment of that proposition, I think that in addition thereto, and I could refer the Court to 43 Ohio State at page 340, *Ballard versus the State*,<sup>44</sup> which syllabus reads as follows:

“In determining the power of the Marshal of a municipal corporation to arrest without warrant, Section 1849 of the Revised Statutes, which makes it the duty of that officer to arrest any person ‘in the act of committing any offense,’ and so forth, and Section 7129 of the State Statutes, which makes it the duty of certain officers named, including such marshal, ‘to arrest and detain any person found violating any law,’ and so forth, should be construed together to determine the extent of power.”

“Under a proper construction of these sections, a marshal of a municipal corporation is authorized, without a warrant, to arrest a person found upon the public streets of the corporation carrying concealed weapons contrary to the law, although he has no previous personal knowledge of the fact, if he acts bona fide, and upon such information as induces an honest belief that the person arrested is in the act of violating the law.”

Now, the case is also cited in the *American Law Review*, and I would call the Court’s attention to Section 2935.03 of the Revised Code<sup>45</sup> which reads:

“A sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer shall arrest and detain a person found violating a law of this State, or an ordinance of a municipal corporation, until a warrant can be obtained.”

Such right is essential. Such right has been established and has been passed on by the United States Supreme Court.

Your Honor, it follows that if it is the law of these United States and Ohio that a police officer in the necessity of making prompt inquiry into the suspicious activities of persons who he observes, has the right to stop and question them, it follows as readily as night and day that in so stopping this person that he has the right to do what is necessary to protect his own life, or to

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<sup>44</sup> *Ballard v. State*, 1 N.E. 76 (Ohio 1885).

<sup>45</sup> OHIO REV. CODE § 2935.03 (1965).

make prompt inquiry into the suspicious activities of the persons he has observed.

Let's assume, your Honor, that in stopping these men that he asked them a question, which question they do not choose to answer, and suppose the question that he asked of them is pointed directly to the commission of some crime, and that in pointing up this particular question that the men then draw guns, what protection is there upon the police officer if he does not have the right and the interest in protection of his own life to make a frisk in the original instance when he has observed suspicious activities?

I come to a second point, which is essential in this case, your Honor, and I think that there must be a distinction made between what is known as a frisk or a patting down, and what is determined as a legal search and seizure, as set forth under the Fourth Amendment.

And I think the distinction must be made, the distinction has been made, it has been made in the state of New York, and I refer the Court to the case of the United States —

THE COURT: You don't mean United States? You mean *People versus Rivera*?<sup>46</sup>

MR. PAYNE: Right, your Honor, I refer the Court —

THE COURT: That was decided this year.

MR. PAYNE: This year. As a matter of fact, in July I believe of this year. I will try to get the exact date and time, your Honor. July 10, 1964, your Honor, this year.

Now, the facts of that particular case were only in variance with the facts of the present case in that the time of stopping the individual in New York was at night time.

We have a similar set of circumstances where the police officer was in an area which had a high rate of crime incidence he observed suspicious activities of a man by the name of Rivera, and upon stopping Rivera to make prompt inquiry into his suspicious activities, and frisking Rivera he found that he had concealed on or about his person a weapon.

Now, after the officer made this arrest and some months after he had made the arrest, a municipal ordinance of New York City was passed, giving the police officer the right to frisk an

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<sup>46</sup> *People v. Rivera*, 201 N.E.2d 32 (N.Y. 1964).

individual that he has stopped to question.<sup>47</sup>

The matter then came into Court, and it was pointed out to the Court that the facts and the arrest of the individual in New York took place before the municipal ordinance was passed.

THE COURT: I believe it was a Statute, wasn't it, instead of municipal?

MR. PAYNE: Well, New York has a peculiar set-up, your Honor, and I honestly can't say whether the statutes of New York or the ordinance.

THE COURT: But it was subsequent to the arrest.

MR. PAYNE: It was subsequent to the arrest. The Court not only upheld the statute or ordinance, but it said it made no difference that the statute was not on the books at the time the frisking and the finding of the weapon took place, because it followed that the power of a police officer to frisk a man when he has stopped him after observing what in his mind was suspicious activities, was indispensable for the protection of his own life, and the phase they used, that if he stops and questions a man and does not have the right to frisk him, the only other alternative that can be drawn is the police officer may receive a bullet as a result of his inability to search if that right were not present.

I would submit to the Court that this is very true. Only last week, only yesterday a police officer was buried, because when he approached into a place and he asked a question, a simple question. "Well, what is going on here?" —

MR. STOKES: I have an objection to this whole line of argument.

MR. PAYNE: Only for the purpose of illustration, your Honor, to show the facts and the possibilities.

THE COURT: Well, it is a situation and a great misfortune that a police officer in line of duty has been killed, and we all read about it.

But as far as the factual situation, that situation has no bearing on this particular case, and I understand your viewpoint on it, and the Court will consider it only from that standpoint.

MR. PAYNE: It certainly only has a viewpoint in this respect, and again referring to the New York case, the New York case points out that when a police officer asks a question, if he

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<sup>47</sup> N.Y. CODE CRIM. PROC. § 180-a (1964).

does not have the right to frisk, the only alternative is a bullet for the police officer.

And I simply, I do not intend to inject any emotionalism in this matter, but I point out that in the situation where the police officer was buried yesterday, he went into a premises and the question that he asked was, "What is going on here?" and the only alternative at that point was a firing at the police officer and a killing of that police officer.

The same facts are pointed out in the New York case, that this is what can occur, this is what can happen.

So therefore in the governing of municipal affairs, and large urban affairs—and there is nothing that requires the Court to be naive, the Court is aware from experience from the matters which have come before it, that the extent of crime is increasing in large metropolitan areas, is increasing in and about stores, shoplifters, and others who go into stores and steal, and others who go into stores and steal, and the activity which is observed by these officers, these police officers have a right to stop and to search these persons for any weapons that they may find upon their persons.

Now, if the Court will note. I indicate that there must be a distinction between a frisking and a searching.

I certainly as an officer of this Court, and as a lawyer, and as a firm believer in the principles of the Constitution, would not in any way think of trying to abrogate any of the principles of the Constitution, and particularly the Fourth Amendment which protects the rights of individuals as to unreasonable, unfair searches, and seizures.

But I say to the Court that rules which apply under the Fourth Amendment which related to unreasonable searches and seizures, and which is the yardstick that must be used to measure whether a search is illegal because it was unreasonable or whether there was probable cause, is not the same rule, is not the same yardstick that should be used to measure the conduct of a police officer who has observed suspicious activities and stops an individual and pats an individual down for protection of his own life.

And this was the testimony of Detective McFadden, "I observed him, I felt that they were casing a job, so I searched them to see if they had any weapons on them."

MR. STOKES: Objection. That is not the testimony.

THE COURT: The Court remembers what the testimony was. Proceed.

MR. PAYNE: Here again there is nothing that requires the Court to be naive, and I think that the Court recognizes the fact that when a man stops a person, that the only reason that he will pat him down is to see if there are weapons on him for protection of his own life.

This follows then as readily as day and night, and we do not need to have into the record Detective McFadden to say, "Oh, yes, I searched them because I was in fear of my own life."

This is the training of a good police officer, an officer who has been on the force a number of years.

Automatically he will stop persons to pat them down, to see whether they have any weapons in their possession, for protection of his own life.

This is as it should be, and this is the training of an excellent police officer, and this is the course of conduct that should be taken.

It is to be noted that in Detective McFadden's testimony, and in his illustrations to this court, he indicated to the Court how he made a patting down of these men, a frisking of these men.

He did not make a search of their person until such time as he found an object which he felt in his experience felt like a gun.

Now, I said to this Court at the very outset, I said certain kinds or types of misdemeanors, that the officer has a right to stop persons who he feels are committing certain kinds and types of misdemeanors, and to make a frisk of their person. Why did I say that?

I say that for this reason, your Honor, because there are certain kinds and types of misdemeanors that constitute a breach of the peace, and that when there is a misdemeanor such as the carrying of a concealed weapon, and any misdemeanor which would constitute a breach of the peace, the officer does not need to know or have knowledge of the facts of that particular misdemeanor prior or beforehand, before he stops the individual to question him.

And that is why yesterday I was questioning on the point in reference to a misdemeanor of carrying a concealed weapon.

A misdemeanor of carrying a concealed weapon is per se considered in law as a breach of the peace.

Under these circumstances, as the Court gave an illustration yesterday, if I were carrying a gun and walked down the street, and the officer stopped me and patted me down and found that gun upon me, that any subsequent motions to suppress or to declare such illegal, would not stand because any carrying of that gun is a misdemeanor that falls into the category of a breach of the peace.

THE COURT: I want to interrupt a little bit in that connection, Mr. Payne. I am not arguing whether the carrying of a gun is a breach of peace, because I am not concerned with that argument at this particular moment.

But do you mean to advise the Court that the mere fact that I happen to be walking down the street, and assuming that I am committing a breach of the peace by the carrying of a gun, that an officer for no reason whatever, without any basis of any reasonable suspicion or feeling that I am committing a breach of the peace, has a right to stop me?

MR. PAYNE: Under the reading of the cases, as I have read them, this is my understanding, and let me refer the Court to a quotation in the New York case, I think, which touches on that, and the extensive application—

THE COURT: I am familiar with the New York case.

MR. PAYNE: I want to read this portion to the Court.

THE COURT: Go ahead.

MR. PAYNE: And where they say, "And the evidence needed to make the inquiry is not of the same degree of conclusiveness as that required for an arrest."<sup>48</sup>

They are touching very closely on the point illustrated by the Court. They go on to say, "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."<sup>49</sup>

Now, to answer the Court's question emphatically, it infers in that section that there must be something which attracts the officer's attention, something which directs his suspicion in some way or other, but they indicate that the degree that is required in making an arrest ordinarily is not the same degree when there is a crime which is constituting a breach of the peace, in

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<sup>48</sup> *Rivera*, 14 N.Y.2d at 445.

<sup>49</sup> *Id.*

following these cases through.

THE COURT: I have read that case carefully and I analyzed it; I feel well enough to have an understanding what it means.

There is no question in that case a real distinction is made between a search and a stop and frisk.

And it indicates furthermore that there must be some basis for the stopping and frisking of the individual. You just can't indiscriminately stop an individual simply because you want to stop him and frisk him.

MR. PAYNE: I don't say indiscriminately, but if it is something to attract the officer's attention —

THE COURT: There must be some circumstances that would justify the stopping of an individual.

MR. PAYNE: There need not be circumstances as great as would be ordinarily in an arrest.

THE COURT: That is correct.

MR. PAYNE: And this is the point I choose to point to make to the Court.

THE COURT: That is right.

MR. PAYNE: And I make this further point to the Court in that connection, that if for some reason, however small his suspicions may be, are attracted to me, and then he finds that I am committing an offense, if that offense is an offense which would fall in those categories of offense constituting a breach of the peace, then his actions and conduct would be completely and totally valid.

If it is—and the law makes this distinction—if it was that kind of an offense that fell into the category that did not constitute a breach of the peace, then the law does not recognize or uphold the officer in these respects, because some types and kinds of crime are considered so reprehensible to the community, and for the benefit and protection of the community and the people in the community, they are put into those categories known as breaches of the peace, and they make a distinction.

And such, your Honor, must be necessary and essential in a civilized community, and in large urban municipalities, because of the complexities and the hazards of conducting orderly process of government therein.

I think this, your Honor, and I must say to the Court, I again reiterated a moment ago that in no manner do I intend to infringe upon those rights in the Constitution and particularly



the Fourth Amendment which protects the rights of individuals, but I would like to say this to the Court as was quoted in the New York case, "And what is reasonable always involves a balancing of interest."<sup>50</sup>

A balancing of interest that in this case, even as in the New York case as they pointed out, the security of public order and the lives of police are to be weighed against a minor inconvenience; the security of public order.

Every day crime is being committed of persons carrying weapons, and concealed weapons, and I need not go into any argument to this Court of the heinousness and the danger and the headaches that come from persons carrying concealed weapons.

And the Court, this Court and I think every court in the land, must recognize the hazards involved that if a police officer stops a man, has the right to stop a man, which the Supreme Court has said he has, and question him, the hazard involved from persons who are committing crime and carrying concealed weapons, is a bullet if he does not have the right to frisk that person and find out if he is carrying weapons.

I say to this Court that a similar statute of this nature has been held constitutional in California.<sup>51</sup>

I say to this Court, and unfortunately I did not bring it up here, I was in a little bit of a hurry when I was coming up here, that a similar incident of this nature, the right of a police officer to stop an individual who he observes committing suspicious activities and frisking that man, was upheld in the state of Massachusetts.<sup>52</sup>

And I say to the Court that as our society becomes more complex, reading the statistics of incidence of crime which are published by the Federal Bureau of Investigation, and where crimes are on the increase, crimes of a violent nature are on the increase, crimes of carrying a gun are on the increase, that the number of officers being killed on duty, in the line of duty, is the result of all of these activities which has come from metropolitan living; that it is essential that this Court and all the Courts of the land recognize the hazard of a police officer, and the right for that police officer to frisk a man, not search him but to frisk a man when he observes that man engaged in suspicious activities

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<sup>50</sup> *Id.* at 447.

<sup>51</sup> See CAL. PENAL CODE § 836 (1964).

<sup>52</sup> See *Commonwealth v. Lehan*, 347 Mass. 197 (1964).

and conduct.

I would so move this Court to overrule the motions to suppress the evidence in both these cases, because it is essential to the public welfare of this community that such a right be accentuated by the court of this municipality and this county and state.

Thank you very much.

THE COURT: Mr. Stokes?

MR. STOKES: If it please the Court, Mr. Payne, your Honor, at the very outset I might say this, I am a little disappointed in this last argument just presented to the Court by Mr. Payne, because Mr. Payne is too fine a lawyer and has too fine a grasp of the law for me to believe that he does seriously urge this Court to make its ruling in this case, based on a statute of another state which has been held to be constitutional, in view of the fact that we are confined in this case to the law of Ohio, and the law of the land as it has been announced by the Supreme Court of the United States.

We are not here involved with nor concerned with a statute in the city of New York.

THE COURT: Well, Mr. Stokes, that statute was adopted in 1964 giving the right, the statutory right to police officers to stop and frisk where circumstances justify.

But the case involving the point that was brought out here, in the Rivera case, applied to circumstances of the stop and frisk situation which occurred prior to the adoption of the statute, and the Court in discussing it said even though the statute is now in existence, will disregard the provisions of the statute, and we are determining the facts of the case and the law that we feel should be the law pertaining to those facts prior to the adoption of the statute.

This is the way I understand it.

You may proceed, Mr. Stokes.

MR. STOKES: Well, assuming that to be true, your Honor, and I will have some reference later on in my argument to what the Supreme Court says with reference to this specific type of thing.

Now, if this Court is going to decide this particular matter, this Court must of course decide this matter upon the facts and the evidence in this case.

Let us for just a moment examine what the precise and ex-

act evidentiary material is with relation to arrests, because this is the only way we can ascertain whether this arrest and the search was illegal or legal, and this is what this Court must decide in this matter.

The police officer said that after observing them for ten to twelve minutes, go look at a couple of windows, come back, and the other man would do likewise.

Then he said that a white man approached the two of them, and they talked, and then this white man continued on; then subsequently these men walked down the street, and it took them about three minutes to walk down the street.

And then I asked him how were they walking? He said in the usual ordinary manner, nothing unusual.

Then he said they were standing in front of Zucker's Store, and I said, "What were they doing there?" His answer was, "Just talking."

Now, the next testimony is that he went up to them and said to them, "I am a police officer, what are your names?"

He said, "They then mumbled something, and at that point I grabbed Terry and spun him around and began patting on him, and as I did I discovered what I believed to be a gun."

Now, he then orders the three of those men inside of Zucker's. Once he has them inside he orders them up against the east wall, with their hands up against the wall.

He says, "I then patted down the second man, Chilton, and I found a gun in his pocket."

He then searched the third fellow, the white man, and he said, "I found nothing on him."

Now, we know this, that there are certain tests that our courts have applied to whether the search and the arrest is reasonable or unreasonable.

Let's apply this, here are three men, let's take the third man, the white man, who has never been charged with anything.

In examining the situation with respect to two of them, in relation to the third man, we can see how illegal this thing was, because they are saying to you we searched this third man whom we took off the street now, ordered him inside the store, up against the wall, and because we found nothing on him he has never been charged.

And this is what our courts are talking about, and they are trying to avoid the cases that never come to court where consti-

tutional rights have been violated.

But they are saying to you because we did find a gun on the other two men, this therefore justifies the arrest which occurred after the search.

Now, they talked about a frisk here and then they talked about a search.

Well, we know this, the frisk resulted in the search, and the search according to the detective resulted in the arrest, because I said to him, "When did you consider these men to be under arrest?"

He said, "When I ordered the wagon."

And the testimony that this court is to rule on is that the wagon was ordered after all three men were searched.

I say to your Honor that the law is clear on this point.

Now, I know this, some reference was made to it in Mr. Payne's argument, the law does make a certain exception with respect to a weapon found on a person.

The law says that this exception exists for two reasons; number one, to provide safety to the police officers, and number two, to prevent the escape of the person arrested.

But this is in situations where there has been a valid arrest, then the police officer has the right to search, search for a weapon, for these two reasons; but not search, find a weapon, and then make the arrest. That is not the law.

What does this boil down to? Under the law of illegal search and seizure, nothing but a general search, and the law is that no search or seizure is ever reasonable if made both without a search warrant and without an arrest.

No search without a search warrant is reasonable unless it falls within the narrow exception of a search incidental to and contemporaneous with a valid arrest.

Now, what is the test in many cases used by our Supreme Court? They have said this, under the fact situation would a court or a judge have granted to that police officer a search warrant based upon those facts?

I submit to your Honor that under the fact situation in this case, where the police officer under this evidence would have had to say to the court, as he said to us yesterday in answer to my question, "Did you know that those men had a gun on them?" His answer was, "I had absolutely no idea in the world that they had a gun on them."

