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# 67/05/17 Brief in Opposition to Petition for a Writ of Certiorari

Reuben M. Payne

John T. Corrigan

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1967

**No. 67**

JOHN W. TERRY, et al., *Petitioners,*

—vs.—

STATE OF OHIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1161.

JOHN W. TERRY, *et al.*,

*Petitioners,*

vs.

STATE OF OHIO,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed in an opinion reported as *State v. Terry*, 5 Ohio App. (2d) 122; 214 N. E. (2d) 114; 34 O. O. (2d) 237. The Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

## QUESTIONS PRESENTED.

The respondent cannot subscribe to the questions presented by counsel for appellant and amicus. Their questions are taken out of context and present a distorted impression of the facts in the record. They then assume incorrect conclusions of fact and fix them in a basic premise and follow with an incorrect conclusion.

The respondent submits that the following questions are presented in this case:

I. Can the protection guaranteed to individuals by the Fourth and Fourteenth Amendments to the Constitution of the United States be said to encompass any absolute right irrespective of such restraints as the safety and welfare of the public may require?

II. Is the exercise of "stop and frisk" based on probable cause a right of society inuring to the benefit of an agent for society (the police officer) in establishing law and order and protecting the welfare and safety of society?

III. Does the decision of the Court of Appeals, Eighth Appellate District of Ohio, upholding the search and seizure, contravene the federal constitutional standards of reasonableness prescribed by the Fourth Amendment?

## STATEMENT OF THE CASE.

John W. Terry and Richard D. Chilton, the petitioners, were indicted on a charge of carrying a concealed weapon, in violation of Section 2923.01 of the Revised Code of Ohio. (See petition Appendix E, page 35.) A pretrial motion to suppress the evidence was overruled, and, upon a plea of not guilty, the court, sitting without a jury, returned a verdict of guilty as to both defendants.

The relevant facts are as follows: At approximately 2:30 p.m. of October 31, 1963, a Cleveland detective with 39 years and 4 months police experience observed two men, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes. One remained at the corner, the other walked several hundred feet up the street, peered into the window of either a diamond store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by each man. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly with the two men, departed and stationed himself across the street. The two men resumed their pattern of conduct, each making four to six trips. The two men then proceeded west on Euclid and at 1120 Euclid Avenue where they encountered the third male who was positioned there, and who had spoken with them previously. The detective testified: "* * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * *" (R. 42).

With this belief in mind, the detective approached the three men, who were engaged in conversation, identified himself as a police officer, and asked for their names. Receiving only a mumbled, incoherent response by one or all (R. 28), the officer took hold of one (later identified as Terry), and turned him around in front of the officer facing the other two. He then patted Terry, the man in front of him. At no time did his hands reach into any pockets (R. 29-30). In patting Terry, in the upper left pocket of the top coat the officer felt a gun (R. 29). At this point the detective ordered the three men from the street to the interior of a nearby store. Retaining the appellant Terry by the collar of his coat he ordered all three to face the wall and place the palms of their hands against the wall. The detective then pulled the coat by the collar, from the rear to the shoulders of Terry, exposing in the upper left inside coat pocket a concealed revolver. The gun was removed by the detective. Subsequent examination proved it to be loaded. The officer proceeded to "pat down on the outside of his clothing" the second man, Chilton. He then felt an object in the left overcoat pocket which felt like a gun. He inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with Carrying Concealed Weapons.

## LAW AND ARGUMENT.

### Preliminary Statement.

Through a long series of landmark decisions, lawyers and society have in the past years witnessed an affirmance of basic principles and rights in the area of criminal law. The reintroduction and affirmance of these rights into the American scene have been interpreted by many as irrevocably altering the face and character of society. The significance of these decisions and their contribution toward our legal and social progress in the intervening years is beyond question, but as with every major innovation, these decisions carry with them an inherent potential for misinterpretation, misuse and abuse on the part of some individuals and organizations, however good their intentions may be.

Realizing that the future of our Nation must rest on the shoulders of her patriotic, law-abiding citizens and on laws that protect the individual rights of those citizens, laws that protect a free society where those citizens live, and a fair and impartial administration of all those laws by the courts, and although we stand with others against those who seek to deprive or limit that patriotic law abiding citizen of any of his basic rights, as guaranteed by the Constitution and reintroduced by the many landmark decisions, it is our position that the shield of these rights should be used as such and not as a weapon by those who in zealous application (deliberately or innocently) who would misuse, misinterpret, or abuse them. We stand not only for the protection of individual rights, but also the rights of society to protection from evildoers. No right under the Constitution is so absolute or self operating that it can be permitted to conduct a bleeding operation on the very society which has given it birth and nourishment.

This is basically what is being requested by these who would have the Court overturn the decision which is the subject of review in this case.

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It is argued on behalf of the petitioners that every frisking or patting down of any individual whom the police have detained for questioning is an invasion of the right to privacy guaranteed by the Fourteenth Amendment irrespective of the "unreasonable" test. It is their contention that the Fourth Amendment guarantees the absolute right of freedom from such action by law enforcement officers.