Now, can you conceive of a judge granting a warrant to search when a police officer says, "The reason I want to search them is they have acted suspiciously up on the corner of 14th and Huron, and they are now standing in front of Zucker's Store talking to a third man," because the court would have inquired, "Do you believe that they have some weapon on them?" And the answer in this evidence is, "No."

Now, certainly we know that when lawyers ask questions from a witness, the lawyers ask them because they want to elicit something they know is essential in the case.

We know that this court in asking questions of the witness on the witness stand yesterday, having the Court's knowledge of what is required under illegal search and seizure, knew that there has to be some basis for this probable cause, and that it must be based upon the experience of the police officer, plus other ingredients, and that is why this Court I am certain asked this question of the officer—and this is part of the evidence—"Have you ever had experience in observing the activities of individuals in casing a place?"

Now, the testimony to this Court was that he suspected them of casing a place.

And in answer to the Court's question on this point, his entire reason for having accosted these men, his answer was, "To be truthful with you, no."

Probable cause? The Court even said, "You never observed anybody casing a place?" And the record is, "No." Then the Court asked about whether or not he would have arrested them whether they were across the street acting under these circumstances, and the truthful answer of this fine officer was that he did not know.

Now, with respect to an officer's right to stop and interrogate people, in *Green versus United States*, 259 Federal, 2nd, 180, U.S. Court of Appeals, District of Columbia,<sup>53</sup> this is what the Court said —

THE COURT: What is the page number again?

MR. STOKES: What is that, your Honor?

THE COURT: What is the page number did you say?

MR. STOKES: 259 Federal, 2nd, 180, U.S. Court of Appeals, District of Columbia.

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<sup>53</sup> *Green v. United States*, 259 F.2d 180 (D.C. Cir. 1958).

The Court in its opinion said this:

"The courts in various opinions have said that officers in the course of an investigation may ask questions before making an arrest. The narcotics officers were entitled to ask Jap Palmer, the known addict, if he were still using narcotics, and then make an effort to induce him to inform them as to his source of supply."<sup>54</sup>

Then the Court says this: "He could have declined to talk. He could have refused to halt. The officers certainly would have had no right whatever, then and there without more, either to seize him or to search him."<sup>55</sup>

So certainly this officer had the right to approach them and this is what he did. He said, "I am a police officer," and then he asked for some names.

But his next step was that of spinning the man around and beginning the search.

Now, I would like to cite *White versus United States*<sup>56</sup> to the Court, and I think this is pertinent to this case. This is 271 Federal, 2nd, 829.

In this case a police officer saw the defendant on the street about two o'clock in the morning, and he thought that the defendant had narcotics, and the testimony in this case was that this particular area had a high incidence of narcotics, and generally anybody that you stopped would inevitably have narcotics on them.

He stopped him without a warrant. This man admitted he had not worked for over a year, that he maintained himself by gambling, and the officer then informed him that he was arresting him for vagrancy and he required him to disrobe.

The search which led to the discovery of stolen money orders was declared to be an unreasonable and unlawful violation of the defendant's rights as a citizen, rendering the stolen money orders inadmissible in a prosecution for forgery, housebreaking, grand larceny, and interstate transportation.

The defendant in this case had been convicted on eleven different counts, and [a Circuit] Court overruled this decision.<sup>57</sup>

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<sup>54</sup> *Id.* at 181.

<sup>55</sup> *Id.*

<sup>56</sup> *White v. United States*, 271 F.2d 829 (D.C. Cir. 1959).

<sup>57</sup> The original transcript says "our Supreme Court overruled this decision." Apparently Mr. Stokes misspoke or the court reporter misheard him.

But here is the law that the Court cited and I think that this is pertinent in this case:

"[T]he strength of the evidence as proof of guilt does not serve retroactively to validate the invalid means by which the evidence was secured, so as to permit its use on the trial of one whose rights are violated."<sup>58</sup>

I think this is particularly pertinent to the finding of a gun, because I realize that the Court is in this position, that it is perhaps difficult for a court to rule under the law realizing that here are two men on the street with loaded guns in their pockets, but we have to look at what our law is, and what our Supreme Court justices have said with reference to such situations.

And the [Circuit] Court in this case said this: "To overlook a violation of a great constitutional protection of individual personality because of the potency of the evidence secured by the violation would be to depart from correct principles in the administration of criminal law by federal courts."<sup>59</sup>

This particular case cited *U.S. versus Di Re*,<sup>60</sup> which is 332 U.S. 581, a case that was decided January 5th of 1948, and had reference to New York law.

In this case, your Honor, there were three men in an automobile. The driver was suspected of selling counterfeit gas ration coupons.

When approached by Federal and State of New York police officers, the informer had coupons in his hand and stated that they were obtained from the driver.

"Without previous information implicating respondent"—and I might say in this case, the testimony in this case is that this police officer didn't know these men, didn't know anything in the world about any of them—"and without a warrant, the state officer arrested respondent and the driver, but did not search the car or state the charge on which respondent was arrested."

And these men hadn't been told yet that they were under arrest by this police officer.

"At the police station, the respondent was searched and counterfeit gasoline ration coupons were found on his person."<sup>61</sup>

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<sup>58</sup> *White*, 271 F.2d at 831.

<sup>59</sup> *Id.* at 831-32.

<sup>60</sup> *United States v. Di Re*, 332 U.S. 581 (1948).

<sup>61</sup> *See id.* at 581 (headnote 1).

He was convicted of possession and it was held by the Supreme Court of the United States that the search was unlawful and the conviction could not be sustained.

Number two, by mere presence in a suspected automobile, a person does not lose immunities from search of his person to which he otherwise would be entitled.

And here was a case where the police had what they considered to be a suspicious automobile. And our Supreme Court says you can't search the person of these people because you suspect the occupants of this automobile.

And the Court said, "in the absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines its validity."<sup>62</sup>

Now, the law of the state of Ohio says that a police officer may not arrest for a misdemeanor, unless it is committed in his presence, or may not arrest for a felony unless he has reasonable grounds upon which to believe that a felony has been committed.

The prosecutor was talking about one which is anticipated, and therefore has never occurred, and that is not the Ohio law, and this I think has to be applied, if we are to follow the search and seizure law.

This is in the syllabus of this case, "A search is not made legal by what it turns up; in law it is good or bad when it starts and does not change character from its success."<sup>63</sup>

This is our Supreme Court saying that the mere fact that you search and find a gun doesn't mean that this illegal search from the beginning is then made successfully.

And this further in the syllabus, your Honor, "That law enforcement may be made more difficult is no justification for disregarding the constitutional prohibition against unreasonable searches and seizures."<sup>64</sup>

The Court said this: "Therefore, the New York statute provides the standard by which this arrest must stand or fall. Since, under that law, any valid arrest of *Di Re*, if for a misdemeanor must be for one committed in the arresting officer's presence, and if for a felony must be for one which the officer had reasonable grounds to believe the suspect had committed, we

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<sup>62</sup> *Id.* at 589.

<sup>63</sup> *Id.* at 582 (headnote 7).

<sup>64</sup> *Id.* (headnote 8).



seek to learn for what offense this man was taken into custody."<sup>65</sup>

This is the Supreme Court asking the question in analyzing this case.

Then the Court said at page 595, "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."<sup>66</sup>

I say to your Honor that the suppression of the evidence in this case does not mean that every gun case coming before this Court would then have to be suppressed.

We know that our courts have already said that each search and seizure case must stand on its own merits.

I say to your Honor that under the evidence as it has been introduced in this case, this Court under our law has no alternative except to grant the defendants' motion to suppress.

Thank you.

THE COURT: Anything further, Mr. Payne?

MR. PAYNE: May I refer the Court to 121 Ohio State, pages 280, the first Syllabus of the case, Judge, if I may just keep my seat and read the first Syllabus here.

THE COURT: All right.

MR. PAYNE: "A police officer of a municipality is authorized without a warrant to arrest a person found on the public streets of the corporation carrying concealed weapons in violation of section 12819, General Code, although such police officer has no previous personal knowledge of the fact, if he acts bona fide upon such information as induces an honest belief that the person arrested is in the act of violating the law."<sup>67</sup>

Porello was arrested —

THE COURT: I have read that case.

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<sup>65</sup> *Id.* at 591.

<sup>66</sup> *Id.* at 595.

<sup>67</sup> *Porello v. State*, 168 N.E. 135, 135 (Ohio 1929) (headnote 1).

MR. PAYNE: Did you read that case?

THE COURT: Yes.

MR. PAYNE: And the comment, your Honor, of the Court was this, and I think it is extremely important:

“Here we have a search made of a person and of an automobile, under circumstances in which the police officers acted bona fide and upon information which induced an honest belief in them that the person arrested was in the act of violating the law. Paralysis of the police system would result if duly authorized officers were compelled minutely to verify their suspicions prior to acting upon honest belief in the matter of search and arrest under such circumstances.”<sup>68</sup>

THE COURT: Today there have been a great deal of changes by our Supreme Court.

MR. PAYNE: There has, your Honor.

THE COURT: And their thinking in their decisions since this particular case and other cases have been cited.

MR. PAYNE: I don't argue that, the philosophy is still excellent.

#### THE COURT'S PRETRIAL RULING DENYING DEFENDANTS' MOTION TO SUPPRESS

THE COURT: I understand your viewpoint, I understand Mr. Stokes' viewpoint.

Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting them-

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<sup>68</sup> *Id.* at 136.

selves suspiciously, and some interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the Court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. *Henry vs. U.S.*, 361 U.S. 98. *Ker vs. California*, 374 U.S. 23, *Mapp vs. Ohio*, 367 U.S. 643.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say 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 a lawful arrest, because there wasn't, from the facts as presented.

It has been frequently stated by the U.S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendment. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of *Ker vs. California*, 374 U.S. 23, the Court pronounced: "The states are not thereby precluded from developing workable rules governing arrests, searches, and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . ." <sup>69</sup>

Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious person for the purpose of interrogation. Therefore, can it be said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our State that is violative of the Fourth Amendment, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such con-

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<sup>69</sup> *Ker v. California*, 374 U.S. 32, 34 (1963).

duct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

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 a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure.

He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for his own personal protection, and by doing so he discovered that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not of a search.

In the case of *People vs. Rivera* (7/10/64) decided by New York Court of Appeals, U.S. Law Week July 28, Volume 33, No. 4, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of large urban communities."<sup>70</sup>

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of *People vs. Martin*, 46 California, 2nd, 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police

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<sup>70</sup> *People v. Rivera*, 201 N.E.2d 32, 34 (N.Y. 1964).

are to be weighed against a minor inconvenience and petty indignity.<sup>71</sup>

I may say at this time, 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, the Fourteenth Amendment, and other amendments of the U.S. and State Constitutions.

But police officers in a community also have rights under the Constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is the right when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure. *Ballard vs. State*, 43 O.S. 340.<sup>72</sup> *Clark vs. DeWalt*, 65 O.L.A. 203.<sup>73</sup>

I believe and I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that police officers know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

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(Thereupon an adjournment was taken to 10:30 A.M., Tuesday September 29, 1964, at which time the following proceedings were had:)

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<sup>71</sup> See *People v. Martin*, 293 P.2d 52, 53 (Cal. 1956).

<sup>72</sup> *Ballard v. State*, 1 N.E. 76, 79 (Ohio 1885).

<sup>73</sup> *Clark v. DeWalt*, 114 N.E.2d 126, 131 (Ct. of Common Pleas 1953).

## CHILTON'S TRIAL

*TUESDAY MORNING SESSION, 10:30 A.M., SEPTEMBER 29, 1964*

THE COURT: Mr. Payne?

MR. PAYNE: Yes, your Honor.

THE COURT: Which case are we going to proceed with first?

MR. PAYNE: Richard Chilton, I believe, your Honor.

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*PROCEEDINGS IN RE STATE OF OHIO VS. RICHARD D. CHILTON, No. 79432.*

THE COURT: Are you ready to proceed, Mr. Stokes?

MR. STOKES: Yes, your Honor.

THE COURT: I have before me a waiver of jury trial signed by Richard D. Chilton, and witnessed by his counsel, Louis Stokes.

May I ask of you, Mr. Stokes, to explain to your client his rights under the Constitution to have a trial by jury.

MR. STOKES: If your Honor please, I did instruct Mr. Chilton that he was entitled by way of the Constitution to have a jury trial.

I explained to him that in signing this waiver he was waiving a right which he had on the trial of this matter to the Court, and he fully understands and appreciates the fact that he has waived this right.

THE COURT: Mr. Chilton, you have heard the statement of your counsel; is that your position?

DEFENDANT CHILTON: Yes.

THE COURT: You are waiving a jury trial?

DEFENDANT CHILTON: Yes.

THE COURT: All right. You may proceed.

MR. STOKES: If your Honor please, before we proceed may I at this time for purposes of this record renew my motion to suppress the evidence in this case, to wit, a gun, which was removed from the possession of one Richard Chilton.

THE COURT: Let the record show that counsel for the Defendant has renewed his motion to suppress the evidence, containing the gun which was found in the possession of Mr. Chilton, and the motion is denied, and exception will be noted to the Defendant.

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OPENING STATEMENT ON BEHALF OF THE STATE OF  
OHIO

MR. PAYNE: If it please the Court, in this case I expect the evidence to show that on or about the 31st day of October, 1963, Detective Martin McFadden while pursuant to his duties as a police officer observed the defendant and another man in the vicinity of Euclid Avenue and East 13th Street, and observing their conduct for some period of time that he went to these two men and asked them to identify themselves, and then frisked the defendant, this man, and found in the pocket of this man a weapon which was concealed thereupon.

We expect the evidence to show that the defendant was placed in custody and subsequently charged with the offense of carrying a concealed weapon, and the matter was presented to the Grand Jury and which an indictment was returned.

Omitting the caption part of it that indictment reads as follows:

"The Grand Jury do find and present that Richard D. Chilton on or about the 31st day of October, 1963, at the County aforesaid unlawfully and feloniously carried and concealed on or about his person a certain dangerous weapon, to wit, pistol, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

It is signed by the prosecuting attorney, John T. Corrigan.

THE COURT: Mr. Stokes?

OPENING STATEMENT ON BEHALF OF DEFENDANT  
RICHARD CHILTON

MR. STOKES: If your Honor, please, we anticipate that the evidence in this case will show that Richard Chilton in the company of two other men, standing in front of Zucker's Store on Euclid Avenue, that they were approached by this police officer, and these men were searched, they were searched illegally.

As a result thereof the police officer came into possession of a gun, and that these men were not placed under arrest until after this gun had been obtained from their person illegally, and that as a result thereof this man stands charged carrying a concealed weapon.

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## THE STATE'S EVIDENCE

MR. PAYNE: The State will call Detective McFadden.

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THEREUPON the State of Ohio, to maintain the issues on its part to be maintained, called as a witness Detective Martin McFadden, who, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION OF MARTIN MCFADDEN

*(Morning Session September 29, 1964)*

*By Mr. Payne:*

Q. Will you state your name, please?

A. Martin J. McFadden.

Q. Where are you employed?

A. Cleveland Police Department, Detective Bureau.

Q. How long have you been so employed?

A. 39 years and four months, a little over four months.

Q. Directing your attention to on or about the 31st day of October, 1963, do you recall what your assignment was on that day?

A. Well, I am assigned to stores and pickpockets in the downtown area.

Q. Were you so assigned on that day?

A. I was.

Q. Do you remember your hours of duty, sir, on that date?

A. Well, it would either be—9 to 5:30, quarter to six. Store hours.

Q. Now, Detective McFadden, did you have the occasion to participate in the investigation of the matter before the Court?

A. I did.

Q. Will you tell us where, when, and approximately what time did you first come into the investigation of this matter?

A. On October 31, 1963, about 2:30 P.M., at Huron Road and Euclid.

Q. While you were at Huron Road and Euclid Avenue, can you tell us what if anything you observed?

A. I was walking northeast on the south side of Huron Road, and approximately 3 to 400 feet away from the corner on the opposite side of the street I saw two men standing at the corner of Huron and Euclid.



As I was walking down I observed one man leave the other man at the corner, and walk up, that is, southwest on the north side of Huron Road.

As he passed either the United Airline or the Diamond Shop, which is right next door, he stopped for a second and then continued a couple of doors down, that is, west, and he come back and he did the same thing. He came back to the man.

In the meantime I positioned myself at Rogoff's which is about two doors from the corner from 14th on Huron Road. There is a restaurant on one corner—or a restaurant and then Milgrim's and then Rogoff's.

I watched these men. I seen them each make three to four trips up Huron Road, and between one of these trips a white man approached them on the corner and stopped and talked with them for a minute or so, and then he walked, left them and walked west on Euclid.

These two men then proceeded to go through the same routine and going up Huron Road, making the stop, going a couple of doors down, and then come back and making a stop a second or so in front of either of these two windows, and then when they left this corner, after they both had made several trips, a couple of trips, three or four trips—

Q. All right. Hold it right there, Detective. One of the men that was making these trips, is he in the courtroom now?

A. Yes.

Q. Will you point him out to the Court?

A. Chilton, the man behind Mr. Stokes.

MR. PAYNE: May the record show and indicate the witness is identifying the defendant in this case?

THE COURT: The record may so show.

Q. Did you subsequently learn his name?

A. Yes, I learned his name.

Q. And what did you learn his name to be?

A. Richard Chilton.

Q. Is that the same man that you observed on the day in question as you just described?

A. It is.

Q. Now, did I understand you to say, Detective, that the two men then left the corner?

A. That's right.

Q. Where did they proceed to?

A. They proceeded west on Euclid on the south side of Euclid Avenue.

Q. What then did you do if anything, what happened there?

A. At about 1120 Euclid Avenue they saw this white man standing in front of Zucker's Store, and they went over and they were talking to him.

Q. Was this the same man that had talked to them previously, when you were observing them?

A. Absolutely the same man.

Q. What then did you do, if anything?

A. I then went over and I informed them that I was a policeman, and I asked each one their name, and they muttered something, I just can't recall what they said their name was.

And I turned—he was the third, he was the further one west standing up against the window, Terry, and I pulled him in front of me and I tapped him down and I felt —

Q. You tapped Terry down?

A. That's right.

Q. When you tapped Terry down what do you mean by tapping him down?

A. I just went over his clothing on the outside, just tapping him, to see whether he had any weapons, to see whether he had any weapons.

Q. What happened as a result of that?

A. I felt a weapon in his outer topcoat pocket, left[-]hand upper pocket, inside.

Q. What then did he do, if anything?

A. I put my hand in there and I felt the gun, the handle of the gun. I tried to get it out and it stuck, so I took the whole coat off of him. I then put him in front of me and ordered the other two men into Zucker's Store, where I informed them to face east with their hands up. I then went over and searched Chilton.

Q. Will you tell us how you—you used the word searched—will you tell us how you searched him?

A. Pardon me, I should have said I tapped him down, too, and then I felt that gun.

Q. You say you tapped him down; did you tap him down or did you search him?

A. I tapped him down first and then searched him.

Q. All right. Now, will you tell us what you mean by tap-

ping him down, again?

A. Just feeling on the outside of his clothing.

Q. As a result of feeling on the outside of his clothing, what if anything did you discover?

A. I felt a gun in his left-hand topcoat pocket.

Q. And upon feeling that object, what then did you do if anything?

A. I put my hand in his pocket and pulled out a .38 caliber revolver.

Q. And this was from whom?

A. From Richard Chilton.

MR. PAYNE: Let the record show that the witness is pointing to and indicating the defendant Chilton at this time.

THE COURT: The record may so show.

(State's Exhibit 1 was marked for identification by the reporter.)

Q. Detective McFadden, handing you what has been marked for purposes of identification as State's Exhibit 1, can you identify State's Exhibit 1?

A. Yes, this is the gun that I took out of Chilton's pocket.

Q. And where was this gun?

A. In his outer pocket, that is, he had a topcoat on, and it was in the left-hand pocket of the outer pocket of his topcoat.

Q. Could you see the gun at any time before you patted him down?

A. No, sir.

Q. Can you tell me what was the condition of the gun in respect to being loaded or unloaded at the time that you removed it from the defendant's pocket?

MR. STOKES: Pardon me. If your Honor, please may I show an objection to all questions pertaining to this gun, a continuing objection.

THE COURT: I thought you were going to object to what might be considered a leading question, but in light of the fact that you are not objecting to that phase of it, but you are making an objection to all questions pertaining to this gun—is that correct?

MR. STOKES: Yes, your Honor.

THE COURT: A continuing objection?

MR. STOKES: Yes.

THE COURT: Let the record so show, and the objection is overruled.

MR. PAYNE: Fine.

Q. I am sorry, your last response to my question, do you recall the question?

THE COURT: Read the question.

(Following question was read by the reporter:)

“Can you tell me what was the condition of the gun in respect to being loaded or unloaded at the time that you removed it from the defendant’s pocket?”

A. Loaded.

Q. Handing you what further will be marked as State’s Exhibit 1-A, can you identify State’s Exhibit 1-A?

A. These are five pellets.

MR. STOKES: Objection to this also, your Honor.

A. These are the five –

MR. STOKES: And a continuing objection to this exhibit.

THE COURT: Your objection will be noted for the record, that it is a continuing objection, as to the gun and what was contained in the gun.

MR. STOKES: Yes, your Honor.

THE COURT: Objection overruled. You may have your exception.

Q. What are State’s Exhibit 1-A?

A. These are pellets found in the gun.

Q. After finding State’s Exhibit 1 and 1-A, what if anything did you do with respect to the defendants?

A. I then went over and tapped the third man down who was Carl Katz, but I found no weapons.

Q. Then what did you do, if anything?

A. I kept them there with their backs turned toward me until I received help.

Q. Did you consider them under arrest at that time, officer?

A. I sure did. As a matter of fact, I told them to call the wagon.

Q. Was the defendant subsequently charged with the offense of carrying a concealed weapon?

A. Yes, sir.

Q. On the street you tapped down Terry and found the pistol and then you asked them to go into the store, is that right?

A. Yes.

Q. Then you patted down or tapped down Richard Chilton, is that correct?

A. Yes.

Q. Can you tell us why you tapped down Richard Chilton?

MR. STOKES: Objection.

THE COURT: It has already been testified to as to the tapping down of Richard Chilton. Objection is sustained.

Q. Detective McFadden, after finding the weapon on the person of Richard Terry, you then –

THE COURT: Richard who?

MR. PAYNE: I am sorry.

MR. STOKES: Chilton.

Q. After finding the weapon on the person of John Terry, you asked all the defendants to go into the store, is that correct?

A. That's right?

Q. Can you tell the Court what was in your mind when you tapped down Richard Chilton?

MR. STOKES: Objection.

THE COURT: Objection sustained.

Q. Did you tap Richard Chilton down for the purpose of ascertaining whether he had any weapons on his person?

MR. STOKES: Objection.

Q. Yes or no?

THE COURT: Objection sustained.

Q. Detective McFadden, the store that you took Richard Chilton into, is that in the city of Cleveland, county of Cuyahoga, and state of Ohio?

A. It is.

MR. PAYNE: Your witness.

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CROSS EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Stokes:*

Q. Detective McFadden, October 31st at 2:30 p.m. was broad daylight, wasn't it?

A. That's right.

Q. And the area in which you saw these men at 2:30 that afternoon was literally filled with people, wasn't it?

A. Well, I wouldn't say it was filled with people. It isn't like being down on the Square. I would say that there were people down there, but on that particular day I couldn't tell you. As a matter of fact any day you never find the number of people there that you would downtown, that is, down in the west end of the Square, around the Square.

Q. Well, with relation to that particular area that day, what was the situation with respect to pedestrians there?

A. Oh, I wouldn't say there would be many.

Q. Well, can you give us some estimate as to about how many people you would say were in and around that vicinity as pedestrians?

A. Well, if I would give you the number of people, I don't know whether I would be lying or telling the truth. I wouldn't know exactly how many people were there.

Q. At any rate, this particular area is flooded with stores, isn't it, there are plenty of stores in that particular area?

A. That's right.

Q. There are people going in and out of those stores at that hour of day, with a great deal of frequency, aren't there?

A. Can I answer that question in my own way?

Q. Yes, surely.

A. You know, those stores extend, this particular section, they extend, there are doors on the Huron Road side and there are doors on the Euclid side. There is a lot more people go in through the Euclid side than there is through the Huron Road side, of any of these stores.

Q. At any rate, we are talking about the area where you saw these men at Huron and Euclid at 2:30 in the afternoon, and my question is this, weren't there other people on the street?

A. Yes, there were some, a few people on the street, yes, naturally.

Q. Now, when you first saw these two men, there was

nothing unusual about two colored men standing on the corner talking, was there?

A. No.

Q. When did you first draw the conclusion that their actions were unusual?

A. Well, when I saw them standing on the corner, and I was on the opposite side of the street walking towards the direction, that is, towards where they were at, they were talking. I walked slow and then I observed the one leave the other and walk up, as I was walking down, and I noticed him peer into a window, go by, come back, and do the same thing, and then I walked a little bit faster and went to the Rogoff Store which as I said is about the third store from the corner of 14th Street, and that is where I observed them more.

Q. Well, at what point did you consider their actions unusual?

A. Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and come back again.

When he come back, then I observed the other man doing the same thing.

Q. Well, would this be a fair statement, then, that it was at this point then that you decided you ought to watch them further?

A. Well, I will be truthful with you, I will stand and watch people or walk and watch people at many intervals of the day. Some people that don't look right to me, I will watch them. Now, in this case when I looked over they didn't look right to me at the time.

Q. So this was your purpose then for watching them because they just didn't look right to you?

A. I get more purpose to watch them when I seen their movements.

Q. You didn't know either one of these men, did you?

A. I did not.

Q. And no one had furnished you any information with respect to these two men, have they?

A. Absolutely no information regarding these two men at all. I am telling the truth when I say that.

Q. I believe you, Mr. McFadden. Now, you can't tell us, can you, whether when they walked over as you described —

A. When they walked over where?

Q. To either United Airlines or the Diamond Shop, which store they were actually looking into?

A. No, I can't, to be truthful with you, no. It was either one of those two.

Q. And at no time did either one of them enter either one of those stores, did they?

A. No, no.

Q. Now, how long a period of time did you observe them there at Huron and 14th?

A. Oh, I imagine around twelve or fifteen minutes, something in that vicinity, ten to fifteen minutes.

Q. During this time how many trips would you say each of them made away from the corner over to the two stores you have referred to?

A. Oh, I would say about four trips, three to four trips, maybe four to five, I didn't count them.

Q. Are you talking about each person?

A. Well, between them, between the two of them, maybe half a dozen trips, maybe a little more, it might be a little less. I don't know, I didn't count the trips.

Q. These trips would be a matter of this fellow walking over, looking into each one of these stores, you don't know which—

A. That's right.

Q.—and then walking back to where the other stood, is that correct?

A. That's right.

Q. There was nothing unusual about their dress, was there, their appearance?

A. No.

Q. And both men had on topcoats?

A. That's right.

Q. Were they wearing a hat?

A. To be truthful with you I don't remember.

Q. Now, when you saw this white man come over and talk to the two of them, there at the corner of Huron and 14th, did you know this white man?

A. No, I didn't.



Q. You had no information with reference to this white man?

A. No information on anything that I—on anything that I seen, anything that I seen I had no information whatsoever on.

Q. Now, you have described their leaving Huron and Euclid and walking west on Euclid?

A. That's right.

Q. Was there anything unusual about the manner in which they walked down Euclid?

A. No, they walked in a natural gait.

Q. And how long would you say it took them to get from the point where they were at Huron and Euclid down to Zucker's?

A. Oh, I imagine it would take a minute.

Q. Now, was this white fellow already standing in front of Zucker's when they got there?

A. That's right.

Q. You had left your spot at Rogoff's, is that it, where you were standing in the doorway?

A. Yes, when I came across the street.

Q. And you were following behind them now?

A. Yes, but I run across the street.

Q. You ran across the street?

A. That's right.

Q. But they were walking?

A. That's right, and then when I—I walked about 20 feet, maybe 25 feet behind them.

Q. How long were they standing in front of Zucker's talking to this white person when you went up to them?

A. It couldn't be between—between a minute and two minutes, maybe less than that. I couldn't say.

Q. Can you describe for us the manner in which the three men were standing in front of Zucker's?

A. The white man was at the easterly end of the display window. Chilton was in the middle. And the other man, Terry, was on the west side of Chilton.

Q. The three of them were just standing there talking?

A. That's right.

Q. You were in plain clothes that day, weren't you?

A. That's correct.

Q. By plain clothes we mean in regular dress?

A. That's right.

Q. When you identified yourself as a police officer, did you take out your badge?

A. No, I did not.

Q. In what manner did you identify yourself as a police officer?

A. I said, "I am a police officer."

Q. But you showed no identification?

A. No, I showed no identification.

Q. After saying, "I am a police officer," what did you next say to these men?

A. I said, well, "What is your name, your name and your name?" and they mumbled something. I don't remember what the names were that they mumbled. They said something but I don't recall what it was at that time.

Q. Then what is the very next thing that was said or happened?

A. The next thing I took Terry and put him in front of me and we were both facing the other two men.

Q. By taking Terry and putting him in front of you, did you have to put your hands on him?

A. Yes, I did.

Q. Would it be fair to say that you grabbed him with both of your hands, would that be fair?

A. Well, I wouldn't say. I just put him—I don't say I went at him like that and grabbed him. I just took him and put him in front of me.

Q. But in doing so you had to touch him with both your hands?

A. I imagine I touched him with both of my hands, that's right.

Q. What you actually did, you completely reversed his position that he was standing in, because you turned him around as to have his back to you?

A. That's right.

Q. Then you say you tapped him down?

A. That's right.

Q. By tapping him down, do you mean that you patted on and about his body with your hands?

A. On the outer part of his body, on the outer part of his clothing.

Q. And when you felt this weapon, you then removed his

coat from his body, didn't you?

A. No, sir, I did not. I put my hands in and I felt a handle of a weapon, and I couldn't get the weapon out of the inside pocket, and I took the coat off.

Q. You removed the coat from Terry's body, didn't you?

A. That's right, that's right.

Q. Now, all of this is taking place out on Euclid Avenue?

A. That's right.

Q. With people passing by?

A. Well, naturally.

Q. Now, when we talk about Zucker's Store, we are getting close to Ninth and Euclid, aren't we?

A. Well, it is about 1100, 1120, well, it is a little distance from Ninth Street.

Q. That is a pretty heavily populated area, isn't it, sir?

A. Euclid and Ninth, yes.

Q. Now, did you ask them to go into the store, or did you order them into the store?

A. I ordered them into the store.

Q. As a result of your order, did these men follow your order?

A. They did.

Q. Now, had you at that point drawn your gun?

A. No. I had it handy.

Q. At that point, had anyone been placed under arrest, and by that point I have in mind these three men being ordered into Zucker's, at that point had anyone been placed under arrest by you?

A. Before I made the second search, when I entered that store, I informed—I hollered out to the man in the store, "Call the wagon." That was enough to say that they were under arrest.

Q. When did this occur now?

A. Pardon?

Q. When did this occur?

A. When I first brought the men, when they first went in there, after I got the first gun and I ordered them in, and at that time when I was going in, as soon as I told them to face east and put their hands out, I told him to call the wagon before I made the second search.

Q. This is after you had searched Terry but before you had

searched Chilton and Katz.

MR. PAYNE:Objection. Just a minute.

THE COURT:What is your objection?

MR. PAYNE:My objection, your Honor, is that the testimony of Detective McFadden described on direct examination was that he tapped them down. My objection is to the use of the terminology.

THE COURT:He described what he had stated, but the Detective sort of interchanges the word searching.

MR. PAYNE:I am aware of that, and I do want to keep the record straight since the officer—

THE COURT:The Court is aware.

MR. PAYNE:I acknowledge to the Court that he has used them interchangeably.

THE COURT:The Court is aware of how he described it, and I am fully aware that the Detective feels a search and a tapping can be used interchangeably. The Court has a different feeling.

MR. STOKES: I have this statement, that he tapped him down first and searched him. Has a ruling been made?

MR. PAYNE: I think he was waiting on an affirmative ruling on the objection, your Honor.

THE COURT: Well, the objection is overruled.

MR. STOKES: May we have the question read back, please?

THE COURT: Read the question.

(Following question was read by the reporter:)

“This is after you had searched Terry but before you had searched Chilton and Katz?

A. Are you referring to the call for the wagon, are you referring to the arrest?

Q. Yes, the arrest.

A. When I entered the store, after the search was made and the gun found on Terry, when I entered the store I informed them to call the wagon.

Q. Well, by calling the wagon, what do we understand that to mean to you?

A. It means an arrest.

Q. Whom were you arresting?

A. I am arresting the whole three of them.

Q. Detective McFadden, you testified approximately a week ago in this very courtroom before this same judge on a motion to suppress, didn't you, sir?

A. That's right.

Q. And at that time do you recall that I asked you this question, and you gave this answer, "At what point did you consider them to be under arrest?" And you said, "When I ordered the wagon," didn't you?

A. That's right.

Q. Do you recall that you testified in that matter that you told the store people to order the wagon after you had searched Chilton and Katz up against the wall in Zucker's Store, do you recall that testimony, sir?

A. I don't remember.

Q. Well, do you recall that in that testimony you said after entering the store you ordered the three men up against the wall?

A. Yes.

Q. Do you recall that you said, "I then patted Chilton down, and I felt a gun in his left topcoat pocket and I reached in his pocket and took the gun out," do you recall that?

A. That's right.

Q. You said, "I then searched Katz and found nothing"?

A. That's right.

Q. "And that at this point I ordered the wagon," do you recall that?

A. I don't recall. I remember saying something about calling the wagon, but whether it was at that point or whether it was at the other I don't recall.

But I remember distinctly when I went in there, after I got that first gun and got those men in there, I told them to call the wagon.

It would be a natural thing for me to do, I got three men.

Q. Well, you tell the Court as you walked through the door and you said, "Order the wagon," and as you further say you were then arresting Chilton, Terry and Katz—

A. That's right.

Q. What were Chilton and Katz being arrested for?

MR. PAYNE: I am going to enter an objection at this time, your Honor.

THE COURT: What is the basis for your objection?

MR. PAYNE: As a matter of law, your Honor, I think the subsequent following of this matter will show that these men were arrested initially and charged with investigation and then

to carrying concealed weapons.

THE COURT: Mr. Stokes, you may continue.

MR. STOKES: Read the question.

(Following question was read by the reporter:)

“What were Chilton and Katz being arrested for?”

A. Association.

Q. Is that your complete answer, sir?

A. Well, they were found in company with a man with a revolver.

Q. So then at that point they were being arrested for association?

A. They were being arrested, yes, period.

Q. Do you know of any charge under Ohio Law entitled “Association”?

MR. PAYNE: I must object now.

THE COURT: Mr. Stokes, I think we have gone into this question. You are questioning the officer on questions of law, whereas the questions should be directed as to the facts and circumstances pertaining to the arrest.

As I have indicated, the question as to what constitutes an arrest is not for the officer’s determination, but is strictly based upon the facts that occurred, and the Court will determine whether an arrest actually occurred from those facts. It is not what was in his mind as to when the arrest occurred.

MR. STOKES: I think I know what the Court means with reference to certain acts at that point, regardless of what the officer calls it, would probably constitute an arrest. But I think it is important and bearing upon this whole question as to what this officer actually did, and his reasons for having done so certainly bear upon this whole question.

THE COURT: Well, you may proceed.

MR. STOKES: Thank you, your Honor. Would the reporter please read that question back, please?

MR. PAYNE: Pardon me, your Honor, if it is to go back to the same question I would have to renew this same objection. I have no problem in my own mind of Mr. Stokes going in, as he stated, as to what the officer actually did. But when it comes to questioning the officer on that which is a matter of law, and I think the last question related to the fact as to whether the officer knew of any law on the books pertaining to association, or something of that nature, I think is improper, because first of all it

has not been established that this officer has training and background in the law to be so qualified to give such an opinion in this way.

I think it is purely a matter of law. Now, his actions and conduct I admit are important.

THE COURT: Let me say this to you, Mr. Payne, if this were a matter before the jury, if counsel objected or even if counsel would not object, in light of the fact that I have indicated in my previous decision on the question of the motion to suppress, that I felt this to be a most interesting and novel question pertaining to the circumstances in this case, and what occurred on the basis of the so-called tapping, stopping and tapping, and I indicated to counsel that I would like to see the matter of the frisking by the police officer be determined, so that police officers will know what they can do and what they cannot do.

MR. PAYNE: I take it then that the Court is of mind to allow a wide latitude?

THE COURT: Therefore I am permitting wide latitude in that direction so Counsel will feel and defendant will feel that everything that they desire to present to the Court has been presented.

MR. PAYNE: All right, your Honor.

THE COURT: You may proceed.

MR. STOKES: Would you repeat that last question for us, please, Mr. Reporter? (Following question was read by the reporter:)

"Do you know of any charge under Ohio law entitled 'Association'?"

THE COURT: You may answer that yes or no, Mr. McFadden.

A. As far as I know, I don't know.

THE COURT: You never graduated from law school, did you?

THE WITNESS: No, sir.

Q. Detective McFadden, were all three of these men taken to the police station?

A. Pardon?

Q. Were all three men taken to the police station?

A. They were.

Q. Nothing was found in the search of Katz, was there?

A. That's right.

Q. But he was taken to the police station, wasn't he?

A. That's right.

Q. And as a result of this arrest which you made that day of Carl Katz, has he from that date until now ever been charged with anything as a result of that arrest?

A. He was.

Q. What was he charged with?

A. Being a suspicious person.

Q. Is that a misdemeanor or felony?

A. Misdemeanor.

Q. By the way, have you had occasion to ascertain whether or not this gun will shoot?

A. If I had the occasion to ask him where he got it?

Q. No, ascertain whether or not this gun will shoot?

A. No.

Q. At what point in this whole thing did you take your gun out?

A. At what point was it?

Q. Yes, at what point during this arrest did you actually pull your gun out?

A. I never had to pull it.

Q. You never pulled yours?

A. No.

Q. Detective McFadden, you held these three men in the store while you waited for the wagon to come, didn't you?

A. Did I what?

Q. You held these three men in the store there?

A. That's right, I held them at bay with one of their guns.

Q. You were holding one of their guns on them?

A. That's right.

MR. STOKES: I have no further questions.

RE-DIRECT EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Payne:*

Q. Detective McFadden, you indicated that the person by the name of Katz was charged with the offense of being a suspicious person, is that correct?

A. That's right.

Q. Do you know whether John Terry or Richard Chilton were charged with that offense prior to being charged with the



offense of carrying a concealed weapon?

MR. STOKES: Objection.

THE COURT: He may answer.

A. No.

THE COURT: I will indicate the basis —

A. They were charged with—

THE COURT: Just a minute. Let me give the basis for my ruling, in light of the fact that the door was opened by you on that particular question.

A. They weren't charged with being suspicious persons. Just charged with carrying concealed weapons, both.

Q. Detective McFadden, directing your attention back to the time that you walked up to these men in front of Zucker's, you indicated that when you first walked up to them and you asked them their names, that you were facing them all at that time, is that correct?

A. That's correct.

Q. Then you turned John Terry around, having him face the other two men, and you were facing the other two men, is that correct?

A. That's right.

Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?

MR. STOKES: Objection.

THE COURT: You may answer.

A. 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.

Q. Now, after finding the gun on John Terry, and then ordering all three into the store, you testified that you then patted Richard Chilton down?

A. That's right.

Q. Tell us why you patted Richard Chilton down?

MR. STOKES: Objection.

THE COURT: He may answer.

A. For the same reason I patted Terry down.

Q. And that was—

A. That was on account of the observation of both of them walking up and down Huron Road and peering into windows, and I suspected they were waiting for an opportunity to pull a

stick-up.

MR. STOKES: I am going to object to that answer as not being responsive, and ask that it be stricken.

THE COURT: Objection overruled. You may have an exception.

Q. Now, after taking them into custody, did you have any conversation with Richard Chilton?

MR. STOKES: Objection.

THE COURT: He may answer.

A. Yes.

Q. Will you tell us what conversation you had with Richard Chilton?

MR. STOKES: Objection.

THE COURT: What is the basis of your objection?

MR. STOKES: Well, we now have a man who is in the police station and who is under accusation of having committed a crime.

We have no information here that he has been afforded his constitutional right to be afforded legal counsel. I would think in light of the *Escobedo*<sup>74</sup> decision that present questions and answers being put to this witness are highly improper and highly prejudicial.

THE COURT: Does the *Escobedo* case go as far as you are trying to indicate to the Court?

MR. STOKES: Well, we don't know. There has been no foundation laid here.

MR. PAYNE: Yes, we do know, your Honor, that the *Escobedo* case does not go that far.

MR. STOKES: Well, you mean that you can just in a courtroom start asking police officers questions with reference to what conversation took place? And you don't have to lay a foundation for it?

MR. PAYNE: Mr. Stokes, certainly on the pure basis of the question you asked now, certainly the answer to that question I think you and I both know and are aware of. But that is not the question.

The question is whether the *Escobedo* case will cover the present situation and the facts as outlined here thus far. The *Escobedo* case is limited only at this time to the facts of that

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<sup>74</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

particular situation, and we have no facts here which would take this case into the ruling of the Escobedo case.

THE COURT: Will you read the question as propounded by the prosecutor?

(Last question was read by the reporter.)

THE COURT: I will overrule your objection. You may answer. You may have an exception, Mr. Stokes.

MR. STOKES: All right.

A. I talked to him with reference to the gun and asked him where he got it. He said he

found it on East 12th Street between Huron Road and Euclid, and right alongside Halle Brothers, that it was in a cellophane—that the two guns were in a cellophane bag, and then another paper bag—the cellophane paper with the guns were inserted into a paper bag. He stated that he found in this bag –

MR. STOKES: I am going to object to this. There was another question before him.

THE COURT: Objection sustained.

Q. Will you continue to relate what further conversation you had with the defendant

Chilton?

MR. STOKES: Show my continuing objection, your Honor.

THE COURT: Objection overruled. You may have your exception.

A. I asked him why, what were they doing, what were you and Terry doing walking up and down on Huron Road in front of those two stores, stopping in front of those stores.

He said he was looking for a pawn shop to sell the gun. I asked him if it was loaded, and he said he didn't know. He was then taken down for a statement.

MR. STOKES: Objection.

THE COURT: Just a moment. Objection sustained.

Q. After having that conversation with defendant Chilton what if anything did you do next?

A. I took him down to the statement room.

Q. Who was present when you took him to the statement room?

A. Well, the man that took the statement, the stenographer that took the statement.

Q. And what is his function or purpose?

A. He takes the statement as this man gives it.

Q. Now, prior to asking this defendant Richard Chilton any question, was he in any way or in any manner advised of any of his rights?

A. He was advised of his constitutional—

Q. Yes or no?

A. Yes.

Q. Detective McFadden, can you recall identically word for word what was said to him?

THE COURT: The Court would like to know who said it.

MR. PAYNE: I will get to it in just one minute, your Honor. I am mindful of that.

Q. Can you recall identically word for word?

A. I think I can recall what was said.

Q. Yes or no?

A. Yes.

Q. All right. Now, who said it?

A. The stenographer.

Q. Now, tell us what he said.

A. "Richard Chilton, you are arrested and may be charged with the crime of carrying concealed weapons. The law gives you the right to make a statement if you so desire. Anything that you say may be used against you at the time you are brought to trial. Now that you know these facts, do you care to make a statement?"

Q. All right. Was this information then placed on the typed paper?

A. That's right.

Q. Do you know what the defendant's response was to that?

A. Yes.

Q. What was his response to that?

A. Yes, I found this—I found these two guns —

MR. STOKES: I am going to object.

THE COURT: Objection sustained.

Q. He did respond?

A. That's right.

Q. Was his response typed out?

A. He said he—

Q. Was his response typed out?

A. That's right.

Q. Was it taken down?

A. That's right.

Q. Were there some more questions asked of him?

A. That's right.

Q. And those questions —

A. No—well, he gave, he says yes and then he went on —

Q. Were his answers taken down?

A. And without any questions being asked he continued.

Q. All right. After he continued were there some more questions asked of him?

A. Yes.

Q. Were those questions typed down?

A. That's right.

Q. Did he respond or did he answer those questions?

A. To my recollection he answered some of them, yes.

Q. And were those answered put down?

A. That's right.

Q. After the completion of the procedure that you have just described to us, the taking down of the questions and the answers, what happened next if anything as far as you can recall?

A. Well, he is given a copy of this and asked to read same.

Q. Was that done in this case?

A. It sure was.

(State's Exhibit 2 was marked for identification by the reporter.)

Q. Handing you what has been marked for identification as State's Exhibit 2, can you identify State's Exhibit 2? Just yes or no?

A. Yes.

Q. What is State's Exhibit 2?

A. This is a statement taken from Richard Chilton by the stenographer.

Q. Were you present when this statement was taken?

A. I was.

Q. And is this the information that you had reference to in your previous testimony a moment ago?

A. It was.

Q. Detective McFadden, I believe that you testified that at the completion of the questions and answers, that a copy was given to the defendant to read?

A. That's right.

Q. Was State's Exhibit 2 given to the defendant Chilton to read?

A. That's right, yes.

Q. Did he read State's Exhibit 2?

A. He did.

Q. Were there any questions asked of him after so reading State's Exhibit 2? Yes or no?

A. Yes.

Q. What question, if you recall, was asked of him after reading State's Exhibit 2?

A. Asked him if the above statement was true.

Q. Go ahead.

A. And would he like to sign the same.

Q. Did the defendant Chilton respond to that statement, to that question?

A. He refused to sign it and stated he would like to see his attorney before he signed it.

Q. Did he sign it?

A. No.

Q. Are there any signatures appearing on State's Exhibit 2?

A. Any signatures?

Q. Yes.

A. My signature, Martin McFadden, Detective John Siphin, and Owen who was the stenographer.

Q. In what capacity do those signatures appear thereon?

A. What do you mean what capacity? As policemen, we are all police officers.

MR. PAYNE: All right, Detective McFadden. For whatever value, I will offer State's Exhibit 2.

MR. STOKES: Objection.

MR. PAYNE: Your Honor, perhaps may I suggest at this time—it is 20 minutes to 12—I do have another matter that I would like to present or take up with the Court before the lunch hour, and perhaps this may be a very convenient place to recess at this time. I will like to so suggest to the Court, that is, recess this matter, not recess the Court.

THE COURT: We will recess this matter. You have no objection, Mr. Stokes?

MR. STOKES: No objection, Judge.

THE COURT: And we will take up this question when we resume at 1:45.

(Thereupon an adjournment was taken to 1:45 p.m., Tuesday, September 29, 1964, at which time the following proceed-

ings were had:)

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*TUESDAY AFTERNOON SESSION, 1:45 P.M., SEPTEMBER 29, 1964*

THE COURT: Will you read the last question?

(Record was read by the reporter.)

THE COURT: And there was an objection made by Mr. Stokes. It is the considered opinion of this Court, that the purported statement made by the defendant, not signed, with the signatures affixed thereto by the officers, is not admissible in evidence, upon the reason that the detective indicated that the questions as made were made to the defendant by the officer, and that he answered some of them. In the light of the fact that this is not a complete and full statement, the questions and answers, it is not admissible.

MR. STOKES: If your Honor please, we have this further motion, that all testimony of this witness pertaining to this written statement be stricken from the record.

THE COURT: Mr. Payne?

MR. PAYNE: Your Honor, I think, I would urge the Court to overrule such a motion, because certainly what the officer did in connection with the investigation of this matter, he is testifying that he did as a matter of his personal acts, and is admissible into the evidence of this case.

THE COURT: Mr. Payne, isn't this statement also in connection with the investigation of the defendant?

MR. PAYNE: I am sorry, I did not hear the Court.

THE COURT: Isn't this statement, purported statement which the Court has refused to be admitted in evidence—

MR. PAYNE: Correct.

THE COURT: —also in connection with the investigation?

MR. PAYNE: Is it in connection with the investigation?

THE COURT: Yes. No formal charge had been made against the individual at the time of this statement?

MR. PAYNE: Oh, yes. I would beg to differ with the Court on that, because the very first paragraph of the statement would speak for itself, that the crime of carrying a concealed weapon was to be charged here.

THE COURT: Was the charge actually made even though it is contained in the statement? There is no testimony of that in the statement which the Court has refused to allow.

MR. PAYNE: Your Honor, I cannot answer the Court's question because I honestly don't know.

THE COURT: I admire your honesty.

MR. PAYNE: I have no objection to the Court—

THE COURT: There has been no testimony by the officer that at the time he conversed, at least, let me put it to you in this fashion, Officer McFadden stated that he conversed with the defendant orally, and asked him matters pertaining to the situation, and he related the answers given to him by the defendant. Is that correct?

MR. PAYNE: That is correct.

THE COURT: That he immediately thereupon took him down to the room for the statements to be reduced to writing. If I am incorrect you correct me.

MR. PAYNE: Yes, for a statement to be reduced to writing. All right.

THE COURT: I must state in this connection therewith that the question was asked by you of the officer, "Did you have any conversation with the defendant?" and there was an objection and I overruled the objection and I said he may answer yes or no. Is that correct?

MR. PAYNE: Yes. Now, before the Court proceeds, let me point out to the Court that the offense charged here of course is one of carrying concealed weapons, but after the establishing of the corpus delicti of that offense, the illegal carrying of the weapon, after that has been established as a matter of fact or law, that then any conversation which is given by the defendant is admissible into the evidence here under that rule in Ohio.

THE COURT: Well, I will go along with you on the first part of your statement.

MR. PAYNE: At this point—I am sorry, I did not mean to interrupt the Court.

THE COURT: I say, I will go along with you on the first part of your statement, of the officer that there are certain circumstances where there is reason to believe that there was a pointed situation, there were activities, as far as the officer is concerned, indicating that the activities of the individual were not normal, and that he suspected, based upon those activities, that a crime



was about to be committed. And I felt under those circumstances that the officer had a right to stop and frisk these individuals, which he did and he tapped them for purpose of determining whether or not these individuals had any weapons or instruments that might bring harm to him, and I firmly believe that I am right in that particular position. Perhaps lawyers or courts may disagree with me, but it is for the protection of the officer's life, and he had that right, and in doing so he discovers a weapon which is in violation of law. There is a commission of a crime by an individual, therefore he has the right to arrest the individual, because there is a violation of a felony law in this case, carrying a concealed weapon, which he had a right to charge him, and he brought him down to police court or wherever they brought him to the station, and the question comes to my mind had the officer the right to ask the individual —

MR. PAYNE: Can I interrupt the Court before the Court proceeds?

THE COURT: Yes.

MR. PAYNE: Because I say to the Court, the motion relates then to the striking from the record testimony of conversation which the officer had with the defendant. At this point, your Honor, there is no question before the Court which would sustain such a ruling. There is no question, or any claims been made of a violation of this man's rights in any manner or in any way thus far, except as it may relate to the original motion to suppress. Now, up to this point there is not. Now, if the Court had in mind, having in mind that I indicated to the Court, that once the corpus delicti is established, that conversation with the defendant is admissible into the evidence. Now, there can be possibly exceptions to that, but those exceptions must be forthcoming from the evidence, and under those circumstances I would think that unless we hear more from defense counsel, or evidence to this effect, that the Court must overrule the motion or hold the motion in abeyance.

THE COURT: Let me say this to you, I will expect counsel Mr. Stokes to present his side, too, but I am merely raising some questions as far as this court is concerned. There is no question in my mind that before an arrest is made, for purposes of investigation, that a police officer has the right to ask questions of an individual, where there are proper circumstances. But the question that I am raising, once that an arrest has been made

against an individual, what is the difference of taking an oral statement of the individual, and not advising him of his rights, or taking a written statement and saying to the so-called suspect or the person charged, "We are telling you about your constitutional rights before we reduce this statement to writing." What is the difference?

MR. PAYNE: Your Honor, at this time in the state of this case, I respectfully beg leave of this Court not to answer that question, because there has been no such claim made or no testimony or evidence as to such. Therefore, I say to the Court we can't decide that question, that on the basis of the evidence as it stands at this point, the motion must, one, be overruled in the absence of any specific claim by counsel for the defendant, or the motion must be held in abeyance until such time as evidence is produced here to raise the question.

THE COURT: Mr. Stokes? Do I make my position?

MR. STOKES: I think so, Judge. My motion at this time has been directed to the oral testimony in the record, which the Court has just refused to accept written corroboration of. All of the questions and answers which are on that statement were asked of this witness on the witness stand, and it stands in the record now as his oral testimony. Now, this Court has refused the prosecutor's offering of this statement, and this is merely written evidence of the oral evidence, and I am saying that it must go out. You can't leave one in, otherwise the Court might as well accept that in.

Now, I am not going back at this point. The Court overruled me when I said, when I entered my objection to the oral conversation. Now I will have some questions to direct with reference to that on my cross-examination, and it may well be that I will have a motion for reconsideration thereof also. But right now I am just going back to any oral testimony relating to this statement.

MR. PAYNE: May I say to the Court, the questions which the officer testified to as the oral conversation, were not taken from State's Exhibit 2. I did not read those questions from State's Exhibit 2.

THE COURT: You did not read—unless I am incorrect, as I recall the officer's testimony, you asked him a question, "Did you have any conversation with the defendant?" and he said, "Yes." There was an objection and I overruled the objection. "Will you

relate the conversation?" and he related the conversation. Then you stated to him, "What was done next?"

MR. PAYNE: Right.

THE COURT: He says, "I took him down to the room to get his statement down in writing."

MR. PAYNE: And we are in accord on what happened, on what transpired. But up until—I agree with the Court's ruling on ruling the statement out.

THE COURT: I thought we had the statement in.

MR. PAYNE: Beg pardon?

THE COURT: Don't we actually have the statement in?

MR. PAYNE: We have oral statements made to the officer in the evidence. We do not have the written statement in, because I feel that the Court has properly ruled the written statement out, because there are certain procedures which are necessary and rules which are above and beyond that required for the admission of a written statement, more so than are required for the admission of an oral statement. We have nothing in the evidence to rule out the oral statements at this point.

MR. STOKES: Judge, may we do this, we will withdraw our motion at this time, and if Mr. Payne is finished with his witness I have some cross-examination.

MR. PAYNE: I have no objection to that either.

THE COURT: I believe we were in the process of cross-examination.

MR. PAYNE: No. I had just offered—

MR. STOKES: He had just finished and then he had made his offer.

THE COURT: All right. I will hold this in abeyance.

—  
THEREUPON the witness, Detective Martin McFadden, resumed the witness stand and was further examined and testified as follows:

CROSS-EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Stokes:*

Q. Mr. McFadden, this morning you made this statement in answer to a question put to you by the prosecutor, "From my observation I felt as though they may pull a stick-up." Do you recall that, sir?

A. Yes, I did.

Q. Now, you testified in this matter on the motion to suppress, didn't you?

A. I believe so.

Q. And do you recall, sir, that I asked you this question, "Did you when you approached these men know that they had guns on them?" and your answer was substantially this, "I had no idea in the world that they had any guns on them." Do you recall that answer, sir?

A. I might have said that, yes.

Q. So then are we to understand or not that when you approached these men you did not have any idea that they had guns on them?

A. Well, I will give my version this way —

Q. Wait a minute, Mr. McFadden. I am not asking for any version. If you can answer that question, fine, and if you can't I will put another question.

A. Put that question to me again. What was the question again?

THE COURT: Read the question.

(The last question was read by the reporter.)

A. I didn't know.

Q. During your tenure as a police officer, during your 39 years as a police officer, how many men have you had occasion to arrest when you had observed them and felt as though they might pull a stick-up?

A. To my recollection, I wouldn't know, I don't know if I had—I don't remember of any.

MR. STOKES: Will the reporter read that answer for me?

(Last answer was read by the reporter.)

Q. You don't remember of any, is that the last part?

A. That's true.

Q. Your work, you are assigned to work as a detective dealing with stores and what, officer?

A. Pickpockets, checks.

Q. When was the last time you arrested an armed robber?

A. I have no idea.

Q. Would it be fair to say that you have never arrested one?

A. I have several.

Q. Now, after you had gotten these men to the police sta-

tion, how long was it before you had a conversation with them?

A. I believe it was the next morning.

Q. This then would be the first day of November?

A. I believe so, yes.

Q. Do you recall where it was that you saw Chilton and had this conversation with him?

A. I believe it was in the morning.

Q. Where would this conversation have taken place?

A. It was up in jail before I took him down for a statement.

Q. At that time what charge if any was pending against Chilton?

A. They were held for investigation.

Q. And they had been held for investigation since the previous day when you had arrested them on Euclid Avenue, isn't that correct?

A. That's right.

Q. Now, you'll tell us when you went in jail to see Chilton, what was the first thing you said to him?

A. That would be hard. I don't remember what the thing was I said to him.

Q. When a man is under investigation such as Chilton was under, is he permitted to consult with an attorney?

A. Sometimes.

Q. Do you know whether Richard Chilton was permitted to consult with an attorney?

MR. PAYNE: Objection.

THE COURT: What is the basis of your objection?

MR. PAYNE: The basis of my objection is the question as it is phrased—the question as it is phrased, the form of it itself.

THE COURT: Well, I mean, I wanted to ask you what is your reason, if it coincides with the Court's?

MR. PAYNE: If this is what the Court is thinking, this is the reason.

MR. STOKES: The form?

THE COURT: It is the form and in light of the fact that there should be some foundation laid pertaining to the question of attorney representation before you ask this question, was he permitted to consult with an attorney. There were a lot of things that happened before.

MR. STOKES: I will withdraw the question, Judge, and try to lay the foundation properly.

Q. After his arrest Chilton was taken to the police station by you?

A. Pardon?

Q. Chilton was taken to the police station by you after his arrest, wasn't he?

A. I believe I accompanied him, went in with him. I am pretty positive I went in with the wagon, yes.

Q. You didn't see him again until the following morning, is that correct?

A. Yes, the following morning.

Q. When you went in to talk with him that morning, did you make any inquiry of him as to whether or not he had seen a lawyer?

MR. PAYNE: Objection.

THE COURT: Will you read the question?

(Last question was read by the reporter.)

THE COURT: You may answer.

A. No.

Q. You related for Mr. Payne some statement that is read to a defendant before you take a statement where you say, "Now, Richard Chilton, you may be charged with the crime of carrying a concealed weapon," et cetera. When do you recite this to a defendant?

A. Before he is asked any questions or asked to make a statement.

THE COURT: Are you talking about a written statement?

THE WITNESS: That's right.

Q. Now, when you went up to talk with Richard Chilton that morning, before you started asking him question[s], did you or some other police officer make such a statement to him?

A. That is made down in the statement room.

Q. So then the conversation, in the conversation which you held with Richard Chilton in the jail, neither you nor any other police officer in your presence gave him any advice as to his constitutional rights, did you?

A. That's correct, no advice at all in jail.

Q. You just start talking with him?

A. That's right.

Q. And he starts answering your questions?

A. That's right.

Q. And at that time you are still investigating a crime,

aren't you?

A. That's right.

Q. And at that point Richard Chilton was being accused of carrying a concealed weapon, wasn't he?

MR. PAYNE: Objection.

THE COURT: Objection sustained.

A. Were you accusing Richard Chilton of a commission of a crime at the time that you talked with him that morning?

MR. PAYNE: Objection.

THE COURT: Objection sustained.

MR. STOKES: I have no further questions at this time, your Honor. I renew my motion to—do you want—

MR. PAYNE: Yes, I want—

THE COURT: You may renew your motion when Mr. Payne finishes.

—

RE-DIRECT EXAMINATION OF DETECTIVE MARTIN  
MCFADDEN

*By Mr. Payne:*

Q. Mr. McFadden, the following morning when you went to the jail to talk to Richard Chilton, am I to understand at that time he was being held for investigation?

A. That's right.

Q. Holding a person for investigation, as a part of that investigation do you talk with the person ever?

A. That's right.

Q. Did you talk with this defendant as a part of your investigation?

A. Yes, I did.

Q. When you went to the jail that morning, did Richard Chilton tell you he had an attorney?

A. No, to my recollection, no.

Q. Did he ask of you for an attorney?

A. To my recollection, no.

Q. Did he ask you to make a phone call for the purpose of securing an attorney that morning?

A. To my recollection, no.

Q. Did you at any time deny him the right to see any attorney?

A. To my recollection, no.

Q. Did you at any time deny him the right to make a phone call?

A. To my recollection, no.

Q. Detective McFadden, you recited some language for the Court that was given, that was spoken in the presence of Richard Chilton, that he was arrested and may be charged with the crime of carrying a concealed weapon, and the law gives him the right, do you recall that language?

A. Yes, I do. That's right.

Q. Is that language said to the defendant during the course of the investigation, or at the time that he is to be charged with the commission of a particular crime?

MR. STOKES: Objection.

THE COURT: He may answer if he knows.

A. This statement is taken before he is charged.

Q. Now listen to the question. Would you repeat the question for him, Mr. Reporter.

(Following question was read by the reporter:)

"Is that language said to the defendant during the course of the investigation, or at the time that he is to be charged with the commission of a particular crime?"

THE COURT: We are talking about this statement, this State's Exhibit 2.

Q. When that language is stated to and was stated to the defendant, was the decision to charge the defendant with a concealed weapon determined at that time?

MR. STOKES: Objection.

THE COURT: Objection sustained.

Q. Do you have in mind the language that was stated to the defendant, is that correct?

A. Yes.

Q. Was that language said to the defendant during the course of the investigation or when the defendant is to be charged with the crime?

A. When he is brought down from jail this is typed, the clerk, the stenographer types —

Q. You have to answer the question as I put it, Detective McFadden.

A. Before he is charged.

Q. Is he then to be charged with a crime, Detective McFadden, when that language is stated to him?



A. No.

Q. He is then not to be charged with a crime?

A. We specifically state in there that you may be charged with a crime of —

Q. While the defendant then is under investigation, this language is not then stated to him, is that correct?

MR. STOKES: Objection to the prosecutor testifying.

THE COURT: Objection sustained.

Q. Let me put it this way: While he is under investigation then, is this language stated to him?

A. While he is under—we don't have any idea when the man will be charged, how he is going to be charged, until we present the facts to the prosecutor.

Q. Agreed.

A. The statements and facts.

MR. STOKES: It was not very responsive.

MR. PAYNE: Your witness.

MR. STOKES: A good time to turn him over.

THE COURT: Anything further, Mr. Stokes?

MR. STOKES: Yes, Judge.

#### RE-CROSS EXAMINATION OF DETECTIVE McFADDEN

*By Mr. Stokes:*

Q. Detective McFadden, a man is under investigation as you have put it here in this case, that man is not at liberty to phone a lawyer, is he?

MR. PAYNE: Your Honor, I am going to object.

THE COURT: On what basis?

MR. STOKES: You have been into this about wanting a lawyer and all of that.

MR. PAYNE: The Court I believe asked me on what basis. Number one, your Honor, the officer has previously testified that he did not prohibit this man from calling, that is number one. Number two, on previous cross-examination the question was asked of the witness as to whether or not the person under investigation had an opportunity to call. I believe the answer, if I recall correctly, was "Not in all cases."

MR. STOKES: I don't think that was.

MR. PAYNE: I believe it was, from the detective, from the officer. It is in the record, your Honor.

THE COURT: Mr. Payne, let me put it to you this way: You went into it extensively on re-direct examination pertaining to what the officer does pertaining to the retention of counsel.

MR. PAYNE: I will accept the Court's ruling.

THE COURT: And we haven't got a jury here, and the Court has indicated under the circumstances that it will be a little bit more lenient. All right.

*By Mr. Stokes:*

Q. Now, Detective McFadden, isn't it a matter of procedure in the police department, that when a man is charged with investigation in connection with a crime, that he is not permitted to make a phone call until after he has been charged?

MR. PAYNE: I must object—I am sorry, your Honor, I must enter an objection as to this, because we are not concerned with the procedure. We are concerned with what happened in this case.

THE COURT: The Court will overrule your objection. If he knows he may answer yes or no. Do you know what the procedure is?

A. In some cases they are allowed to make a phone call.

Q. Do I understand your answer to be that a man under investigation over there is permitted to make a phone call?

A. I have had people in for investigation and a lot of them make phone calls.

Q. Was Richard Chilton permitted to make a phone call?

MR. PAYNE: Objection.

THE COURT: Objection sustained.

Q. While Richard Chilton was under investigation was he permitted visitors?

MR. PAYNE: Objection.

A. Was he permitted visitors?

THE COURT: Just one second, please. I will sustain the objection as to the nature of the question. There is no foundation for that particular question.

MR. STOKES: Judge, I would think these questions would relate directly back to the questions—

THE COURT: Let me give you the reason for my ruling in case you are perplexed.

MR. STOKES: I am perplexed, Judge.

THE COURT: Now you have asked a question, "Was he permitted to have visitors?" First, there must be preliminary to

that situation the establishment as to whether or not he asked for permission to have visitors, or whether or not visitors asked him to be permitted to visit the gentlemen.

In light of the fact that you have not laid the foundation properly, the Court has sustained the objection. Proceed.

MR. STOKES: Judge, I am just wondering, even in light of the Court's ruling here, I am thinking that this being cross-examination—

THE COURT: There is no basis for the question that you asked under cross-examination that has any relation to what has been asked on direct or re-direct.

MR. STOKES: All right, we will put it this way.

*By Mr. Stokes:*

Q. Did Mr. Chilton ask you to see a lawyer?

A. To my recollection, no.

Q. He did tell you he had not seen a lawyer, didn't he?

A. Pardon?

Q. He did tell you he had not seen a lawyer, didn't he?

A. The only time a lawyer was mentioned was when we asked him to sign the statement and he says wouldn't sign it until he seen a lawyer.

Q. And was this your first knowledge of the fact that he had not seen a lawyer?

A. I imagine so.

Q. At the time you went upstairs to talk to him that morning, you had not applied yet for papers against him, had you?

A. That's right.

Q. But having made the arrest of this man, at that time it was your intention, was it not, to present evidence that would connect him with carrying a concealed weapon?

MR. PAYNE: Objection.

THE COURT: You may answer yes or no.

A. Yes.

MR. STOKES: Thank you, sir. That is all.

THE COURT: Anything further, Mr. Payne?

MR. PAYNE: I think that is all, your Honor.

#### DEFENDANT'S RENEWAL OF MOTION TO SUPPRESS

THE COURT: You are renewing, I presume, your motion?

MR. STOKES: I am renewing my motion as it relates to oral

conversations, both the oral conversations prior to the statement, and oral conversations relating to the statement.

THE COURT: Well, the Court has already ruled, you understand, on the written statement. But in light of the fact that the evidence before me is clear and convincing that statements were made to the officer during the course of the investigation when he was held on a charge of suspicion, is that correct, that you mentioned, I believe, for investigation?

MR. PAYNE: Held for investigation.

THE COURT: That the oral statements that he gave and which he has related, which has been related by the officer, was for the purpose of carrying out the investigation to determine what if any charge was to be placed as against the defendant. I don't believe he asked about any other case. So therefore it is Court's ruling that if those statements—I may say this furthermore, for the record, that if the oral statements were made just prior to the charge after the investigation was completed, and just before reducing the statement to a written charge, but after the investigation was completed, the Court would have had to hold the same as I held about the written statement. But in light of the fact that the evidence as I have stated, and I repeat again, was obtained from the defendant during the course of the investigation, and prior to determination as to a likely charge to be placed against the defendant, the Court will overrule your motion, exception may be noted for the record.

MR. PAYNE: If it please the Court, I don't know whether I offered State's Exhibit 1 and 1-A into the evidence, and whether they were received or not?

THE COURT: To be honest, I don't recall myself.

MR. PAYNE: Show that I offer them.

THE COURT: Any objection?

MR. STOKES: What exhibit is that, the gun?

MR. PAYNE: The gun and the shells.

MR. STOKES: We would object to the introduction of both of them.

THE COURT: They may be received, and exception to the defendant.

MR. PAYNE: That is all, your Honor. The State will rest its case.

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THEREUPON THE STATE OF OHIO RESTED

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DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF  
ACQUITTAL

MR. STOKES: May we have the record show we move this Court for a directed verdict of acquittal for the defendant?

THE COURT: State the basis for your motion.

MR. STOKES: We base it, your Honor, upon the illegality of the arrest, and the fact that having renewed our motion, and all of the evidence being before this Court with relation to suppressing the evidence in this case, that we feel that the Court at this point is in a much better position to grant the motion, and consequently we therefore direct this motion to the Court.

THE COURT: Mr. Stokes, I want to ask you one question.

MR. STOKES: Yes, your Honor.

THE COURT: If the Court is correct in its position on the stopping and frisking, would you be serious in asking based upon the statutory provision—

MR. STOKES: Let me understand you, Judge.

THE COURT: If the Court were correct in its position that the stopping and frisking was perfectly proper, and not in violation of the Fourth Amendment of [the] United States Constitution, would you be serious in a motion for a directed verdict based upon the evidence and the statute?

MR. STOKES: No, I would not be, Judge.

THE COURT: So in light of the fact that the Court has already ruled on the previous motion to suppress the evidence, with due exception, the Court will now overrule your present motion for a directed verdict, and exception to the defendant.

MR. STOKES: Show an exception.

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## DEFENDANT'S EVIDENCE

THEREUPON Richard D. Chilton, defendant herein, to maintain the issues on his part to be maintained, offered himself as a witness in his own behalf, who, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION OF RICHARD D. CHILTON

*By Mr. Stokes:*

Q. What is your name?

A. Richard D. Chilton.

Q. Where do you live?

A. 16101 Lotus Drive.

Q. Keep your voice up. The reporter has to take every thing down that you say. How old are you?

A. Twenty-seven.

Q. Where were you born?

A. Bell Vernon, Pennsylvania.

Q. How long have you been in Cleveland?

A. Since '46, 1946.

Q. Are you married or single?

A. Married.

Q. Do you live with your wife?

A. No, we are separated.

Q. How long have you been separated?

A. 1960.

THE COURT: What was that, 1962?

THE WITNESS: 1960.

THE COURT: 1960.

Q. Where is she now?

A. In California.

Q. Do you have any children?

A. No.

Q. When did you get married?

A. In '57, 1957. 1956.

Q. 1956?

A. Yes.

Q. Now, when was the last time that you had a regular job?

A. Well, I worked a regular job in Chicago, at the R. L. De-mion Company, a printing company. That was in 1962.

Q. What type of work were you doing for this company?

A. Printer.

Q. You are a printer?

A. Yes.

Q. How long have you been in the business of printing?

A. I started printing in 1953 and worked until '61, the Grand Printing Company as a printer here in Cleveland.

Q. Do we understand that you worked for this one company from 1953 to 1961?

A. Yes.

Q. In what capacity?

A. As a printer.

Q. As printer do you belong to any type of union?

A. Yes.

Q. What union?

A. Printers' Union on 18th and Superior, between Superior and Payne, 1590—I don't know the address.

Q. How old were you when you started on that job in '53?

A. 16.

Q. How old were you when you left?

A. 24 or 25.

Q. Are you presently employed anywhere?

A. No, I am not.

Q. Who do you live with?

A. My mother.

Q. Now, calling your attention to October 31, 1963—before we go into that, have you ever been arrested and convicted of a crime either against the State of Ohio or the Federal government?

A. I have never been arrested nowhere for anything.

Q. Now, on October 31st what time did you get downtown that day?

A. It was early. It was before—it was about 11:00 o'clock.

Q. What was your reason for being downtown?

A. I was looking for employment at different places.

Q. Were you able to find any employment that day?

A. No, I wasn't.

Q. Now, did you see John Terry that day?

A. Yes, I did.

Q. Where did you see him?

A. On Ninth Street, between Prospect and Euclid.

THE COURT: Can we present each particular identified item separately without presenting the entire exhibit?

MR. STOKES: Okay, Judge.

Q. Showing you for purposes of identification State's Exhibit 1, and then further showing you what is marked for purposes of identification State's Exhibit 1-A, I will ask you if you saw these exhibits on October 31, 1963.

A. Yes.

Q. Where did you first see these two exhibits?

A. Between Euclid and Prospect, by Halle's or Higbee's—Halle's.

Q. Where with relation to Halle's?

A. Well, I was going from Euclid to Prospect, and I found something. I didn't know what it was until I opened it up, and found it, a bag, and inside the bag was a plastic bag, and inside the plastic bag was two pistols.

Q. Now, was it just laying out there on the street or —

A. No.

Q. Or exactly where was it?

A. Well, there was a stop sign going through between Euclid and Prospect. There is a stop sign to the right up real high. There is a little cut-out, and it was down on the ground floor, and the reason I ran—I didn't run, it was raining, and I was trying to get out of the rain, and I stepped back there while some cars were coming, and this is how I come upon the package.

Q. Upon finding this package you learned then that there were two pistols in it?

A. Yes.

Q. What did you do if anything with the package?

A. I put both the pistols in my pocket.

Q. What were you wearing that day?

A. Overcoat and suit coat.

Q. Now, when you found these items were you alone or with someone else?

A. I was with someone else.

Q. Who were you with?

A. John Terry.

Q. And you say you put both guns into your pocket?

A. Yes.

Q. Then what did you do?

A. I had my gloves and the two pistols in my pocket, and my



pockets were bulging, and I gave one of the pistols to Terry to put in his pocket.

Q. Did he take it?

A. Yes.

Q. Then what did you do?

A. I started up Prospect, and Huron, Prospect, I started up, and I met a fellow that I knew and I asked him a few questions pertaining to the pistols, like where could I get rid of them or sell them or pawn them.

Q. Who was this fellow?

A. Carl Katz.

Q. Was Terry with you when you were talking with Katz about selling the guns or pawning them?

Q. Yes.

Q. Now, were you and Terry ever at the corner of Huron and Euclid that day?

A. Yes.

Q. What were the two of you doing while you were there?

A. Carl wanted to see them but he didn't want to see them right there on the corner and I started down the street, down Prospect, and he crossed the street, he jay-walked across the street, Carl did. He said he would look at them down the street. See, he told me a place where I might be able to pawn them on Prospect, which is a loan place on 4th and Prospect. I started off with them that way and then I came back to the corner where Terry was standing, and then I proceeded down Euclid Avenue where I met Carl to show him the pistol, and I was getting ready to show Carl the pistol when the arresting officer walked up.

Q. Now, there has been testimony in this case with respect to you leaving Terry and then coming and looking in some windows, coming back to Terry, Terry doing the same thing; Now, had this occurred then?

A. Yes.

Q. Well, what were you looking at or for when you went over to the stores?

A. Well, I wasn't looking for anything. I stopped. I was on—I started down the street and I came back to get Terry, you know. I walked back up the corner, and at this time, Carl came across the street, and Terry said he was going to put his piece somewhere, because he didn't want to keep walking with it on his person. He started down the street, you know, and Carl said

he is going down a place where we can look at it, where he can look [at] it. This was the place on Euclid. Then Terry came back to where I was at and we both started down—Carl Katz was in front of us, and we were following him down to where we got to Zucker's to show him, you know, what we had.

Q. After you got in front of Zucker's what happened?

A. Well, I took my pistol out of my pocket. I was standing next to Carl to show it to him and as soon as I get here or about, you know, a few seconds after I was standing there, that's when the officer walked up.

Q. When he walked up what happened?

A. I put the pistol back in my pocket, and he said, he started to say something to Terry, as far as I know, what he did, there was a little scuffle. It wasn't no—it wasn't fighting or anything, it was a scuffle, because he had his hand in Terry's inside overcoat pocket, and he was trying to get something out of the pocket. He was trying to get the pistol out of his pocket.

Q. Did he get the pistol out?

A. No. He didn't get the pistol out until he got inside the store, and he had the whole coat—he had the coat and all when he took the pistol out.

Q. This is Terry's coat that he had?

A. Yes.

Q. How did you happen to go into Zucker's?

A. He told us to go in.

Q. What happened after you got inside of Zucker's?

A. We stood up right to the front, to the showcase, and faced the wall, and he searched me next, and he searched Carl Katz.

Q. I want you to step down for a moment, and go over to that wall I am pointing to, and describe the manner in which you were up against the wall, show us how you were up against the wall.

A. I was standing up like this.

MR. STOKES: May we have the record show that the witness has faced the north courtroom wall, and that he has raised both arms.

THE COURT: Is this the north wall?

THE WITNESS: This is the east wall.

MR. PAYNE: The east wall.

MR. STOKES: That he had both hands extended upward and outward towards the wall.

Is that all right Mr. Payne?

MR. PAYNE: Yes, so agreed.

Q. All right, take the stand again. Then what happened after you were up against the wall as you have described?

A. Then he told someone to call the wagon. We stood there until the wagon come, and he put handcuffs on us and took us out to the wagon.

Q. Did the officer take your gun from you, the one that you had in your pocket?

A. Yes, my outside coat pocket.

Q. Where were you standing when this was done?

A. In the store, facing the counter.

Q. Before the gun was taken did he do anything to you?

A. No.

Q. How did he learn there was a gun in your pocket?

A. He went, you know, whatever you call it, I don't know what you call it.

Q. I don't know, I want you to tell us.

A. He patted me down and found a pistol in my outside coat pocket and took it.

Q. Did he ever say to you that you are under arrest, or words to that effect?

A. Not to my knowledge, no.

Q. You say you heard him order a wagon?

A. Yes.

Q. Was this before he took the gun from your pocket or after he took the gun from your pocket?

A. This was after he searched everyone.

Q. By everyone whom do you mean?

A. Terry, myself and Carl. Carl was the last one to be searched.

Q. Now, you were taken to the police station that day?

A. Yes.

Q. And do you know what charge if any was placed against you?

A. Well, we weren't charged right off. We were held for investigation.

Q. How long were you held for investigation?

A. I really don't remember. It was overnight, you know. It wasn't 72 hours. It was, before we were charged, it was the next day some time.

THE COURT: Why do you say 72 hours?

THE WITNESS: Beg pardon?

THE COURT: Why do you say 72 hours?

THE WITNESS: Why do I say it?

THE COURT: Yes, what brings to your mind the 72 hours?

THE WITNESS: Well, that's how long you are supposed to be held for investigation.

THE COURT: Proceed, Mr. Stokes.

MR. STOKES: All right, your Honor.

Q. The period that you were under investigation, did you have occasion to request of anyone the right to make a telephone call?

A. Yes.

Q. Who did you ask?

A. The fellow with the keys, the turnkey.

Q. Were you permitted to make a phone call?

MR. PAYNE: Now I am going to object at this time, your Honor, unless we identify the person in some kind of way.

THE COURT: I believe he has identified him by saying the turnkey.

MR. STOKES: You mean you have got to know his name?

MR. PAYNE: I abide by the Court's ruling.

THE COURT: You will have a chance to cross-examine him in that direction. Go ahead.

Q. Were you permitted to make the phone call?

A. No.

Q. Whom did you want to call?

A. Well, first I was going to call my people and let them know where I was at. Then I was going to call a lawyer to try, you know, a lawyer or bondsman.

Q. Were you ever permitted to make a call?

A. No.

Q. Not ever?

A. When I was charged, after I was charged, yes.

Q. That is what I am asking you.

A. Yes, after I was charged.

Q. You say after you were charged?

A. Yes.

Q. After you were charged with what?

A. Carrying a concealed weapon.

Q. Until you were charged with carrying a concealed

weapon, while you were under investigation, did you see anyone other than police personnel?

A. No.

Q. Are you a stick-up man?

A. No, I never stuck up anyone.

Q. Have you ever stuck-up anyone or any place?

A. No.

Q. Were you on October 31, 1963, when you were standing in front of Zucker's, or anywhere in the vicinity of that store, were you planning and casing a job for the purpose of sticking it up?

A. No.

Q. Do you remember Mr. McFadden coming up to the jail to talk with you the following day?

A. Yes.

Q. Before you had any conversation with him up there that morning were you told by him that you had a constitutional right not to make any statements against yourself?

A. Would you say that again?

Q. Directing your attention to having a conversation with Detective McFadden up in the jail that morning, and I am asking you before he began talking with you up there in the jail did he advise you that you had a constitutional right not to answer any of his questions?

A. No.

Q. Did he at any time advise you that you had the right to see a lawyer before you made any statements?

A. No.

Q. Before October 21, 1963, had you ever seen State's Exhibit 1 and 1-A before in your life?

A. No.

Q. Do you have any knowledge at all as to whether or not that gun will shoot?

A. I don't know.

Q. And what was your intention to do with that gun that day?

MR. PAYNE: Objection.

THE COURT: Objection sustained.

MR. STOKES: You may examine.

## CROSS-EXAMINATION OF RICHARD D. CHILTON

By Mr. Payne:

Q. Mr. Chilton, you were arrested some time in the afternoon of October 31, 1963?

A. Yes.

Q. Then you were conveyed to the police station next door, is that correct?

A. Yes.

Q. Then you remained there in jail all that night, is that correct?

A. Uh-huh.

THE COURT: Speak up.

A. Yes.

MR. STOKES: You have to answer.

A. Yes.

Q. Next morning you talked to Mr. McFadden?

A. Yes.

Q. Now, you indicated that you asked someone to make a telephone call, is that right, the turnkey?

A. Yes.

Q. When did you ask him?

A. That morning.

Q. That morning?

A. Yes.

Q. Before or after you saw Mr. McFadden?

A. Before.

Q. What did he say to you, the turnkey, when you asked him?

A. He said something about a certain color slip, I think it was a pink slip or something. He said I don't have a pink slip, and I can't make no call, whatever this means. I don't know what it means.

Q. Did you inquire about the slip further?

A. He didn't talk to me that much.

Q. What else if anything did he say to you?

A. He said I couldn't make no phone call.

Q. Unless there was a slip?

A. Unless there was a slip or a charge or something, I had to be charged to make a phone call.

Q. In other words, he didn't say to you outright that you couldn't make a call, but that you had to have some kind of slip,

is that correct?

MR. STOKES: Objection.

THE COURT: Read that question. (Last question was read by the reporter.)

THE COURT: He may answer if he knows.

MR. STOKES: Judge, my objection, if your Honor please, is to the prosecutor making an interpretation and basing a question upon interpreting it. He is saying, "In other words," and he is setting forth his statement. I have no objection to questions and answers but this is clearly objectionable.

THE COURT: I understand the question could be put a little more appropriately, but if the witness understands the question he may answer. Do you understand the question?

THE WITNESS: Yes.

THE COURT: All right.

A. He said I had to be charged before I could make a phone call.

Q. And this was before Mr. McFadden talked to you?

A. Yes.

Q. Then how long after that did Mr. McFadden talk to you?

A. It was quite a while.

Q. Approximately how long would you say?

A. This was early morning I asked to make the call. I didn't talk to McFadden until later.

Q. About how long, to your best recollection?

A. For three or four hours.

Q. You didn't say anything to Mr. McFadden about your having asked the turnkey to make a call, did you?

A. No.

Q. You didn't ask Mr. McFadden to make a call, did you?

A. No.

Q. You didn't ask Mr. McFadden to call a lawyer for you, did you?

A. No.

Q. You didn't ask Mr. McFadden about having anyone visit you, did you?

A. No.

Q. And you did not say anything to Mr. McFadden at all about your conversation with the turnkey about making a call, did you?

A. It was never brought up.

Q. You didn't say anything to him, did you?

A. He came to me for a specific reason.

Q. My question, sir –

THE COURT: Answer the question, did you or did you not?

A. No.

Q. You were asked on direct examination who you were going to call and I believe you indicated that you were going to call your people, is that right?

A. Uh-huh.

Q. Then you were going to call your lawyer or your bondsman; who is your bondsman?

A. I don't have a bondsman.

Q. Did you tell us you were going to call your bondsman? To be specific, did you answer, "I was going to call my lawyer or my bondsman"?

MR. STOKES: Objection.

Q. Is that what you said?

MR. STOKES: He said a lawyer or a bondsman.

Q. When Mr. McFadden questioned you some time after that, you were taken downstairs, weren't you?

A. Yes.

Q. And there was a man there with a typewriter, wasn't there?

A. Yes.

Q. And that man was asking you some questions and he was typing it, wasn't he?

A. Yes.

THE COURT: Speak up.

A. Yes.

Q. You didn't say anything to that man at that time or Mr. McFadden at that time about calling a lawyer, did you?

A. No.

Q. As a matter of fact, it was not until after the complete typing of questions and answers, questions by the officer, and answers by you, and then you were given a piece of paper to read, weren't you?

A. Yes.

Q. And it wasn't until that time that you first mentioned a lawyer to Mr. McFadden or to the man who was there, isn't that correct?

A. Yes.



Q. And when you mentioned that lawyer to Mr. McFadden, or the other man who was there typing, you said to him, "I don't want to sign anything until I talk to my lawyer," isn't that correct?

THE COURT: Speak up.

A. Yes.

Q. Mr. McFadden didn't force you to sign that after you told him that, did he?

A. No.

Q. As a matter of fact, you were permitted to go back upstairs, weren't you?

A. When is this?

Q. After you told Mr. McFadden you didn't want to sign anything, until you talked to your lawyer?

A. They took me back upstairs, yes.

Q. And you were permitted to make telephone calls, weren't you?

A. No.

Q. You didn't make any telephone calls?

A. No.

Q. At no time?

A. Not going back—not when I went right upstairs.

Q. Did you make any telephone calls at any time?

A. After I was charged.

Q. When were you charged?

A. It was I think it was the next day after we talked I was charged.

Q. When you told Mr. McFadden that you didn't want to sign anything until you saw your lawyer—do you remember that?

A. Yes.

Q. That was right after you were given that piece of paper to read, wasn't it?

A. Yes.

Q. You didn't say to Mr. McFadden at that time, "I would like to call my lawyer," did you?

A. There was something pertaining to this.

Q. Answer my questions. You didn't say to Mr. McFadden at that time, and I am referring to the time when they gave you a piece of paper to read, you didn't say to Mr. McFadden at that time, "I would like to call my lawyer," did you?

A. At one time I said something to him. I don't know what time it was.

Q. Listen to my question. Do you remember when you were given that piece of paper to read?

A. Uh-huh.

Q. And you told Mr. McFadden, "I don't want to sign anything until I see my lawyer," do you recall that?

A. Yes.

Q. You didn't tell him at that time that you wanted to call your lawyer, did you?

A. I don't know.

Q. All right, sir. Now I want to ask you this; the last regular job that you had was in 1962 and that was in Chicago, is that correct?

A. Yes.

Q. How long after that did you come to Cleveland?

A. I stayed in Chicago, oh, six months. I worked in Chicago six months and then I come to Cleveland.

Q. Was that still in 1962?

A. That was the latter part of 1962, yes.

Q. Since coming to Cleveland in 1962 whom have you lived with?

A. My mother.

Q. Where have you worked?

A. For my brother-in-law, for car washers and what not.

Q. Have you had a steady job?

A. Steady in the summer months.

Q. Where were you working on October 31, 1963?

A. Nowhere.

Q. How long had you been out of work?

A. Since the weather changed, since, you know, I worked that summer of '63.

Q. When was the last time you worked in the summer of '63?

A. In August.

Q. From August to the 31st of October, 1963, you hadn't had any steady employment?

A. No.

Q. You were living with your mother?

A. Right.

Q. You were downtown on this particular day and you had

been looking for a job, is that correct?

A. Yes.

Q. Where had you been looking for a job at?

A. One place I went to was Mill's Restaurant. That was one place.

Q. What time did you go downtown?

A. It was about 10 o'clock when I got downtown.

Q. You went to Mill's Restaurant?

A. Not first.

Q. Where did you go?

A. I went to several places in the Terminal Tower.

Q. Name them for me.

A. There was one place had a sign, I don't remember the name of the place. It was a restaurant, on the first floor as you come in the door.

Q. Name the other places you went to, if any.

A. I went on—I walked over to West 6th—West 3rd Street.

Q. What was the name of the place you went to?

A. I went to—there is a place right on the corner of 6th and Lakeside.

Q. What is the name of it?

A. Ontario Printers.

Q. You say you went to several places in the Terminal Tower?

A. Yes.

Q. Several places, name them for us?

A. There were several restaurants, there were several—they were restaurants is what they were.

Q. Do you remember the names of any of them, sir?

A. I remember the name of the printing shops I went to. There was a small printing shop there.

THE COURT: We are talking about the restaurants. He is asking the question about the restaurants. Do you remember the name?

THE WITNESS: No. I don't remember the names offhand.

THE COURT: All right.

Q. Then you proceeded finally to the vicinity of 13th and Euclid, is that right?

A. Yes.

Q. How did you proceed there?

A. I walked.

Q. What street?

A. Euclid Avenue.

Q. Then what way did you go and where?

A. I walked up to Ninth Street.

Q. Yes?

A. There is a restaurant there on Ninth Street, between Ninth and Prospect—between Ninth and Euclid, between Euclid and Prospect, there is a restaurant there and I ate a sandwich there.

Q. Where did you go to then?

A. I walked up Euclid.

Q. To where?

A. In that general vicinity, to 14th Street.

Q. Then where did you go?

A. See, this is where I met Terry, on Ninth Street coming across the street, on Ninth, and we both had something to eat at this restaurant. Then we both walked together.

Q. To where?

A. Up Euclid Avenue. We were contemplating on going to a movie.

Q. Where did you go to when you walked up Euclid Avenue after you met Terry?

A. We walked up to where this driveway is that goes from Euclid to Prospect.

Q. Go ahead.

A. And it was raining, this particular day.

Q. Halle Brothers Store, is that Halle Brothers Store there?

A. Yes.

Q. You walked through there?

A. Yes.

Q. Did traffic go through there?

A. Yes.

Q. Pedestrians?

A. Yes.

Q. There were quite a number of people?

A. There was a moderate number of people. The alley wasn't crowded.

Q. All right, continue.

A. We walked up—they have got a display window there for men, we looked at some clothes in the window, right there on the ground floor.

Q. Yes?

A. And this is where back down coming toward Euclid is where we found the package.

Q. And did you open —

A. Where I found the package.

Q. Did you open the package up?

A. I did.

Q. And you saw that there was what inside?

A. There was something, I couldn't make out what it was when I opened it from the brown paper sack, it was something wrapped up in cellophane.

Q. My question was you opened it up?

A. Yes.

Q. And what did you find was in the inside?

A. Another bundle?

Q. And did you open that?

A. Yes.

Q. What did you find was inside of that?

A. Two pistols.

Q. You found two pistols, did you take them out?

A. I did.

Q. And people still going through this alleyway there, weren't they?

A. Yes.

Q. And you took the guns out in the open?

A. I took them, I put them in my pocket, both guns.

Q. You took them out of the bag?

A. Yes, sir.

Q. And you put them in your pocket?

A. Yes.

Q. Did you look at them?

A. Not to examine them.

Q. You then found out that the guns made a bulge in your pocket, is that correct?

A. With the other stuff that I had, yes.

Q. And you took one of them and gave it to Terry, is that right?

A. Right.

Q. Now, sir, when you put the gun in your pocket, you know that that was a weapon, didn't you?

A. Yes.

Q. You knew that it was against the law to carry a weapon concealed, didn't you?

MR. STOKES: Objection.

THE COURT: Objection sustained.

Q. Did you, sir, know that it was against the law to carry a weapon concealed?

MR. STOKES: Objection.

THE COURT: Sustained.

Q. You put the gun in your pocket, is that right?

A. Right.

Q. Then where did you and Terry proceed to?

A. Back toward Prospect.

Q. Prospect or Huron, sir?

A. Huron, Huron, Huron.

Q. All right, in the vicinity of the Airlines office?

A. Wherever you come out of the alley is, you know.

Q. There is an Airline office and a jewelry store there, isn't there?

A. No.

Q. None there.

A. Not as you come out of the department store, Halle's.

Q. You walked out of there and you walked down the street, didn't you?

A. Yes.

Q. You were standing talking in the vicinity of the airlines office and the jewelry store, weren't you?

A. Right on the corner.

Q. You walked away from Terry, didn't you?

A. Yes.

Q. When you walked away from Terry where were you going?

A. Down Huron.

Q. To where?

A. I didn't go anywhere. I was going down —

Q. Where were you going?

A. I was walking down Huron.

Q. To where?

A. To East 4th Street.

Q. All right. Then you walked back?

A. I didn't walk to East 4th Street.

Q. Then you walked to Terry?

A. Yes.

Q. After you walked back to Terry, then a white man came up to you, didn't he?

A. Yes.

Q. Let's go back just a moment. When you walked to the vicinity of the airlines office and the jewelry store, you walked away from Terry, you were headed towards East 4th Street, is that right?

A. I was walking west on Huron.

Q. And you were going where?

A. To where I know a pawn shop is at, a loan, a place that loans money on articles.

Q. That is located where?

A. There is a place, Saul Bergenman's, on 4th and Prospect.

Q. Is that where you were headed?

A. Yes.

Q. Then you came back to Terry, is that right?

A. Yes.

Q. Then a white man came up to you, is that right?

A. That is when I came back to Terry.

Q. And what was his name?

A. Carl Katz.

Q. Did you know him before from previously?

A. I seen him.

Q. Where had you seen him?

A. He works in a public place. He is the manager of a public place.

Q. What kind of a public place?

A. It is a bar, he is a manager of.

Q. You had a conversation with him?

A. Yes.

Q. And the conversation you had with him was about the weapons, is that right?

A. Yes, sir.

Q. Did he exhibit any interest in purchasing these weapons?

A. Not for himself, no.

Q. Didn't you testify on direct examination that he wanted to look at them?

A. Yes.

Q. And that he also told you that you probably could pawn them at 4th and Prospect?

A. He said, "I might be able to get rid of them for you."

Q. Didn't you tell us that he mentioned the pawn shop at 4th and Prospect?

A. He said he knew of a pawn shop. I knew of Saul Bergenman's myself.

Q. Then you and Terry walked away from there, to Zucker's, didn't you?

A. We walked down Euclid to Zucker's.

Q. And the officer came up to the three of you, didn't he?

A. Right.

Q. That was the officer seated here?

A. Right.

Q. Detective McFadden?

A. Yes.

Q. When he came down to Euclid, he asked you your names, didn't he? He said he was a police officer, didn't he?

A. Yes.

Q. And he asked you your names, didn't he?

A. Yes.

Q. Then he took Terry and turned him around and Terry was facing you and Carl Katz, wasn't he?

A. No.

Q. He wasn't?

A. No.

Q. The officer was behind Terry, wasn't he?

A. He was behind all of us. We were facing the window. He walked up behind us.

Q. Then he said he was a police officer, and you all turned around, didn't you, you were facing the officer then, weren't you?

A. Yes.

Q. Then he asked you your names, as you were facing the officer, didn't he?

A. Yes.

Q. All three of you?

A. Yes.

Q. Then the officer after he asked you your names, turned Terry around, didn't he, so that Terry was facing you and Carl Katz, isn't that a fact?

A. No.

Q. The officer did not turn Terry around?

A. No.



Q. What did he do with Terry, if anything?

A. He was standing beside Terry.

Q. When he was standing beside Terry what did he do with Terry if anything?

A. He started patting him.

Q. You indicated that there was a scuffle, didn't you?

A. Yes.

Q. What happened in that scuffle?

A. He was trying to turn the man around.

Q. Right. And then he was patting on Terry, wasn't he?

A. Right.

Q. And when he was patting on Terry he felt something on Terry, didn't he?

A. Yes.

Q. Then he reached inside after he patted on Terry, inside Terry's coat, didn't he?

A. Yes.

Q. And whatever was in there he couldn't get out at that time, and he then took Terry's coat off, didn't he, pulled it off of him, didn't he?

A. Yes.

Q. Then he ordered all three of you to go into the store, am I correct?

A. No, that is not quite correct.

Q. Well, you tell us, sir.

A. He didn't take Terry's coat off of him until he got into the store.

Q. All right. He pulled Terry's coat down?

A. Yes. He had his coat off his shoulders.

Q. So that it would be partially in this manner?

A. Yes.

Q. And did he have a hold the back of it?

A. Yes.

Q. And he ordered all of you—I am sorry, let the record show and indicate that the description of the coat is off the shoulders and partially down the arms on each side. He ordered all three of you into the store?

A. Correct.

Q. And when he ordered you into the store, you heard the officer specifically say to someone, "Call the wagon," didn't you?

A. No.

Q. You didn't?

A. No.

Q. Did the officer say anything?

A. Yes.

Q. What did he say?

A. He told all of us to face the counter.

Q. After he told you to face the counter, then you heard him say to someone, "Call the wagon," didn't you?

A. No.

Q. When did you hear—did you hear the officer say, "Call the wagon"?

A. Yes.

Q. Didn't you testify on direct examination that after the officer had you go into the store, and face the counter, that you heard him say to someone "Call the wagon"?

MR. STOKES: Objection. That is not the testimony.

MR. PAYNE: Of course, I am asking did he say that.

THE COURT: With all deference to you, I don't know if it is in the record or not, but if he did not say it he can say he didn't say it. If he did say it he can say he said it. Do you recall saying it?

THE WITNESS: What was the question?

THE COURT: Read the question  
(Following question was read by the reporter:)

"Didn't you testify on direct examination, that after the officer had you go into the store, and face the counter, that you heard him say to someone 'Call the wagon'?"

MR. STOKES: I am going to object to that question.

THE COURT: Overruled. He may answer if he recalls.

A. How do I answer it, yes or no, or can I answer it the way

THE COURT: Do you recall making that statement before?

THE WITNESS: Before?

THE COURT: Yes.

THE WITNESS: Not before, no. He made the statement after he searched Carl. This is when he made the statement.

Q. Were you all three with your hands in the air?

A. Yes.

Q. Then the officer came up to you, didn't he?

A. Yes.

Q. And when he came up to you he patted on you, didn't he?

A. Yes.

Q. And he patted you on the outside and down in this manner, didn't he?

A. Yes.

Q. And when he patted down to your—you had on an overcoat, didn't you?

A. Yes.

Q. When he patted down to your overcoat he felt something in your overcoat, didn't he?

A. Yes.

Q. That something that he felt was in the pocket of that coat, wasn't it?

A. Yes.

Q. It was not out in sight, was it?

A. In sight?

Q. Yes.

A. No.

Q. In other words, it was completely inside the pocket of that overcoat?

MR. STOKES: Objection.

THE COURT: He may answer.

A. Was it completely in the pocket?

Q. It was completely in the pocket of that coat?

A. It was completely in the pocket of the coat.

Q. And the officer couldn't see it, could he?

A. I don't know if he could see it or not. It was in the pocket of the coat. I don't know whether he could see in the pocket of the coat or not.

Q. When he felt that item he then after feeling that item put his hand in your pocket, didn't he?

A. Yes.

Q. And when he put his hand in your pocket he took out a gun, didn't he?

A. Yes.

Q. He took out State's Exhibit 1, didn't he?

A. Yes.

Q. When he took out State's Exhibit 1, he took these shells from out of State's Exhibit 1, these cartridges, did he not?

A. I don't know if he did or not.

Q. These cartridges were in the gun that was in your coat, weren't they?

A. I don't know. I didn't know it until I got to the police station that the gun was loaded, that the guns were loaded. That is when they took the bullets out of the gun, at the police station.

Q. You do consider that as a weapon, do you not?

MR. STOKES: I am going to object.

THE COURT: Objection sustained.

Q. You had State's Exhibit 1 concealed on your person, didn't you?

A. Yes, I had it in my pocket.

MR. PAYNE: That is all. Thank you.

THE COURT: Anything further, Mr. Stokes?

*Defendant's Renewal of All Motions*

MR. STOKES: You may step down. If your Honor please, at this time we renew all motions heretofore made which were overruled by the court.

THE COURT: At this time the Court again denies your motions previously made, and you may have your exceptions. I presume you are finished with your testimony?

MR. STOKES: At this time, we rest, your Honor.

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THEREUPON DEFENDANT RESTED.

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MR. PAYNE: No rebuttal testimony, your Honor.

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THEREUPON THE STATE OF OHIO RESTED.

TESTIMONY CLOSED.

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THE ABOVE AND FOREGOING, TOGETHER WITH THE EXHIBITS OFFERED AND RECEIVED IN EVIDENCE, WAS ALL OF THE EVIDENCE OFFERED AND RECEIVED, UPON THE TRIAL OF THE ABOVE CAUSE ENTITLED STATE OF OHIO VS. RICHARD D. CHILTON, BEING CASE NUMBER 79,432, IN SAID COURT OF COMMON PLEAS, CRIMINAL BRANCH, IN AND FOR CUYAHOGA COUNTY, OHIO.

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THE COURT: The Court will give you an opportunity, however, to argue this particular question.

MR. PAYNE: The State will waive its opening argument, your Honor.

THE COURT: I want you to have an opportunity to argue, Mr. Stokes, and we will hold it in abeyance, the argument, until we can proceed with the other case, when I find out from you tomorrow as to how long you will be detained in Federal Court tomorrow; is that agreeable?

MR. STOKES: Judge, on the question of argument, I am confronted with this —

THE COURT: Are you willing to waive argument, too?

MR. STOKES: Judge, I see no point in argument. I think argument is for when there is some possibility of convincing the Court.

THE COURT: Well, the Court has a mind that is flexible, and if you have had success in swaying people you might possibly sway the Court, too, I don't know. However, if there is no particular hurry at this moment for the Court to make a decision, I want you to think it over, as far as any argument. You may come up with something that you might feel should be brought to the Court's attention, and in light of the fact we want to go ahead with the other case involved here.

MR. PAYNE: I would think so, your Honor, if view of the hour.

THE COURT: So notify Mr. Payne tomorrow as to when we can resume in the other case.

Adjourn court until 9:15 tomorrow morning.

(Thereupon an adjournment was taken to 9:15 Wednesday, September 30, 1964.)

*Friday Morning Session, 9:15 a.m., October 2, 1964*

THE COURT: I believe when we left off I raised the question whether counsel desired to argue, and there was an indication by the prosecuting attorney that he would waive argument.

MR. PAYNE: Yes, your Honor.

THE COURT: And Mr. Stokes indicated that he would waive, and I suggested that he have a little time to think it over and he might change his mind. So what is now your position, Mr. Stokes?

MR. STOKES: Your Honor, we might offer the Court some brief argument.

THE COURT: All right.

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(Thereupon, counsel for the respective parties made their closing arguments to the Court.)<sup>75</sup>

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THE COURT: Gentlemen, I will tell you what I will do. I will hold my decision in abeyance until we dispose of this other case. So can we proceed? Do you want to take a five-minute recess?

MR. STOKES: Yes, your Honor.  
(Thereupon a recess was had.)

THE COURT: Are you ready to proceed in the other case?

MR. PAYNE: Yes, your Honor.

### TERRY'S TRIAL

*Proceedings in re: State of Ohio vs. John W. Terry, Case No. 79,491.*

MR. PAYNE: Your Honor, we have before the Court at this time consideration of case number 79,491, State of Ohio v. John W. Terry, who is charged with the offense of carrying concealed weapon. The indictment reads as follows:

"Indictment for Carrying Concealed Weapon, Revise Code 2923.01. State of Ohio, Cuyahoga County. In the term of Sep-

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<sup>75</sup> These arguments were not transcribed as part of the accompanying trial proceedings.

tember, in the year of our Lord one thousand nine hundred and sixty-three, the jurors of the Grand Jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John W. Terry on or about the 31st day of October, 1963, at the county aforesaid, unlawfully and feloniously carried and concealed on or about his person a certain dangerous weapon, to wit, revolver, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio." Signed by the prosecuting attorney, John T. Corrigan.

To this indictment, it is my understanding, the defendant has entered a plea of not guilty; is that correct, Mr. Stokes?

#### DEFENDANT'S RENEWAL OF MOTION TO SUPPRESS

MR. STOKES: May we do this, your Honor, prior to entering the

plea, may we renew at this time the motion to suppress which has theretofore been filed in this matter?

THE COURT: I don't think it will be necessary to have any argument on it?

MR. STOKES: No, Judge.

THE COURT: The motion is overruled.

MR. STOKES: Now, at this point, your Honor, we will enter a plea of not guilty.

#### THE STATE'S EVIDENCE: A STIPULATION BY THE PARTIES

MR. PAYNE: If it please the Court, there is a stipulation between counsel for the State and counsel for the defendant, that all of the testimony which has previously been given in the case of the State of Ohio v. Richard D. Chilton by Detective McFadden, the arresting officer here, may be fully incorporated into the case of John W. Terry as though it was fully testified to from the stand under oath; with the additional stipulation to the Court that after Detective McFadden observed these men in front of the area of the Diamond Store, or Airline Office, and after they had left that area and gone to the area of Zucker's on Euclid Avenue, that he approached them, asked for identification, in which something was said by each of them, at which time he then turned the defendant Terry around, patted him down, Terry

having on an overcoat and a suitcoat, and in patting him down felt an object in the upper region of the left breast pocket;

That thereupon feeling the object which felt in the nature of a weapon, that he reached in under the overcoat into the upper breast area pocket of the coat, inside pocket of the coat, your Honor, and removed from the inside pocket of the coat a revolver containing a clip, and seven shells, which will be marked for purposes of identification as State's Exhibit 3.

(State's Exhibit 3 was marked for identification by the reporter.)

THE COURT: It may be received.

MR. PAYNE: I haven't finished the stipulation.

MR. STOKES: Go ahead.

MR. PAYNE: That it may be received —

THE COURT: Well, I am little ahead of myself.

MR. PAYNE: Well, it is offered into evidence, and there is an objection by counsel for the defense as to its admission into evidence. There is an objection by counsel for defense as to its admission which we will ask the Court to rule on in view of the stipulation as to the other facts.

It is further stipulated that the officer would testify that the weapon was concealed in the inside pocket of Terry, that he removed the same, and that subsequently the defendant Terry was arrested and charged with the offense of carrying concealed weapon, which he is on trial here for at this time; and that the offense was committed in the State of Ohio, County of Cuyahoga, and City of Cleveland.

THE COURT: As testified by Detective McFadden?

MR. PAYNE: Yes, as testified by Detective McFadden.

MR. STOKES: We will enter into those stipulations which have just been enunciated by Mr. Payne, your Honor.

THE COURT: But you are objecting to the introduction of State's Exhibit 3?

MR. STOKES: Yes, that's correct. Is it 3-A, too?

MR. PAYNE: I just marked it all Exhibit 3.

MR. STOKES: I see.

THE COURT: The Court will accept the stipulation as agreed to by counsel for defendant Terry. And the Court at this time will accept into evidence State's Exhibit 3, which constitutes the revolver and the seven bullets.

MR. PAYNE: And the clip.



THE COURT: And the clip. You may have your exception.

MR. STOKES: Yes, your Honor.

MR. PAYNE: With those agreed stipulations, your Honor, having been entered into, the State would rest its case at this time.

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THEREUPON THE STATE OF OHIO RESTED

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DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF  
ACQUITTAL AND RENEWED MOTION TO SUPPRESS

THE COURT: Mr. Stokes?

MR. STOKES: If your Honor please, then, we would at this time renew all the motions made by the defense in this matter.

THE COURT: And the Court overrules your motions, in connection with the search and seizure, and for directed verdict, I presume that you have in mind, is that correct?

MR. STOKES: Yes. Let's see, we did not make a motion for directed verdict —

MR. PAYNE: I believe that it was —

MR. STOKES: —in the other case.

THE COURT: I am quite sure you did in the other case.

MR. STOKES: Well, for the record, let's say this, at this point we would move for directed verdict of acquittal for the defendant, and we would further move, your Honor, to renew all of the motions heretofore made and overruled by the Court in this matter.

THE COURT: All right. Motion is overruled, with exceptions to the defendant.

Anything further, Mr. Stokes?

MR. STOKES: Then, if your Honor please, the defense would rest, also.

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THEREUPON THE DEFENDANT RESTED.

TESTIMONY CLOSED.

THE ABOVE AND FOREGOING, TOGETHER WITH THE EXHIBITS OFFERED AND RECEIVED IN EVIDENCE, WAS ALL OF THE EVIDENCE OFFERED AND RECEIVED, UPON THE TRIAL OF THE ABOVE CAUSE ENTITLED STATE OF OHIO VS. JOHN W. TERRY, BEING CASE NUMBER 79,491,

IN SAID COURT OF COMMON PLEAS, CRIMINAL BRANCH,  
IN AND FOR CUYAHOGA COUNTY, OHIO.

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THE COURT: I don't believe there would be any need for any further arguments in light of the fact that you have argued so strenuously and so eloquently, each of you, unless you so desire.

MR. STOKES: No, Judge.

THE COURT: In that case, the Court will recess for one-half hour so I can go over the facts in this case.

MR. PAYNE: Your Honor, Mr. Stokes is due in Juvenile Court at eleven o'clock, I understand.

THE COURT: In light of that fact, supposing you return here at two o'clock, and the Court will make its ruling in both cases at two o'clock.

MR. STOKES: That will be fine, Judge.

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(Thereupon an adjournment was taken to 2:00 p.m., Friday, October 2, 1964, at which time the following proceedings were had:)

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*Friday Afternoon Session, 2:00 p.m., October 2, 1964*

#### COURT'S FINDING

FRIEDMAN, J.: Gentlemen, in light of the fact that the testimony as adduced in court relating to Robert [sic] Chilton was by stipulation agreed to between both counsel for the State and counsel for the defendant, as being the testimony of John W. Terry, with the exception of one item which counsel took exception to, the introduction of State's Exhibit 3 which is the pistol, the chamber, and the bullets—is that correct?

MR. PAYNE: That's correct, your Honor.

THE COURT: Therefore, my decision will be relating as to both defendants, making it such.

The two defendants have been charged with violation under Section 2923.01 relating to concealed weapons. That section provides and reads as follows; and I will read it verbatim, the pertinent part thereof:

"No person shall carry a pistol or their dangerous weapon concealed on or about his person."

And then it has a provision pertaining to exceptions, and the exceptions do not apply in this particular case.

The elements required under this section of the statute for the State to prove its case beyond a reasonable doubt are to knowingly have concealed on or about his person a pistol; and the venue.

Since the defendants had waived a jury and have tried this matter before the Court, it is incumbent upon me to evaluate the testimony and determine if the State has proved its case beyond a reasonable doubt whether the defendants have violated the law as prescribed by statute.

What is the testimony in this case? Detective McFadden, a member of the Cleveland Police Department for 39 years, a detective for approximately 35 years, assigned to the downtown district for many years, specialized in the field of observing shoplifters and pickpockets, on or about the 31st day of October, 1963, while on Euclid Avenue observed suspicious conduct of the defendants Chilton and Terry, and a fellow by the name of Carl Katz, in the areas of East 13th and Euclid and Huron, and also in the area of approximately E. 12th Street and Euclid.

He testified that either the defendant Chilton or Terry would walk up to a jewelry shop or United Airlines store, look around it, come back, and consult with each other.

Then the other person would do the same. This continued for approximately five to six times, as I recall the testimony.

After doing so for about ten to fifteen minutes they walked towards 11th or 12th Street and Euclid, at the location of Zucker's Men's Shop, and met there with a fellow by the name of Carl Katz and conversed with that gentleman.

That was the time when Detective McFadden decided to approach the defendants for the purpose of interrogation and determine what they were up to, and he identified himself when he approached them as a police officer.

That he made the defendant Terry turn around, patted him, discovered a gun in his pocket while patting him down.

That he ordered all three persons into Zucker's store, patted each one down, discovered a gun in the left-hand pocket of the defendant Chilton, which gun was not observable, and removed the same. Each of the guns were loaded.

He called the wagon, took them to jail, and placed them on a charge of investigation.

The defendant Richard Chilton, which the Court has to take, is the testimony of defendant Terry, also, in light of the stipulation.

Richard Chilton is 27 years of age. He has testified that he is a printer by trade, was married, has been divorced, has worked for the Grand Printing Company for 1953 to 1961; that he lives with his mother, and that he is not presently employed. He has never been arrested before.

That he got downtown early in the morning and was looking for a job. He went to several restaurants and printing shops, but was rather hazy about the places he went to.

That he met John Terry at East 9th and Euclid; that in the alley between Prospect and Euclid Avenue separating the Halle's store, he found a bag containing two guns. He unwrapped the bag, put both pistols in his pocket. When he found his pocket too bulky he gave one of the guns to the defendant Terry; that he was on his way to sell or pawn the gun when he was stopped. This is the testimony of Chilton.

That the officer patted him down, and found a gun inside his left coat pocket.

The testimony in this case, as I have stated, is that at the present time he is unemployed, that the last regular job he had was in 1962 in Chicago where he worked for six months, and he came to Cleveland in August of 1962 to work temporarily as a car washer and has no steady employment.

As I said, the testimony of Terry would have to be the same as to the surrounding circumstances, save and except as to employment and as to the places where he lives.

In light of the facts before me, and in view of my decision which was so strenuously and eloquently argued by counsel for the defendants—I want to commend you, Mr. Stokes —

MR. STOKES: Thank you, your Honor.

THE COURT: And I sincerely meant that your argument which you presented to the Court was as eloquent an argument that I have ever heard from a counsel representing an individual, and I am quite sure that Chief [sic] Justice Potter Stewart of the Supreme Court, if you would argue the same way, he probably would commend you in the same manner.

MR. STOKES: Thank you, your Honor.

THE COURT: And that goes for you, too, Mr. Payne.

MR. PAYNE: Thank you, your Honor.

THE COURT: Don't take it so nonchalantly. I am sincere in saying it, both of you represented your respective sides in a very fine manner.

### THE JUDGMENTS OF CRIMINAL CONVICTION

Considering the facts as stated, and in light of my decision, I can see no other alternative save and except to find each of the defendants guilty of the crime as charged of carrying a concealed weapon.

Will the defendants and their counsel step forward.

Mr. Stokes, on behalf of Mr. Chilton, do you care to make any statement?

### ARGUMENTS ON BEHALF OF DEFENDANTS REGARDING SENTENCING AND BAIL

MR. STOKES: If your Honor please, I would make this request to the Court, that the Court defer passing this matter for sentence until such a time as we have had an opportunity to file a motion for new trial before this Court.

THE COURT: I will not go along with your request as to one of the defendants. But I had in mind, I think this thing has been hashed out. It was tried to a Court. It might have been different if tried to a jury, but in light of the fact that the matter was submitted to the Court, and having heard all of the testimony, and all of the argument, I am of mind that a motion for a new trial at this time, as far as holding in abeyance or passing sentence, the Court will not go along with you.

MR. STOKES: Well, Judge, in light of the urging of the Court with respect to wanting to see this matter taken up for review, I would want to be able to consult with my clients with respect to what possibilities there are for them to take the matter up for review, and I would hope that in the interim period that we might have some opportunity to have these men remain on bond pending the appeal in this matter, for the reason that such review will in all probability take a great deal of time; and in the event, let us say, that we were successful in the appeal, and this man were remanded, we would be in the very perilous position of these men having served time for something which —

THE COURT: Well, let me put it this way, as far as Terry is concerned, I want to make myself clear. I have gone over the whole situation, I have gone over his record. I think the com-

munity would be safer if he were sentenced right now, and I am going to do so, and if there is any question that he wants to get out on bond, he can go to the Court of Appeals for that.

As far as Chilton is concerned, in light of the fact that he has no record at all, although I did not believe his testimony, and I am honest about it, I think he has endeavored to take the Court over, and I am sure he endeavored to take you over, he comes in with a fantastic story that he was walking along an alley and finds two loaded guns.

To me it is an obvious case of not telling the truth, and that is putting it lightly. I was at the point of doing something in that connection. But I considered it calmly and coolly, and I have made my decision in that case.

As to Chilton I will refer this matter to the Probation Department for pre-sentence report.

As to Terry, I will sentence him to the Ohio Penitentiary for the term prescribed by statute. If he wants bond, he can go to the Court of Appeals.

MR. STOKES: Judge, may I further be heard? With respect to Chilton, I have no objection to the Court making this referral, but I would appreciate it if the Court would consider letting him remain on bond pending the probation report. And then with respect to Terry, I realize this man has a record that his Court must take into consideration. I also want to urge upon the Court this consideration, in this instance these guns were not used. These men did not give the police officer a difficult time at all.

There was no testimony that they in any manner resisted arrest, or did anything but submit completely, and we of course have to surmise from this evidence, that if we are going to take the testimony of the officer, that something he felt was going to be committed, but we know this, nothing was ever committed, and these guns were not tied in with anything illegal, and I would ask —

THE COURT: Mr. Stokes, it would take one second to use a gun, and you have observed and seen and you can take notice that many people are robbed, and many people are killed, with the use of a gun. It was fortunate in this case that the crime was prevented, in my estimation.

MR. STOKES: The only thing I want to urge upon the Court was in view of the facts which I have attempted to set forth to the Court, would the Court consider the other provision in the

statute for Workhouse sentence as opposed to a penitentiary sentence?

I would feel that under the circumstances where they did nothing to this police officer, they submitted, there has been no crime, for the Court to consider sentencing this man to the Workhouse for six months.

MR. PAYNE: There is a matter I want to bring to the Court's attention and to clarify between the Court and Mr. Stokes. I presume for purposes of clarifying, if the Court would act on Mr. Stokes' request in reference to Chilton, I believe—is he the one being referred to probation?

MR. STOKES: That is Chilton.

MR. PAYNE: And act on his request and leave him remain out on bond pending the probation report, and perhaps we can dispose of the other matters here, and this is a question I want to raise with Mr. Stokes and the Court, for purposes of clarification.

THE COURT: Well, I have stated as far as Chilton is concerned, I am referring him for pre-sentence report, and will permit him to remain on—what is the bond he is on?

MR. STOKES: Five thousand, Judge.

THE COURT: All right, he may remain on the same bond.

MR. STOKES: Thank you.

MR. PAYNE: All right, sit down for a minute, Chilton.

Now, I presume, the question I want to raise for clarification with Mr. Stokes and with the Court, would not be applicable until such time as the Court decides on the sentencing of the matter one way or the other, which he is going to do with reference to that, because there is a serious question I want to raise when that is disposed of.

THE COURT: I don't know what you have in mind. I am going to sentence Mr. Terry.

MR. PAYNE: Your Honor, I didn't understand Mr. Stokes' motion completely, in this respect, having in mind that the Court has said, I didn't know whether Mr. Stokes' motion was two-fold, whether he was requesting bond and stay of execution of any sentence that the Court may impose.

If his motion is in two parts, I don't think the Court understood it to be in two parts, but I do have that question in my mind, because as a matter of stay of execution I think he would be entitled to that as a matter of right.

As to the question of bond, he would not. That would be a discretionary matter with the Court here, and I raise this for the Court's clarification at this time, with reference to the Court passing on the matter.

THE COURT: On what basis he is entitled as a matter of right to stay of execution?

MR. PAYNE: He is entitled as a matter of right, your Honor, for a stay of execution —

THE COURT: Pending the filing of an appeal.

MR. PAYNE: —pending the filing of an appeal and pending the perfecting of the appeal.

The question of bond is solely discretionary. That stay of execution may be right here, if the Court decides. That is why I say the question of bond is discretionary, and I didn't know whether Mr. Stokes' request was two-fold in that respect, and I simply wanted to clarify it so there would be no mistake or error in the consideration of is request.

MR. STOKES: Actually, what it was, I think I perhaps did not make it clear to the Court, for this reason, I started out requesting a stay for purpose of filing my motion, which the Court immediately denied, and then the Court I believe was about to pass sentence, and at that point —

THE COURT: All right, you are making a motion for stay of execution.

MR. STOKES: Yes, your Honor.

MR. PAYNE: I think, your Honor, we better not consider that until such time as sentence is imposed.

MR. STOKES: The Court would have to pass sentence, but I would want the Court to consider in passing the sentence my request —

THE COURT: For the Workhouse. I regret that I cannot concur with you in the workhouse sentence. I think that section which provides for the alternative, workhouse institution sentence, has given to the Court discretion in a situation which involves certain circumstances. The circumstances for a workhouse sentence are not there as far as Terry is concerned, I sincerely regret it, although I admire you for requesting it for your client, but I cannot in that direction go along with you.

It is the order of the Court that Terry—is there anything you care to say, Mr. Terry, before the Court pronounces sentence?

DEFENDANT TERRY: No, sir.



*Sentencing of Defendant Terry*

MR. STOKES: Judge may I make one further observation? I am confronted with a situation that this Court is about to pass sentence. It disturbs me to some degree as a lawyer. At the beginning of this trial we could have, of course, avoided a trial and entered a plea in this matter.

Being conversant with the facts in this matter, I realize that if this evidence was permitted in, that there was but one verdict to be arrived at, and that is the verdict of guilty.

Consequently I approached this trial as I approached any other, trying to think of what is best for the defendant.

We then considered filing a motion, and considered what the effects of having the motion overruled would be, and we considered what the effect perhaps might be of entering a plea, saving the Court the time of a trial, and making a plea for mercy and leniency to the Court.

Once we got into the motion and had the motion heard, we could have at that point avoided trial. We still had the opportunity to enter a plea.

We felt at the urging of the Court that there was a great deal of merit to the Court's suggestion that this area of law be explored further for good of the entire community.

Of course, at that point we did not again yield to some temptation to at that point ask for mercy of this Court with a plea.

And now I find myself having attempted to indulge in the suggestions of this Court, and I would hate to feel that having done so that I may have caused this defendant to have been denied some consideration with he might have been afforded had a plea been entered here.

THE COURT: He would not have been afforded any other consideration. Let me say this to you, Mr. Stokes, in all honesty. Of course, during the course of a trial the Court cannot take into consideration, as far as the jury is concerned, anything save and except conviction of felonies or State violations, that are admissible in evidence.

But in considering the question what to do once he is found guilty, the Court can take into consideration every element of conduct of the individual during his entire lifetime to determine what is best for the community, what is best for the individual. And he has a sorry record all the way through, although there is only a conviction or two in the record. Yet the entire record

when you add it up, he has been picked up consistently in all kinds of crimes.

The mere fact that he has been released does not mean that he was not involved; probably in some instances there was not sufficient evidence presented to the grand jury.

But here is a man who has from December 30, 1948, to the present time, being consistently involved in difficulties with the law,<sup>76</sup> and it is my personal observation here is a man who has no record who is seduced or induced to partake in a crime.<sup>77</sup>

The community here is entitled to some consideration, and that is one of the reasons why I have decided in this instance to do what I am doing.

I know this much, you are going to make a request for a stay of execution, which the Court will consider and grant you that, but the Court is under no obligation to place him under bond. If the Court of Appeals disagrees with me, they certainly will grant him a stay, or release him on bond.

But I have felt, and I feel that what I am doing is right in this case.

I didn't hesitate to do what I did in the other individual, because there isn't a record, and I don't think I would be harming the community, and I sincerely hope that this will be a lesson to Chilton to behave himself and conduct himself the way he can conduct himself, and the way he has conducted himself until such time as he was picked up and found with a loaded gun.

I appreciate your plea on behalf of your client, but thank God I have worked with my own conscience in determining what is right and what is wrong, and this is my decision.

Now, you are asking for a stay of execution, is that correct?

MR. STOKES: I would like a stay of execution.

MR. PAYNE: I don't think the sentence was completed, I don't think.

THE COURT: I have sentenced him to the Ohio State Penitentiary for the period prescribed by statute.

MR. STOKES: Now we would request a stay of that, your Honor.

THE COURT: Pending bail?

MR. STOKES: Pending the filing of a notice of appeal. Do I

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<sup>76</sup> This appears to be a reference to Mr. Terry.

<sup>77</sup> This appears to be a reference to Mr. Chilton.

understand this Court will not consider bond, that we should consider making application to the Court of Appeals?

THE COURT: That's right, to the Court of Appeals, and if they find he is entitled to bond —

MR. PAYNE: May I, for the purposes of the record, have the Court's specific expression on the two motions, the one as to the stay, and the one as to the bond.

THE COURT: I have stated that I am granting the stay of execution, pending the appeal.

MR. PAYNE: And the bond situation?

THE COURT: And the bond is denied, and the defendant is committed.