The first question posed is then:

**I. Can the protection guaranteed to individuals by the Fourth and Fourteenth Amendments to the Constitution of the United States be said to encompass any absolute right irrespective of such restraints as the safety and welfare of the public may require?**

The answer is found in decisions of this Court concerning the right of freedom of speech and freedom of religion.

As early as 1890 in *Davis v. Beason,* 133 U. S. 333, the Court said, "* * * with man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on these subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions re-

garded by general consent as properly the subject of punitive legislation."

The freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevent the punishment of those who abuse this freedom. *Gitlam v. New York,* 268 U. S. 652, 45 Sup. Ct. Rep. 625.

"The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rest, and that freedom, therefore, does not and cannot be held to include the right to virtually destroy such institutions; however complete is the right of the press to state public things and discuss them, that right as every other right enjoyed in human society, is subject to the restraints which separate right from wrong doing." *Toledo Newspaper Co. v. United States,* 247 U. S. 402, 38 Sup. Ct. Rep. 560.

The right of free speech is not an absolute one, and the state, in the exercise of its police power, may punish its abuse by those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. *Strongberg v. California,* 283 U. S. 359, 51 Sup. Ct. 532.

Liberty of speech and of the press is not an absolute right, and the state may punish its abuse. *Near v. Minnesota ex rel. Olson,* 283 U. S. 697, 51 S. Ct. 625.

Thus we find from a long line of decisions that the law as it applies to question one has long been so well settled that it is unnecessary to do more than state it whenever the occasion arises.

It can therefore be assumed that the constitutional right to protection against unreasonable search and seizure is not absolute where the safety and welfare of the police officer and of the public are concerned.

**II. The exercise of "stop and frisk" based on probable cause is one of those restrictive limitations permitted to the state as circumscribing the provisions of the Fourth Amendment for the protection of the safety and welfare of the people.**

Such right must inure to the benefit of the people through their lawful agent, the police officer.

"The right of freedom of speech and press * * * as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing." *Toledo Newspaper Co. v. United States, supra.*

The state is necessarily invested with the police power which is the expression of the popular conception of the necessities of social and economic conditions and under which may be done that which will best secure the peace, morals, health and safety of the community. *Bloomfield v. State,* 86 O. S. 253, 99 N. E. 309, 41 L. R. A. (NS) 726, Am. Cas. 1913 D, 629 (affirming the Circuit Court, which affirmed, without opinion *State v. Bloomfield,* 13 N. P. (NS) 121).

The governmental body thus is given the right to act or limit individual rights of the constitution in the area of securing peace, morals, health and safety of the community.

The Court of Appeals in rendering its opinion in the instant case has stated:

> "The right of the proper authorities to stop and question persons in suspicious circumstances has its

roots in early English practice where it was approved by the courts and the common law commentators. See, 2 Hawkins, Pleas of the Crown, 122, 129 (6th Ed. 1787): 2 Hale, Pleas of the Crown, 89, 96-97 (Amer. Ed. 1847): Lawrence vs. Hedger, 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E. G., N. Y. Code of Crim. Pros., Sec. 180A (1965 Supp.): Gen. Laws of R. I., Sec. 12-7-1 (1956): N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955): 11 Del. Ann. Code, Sec. 1902 (1953): Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942): Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by court decisions, E.g., People vs. Rivera, 14 N. Y. (2d) 441 (1964): Gisske vs. Sanders, 9 Cal. App. 13 (1908): People vs. Fagenkrantz, 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, Henry vs. United States, 361 U. S. 98, 106 (1959) (Clark, J. dissenting): Brinegar vs. U. S., 338 U. S. 160, 178 (1949) (Burton, J. concurring): Keiningham vs. United States, 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 948 (1963): Busby vs. United States, 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, Ellis vs. United States, 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959): United States vs. Bonanno, 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., U. S. vs. Buffalino, 285 F. (2d) 408 (2d Cir. 1960), cited with approval in U. S. vs. Vita, 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the Constitution. See, Note, 50 Cornell L. Q. 529, 533 (1965); United States vs. Vita, 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of People vs. Cahan, 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., People vs. Martin, 46 Cal. (2d) 106 (1956); People vs. Simon, 45 Cal. (2d) 645 (1955); People vs. Jones, 176 Cal. App. (2d) 265 (1959). Also of great persuasive authority is the recent New York Court of Appeals decision in People vs. Rivera, 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio At Large In The Fifty States, 1962 Duke L. J. 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." Traynor, supra, at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police

is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of People vs. Rivera, supra, at p. 444:

> 'The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off.'
>
> Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented."

It is well settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purpose of limited inquiry in the cause of routine police investigations. *Rios v. United States,* 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); *Busby v. United States,* 296 F. 2d 328 (9th Cir. 1961).

The local policeman, in addition to having a duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within consti-

tutional limits, to investigate whenever such circumstances indicate to him that he should do so. *Frye v. U. S.*, 315 F. 2d 491 at 494 (9th Cir. 1963).

While the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between that cause which will justify informal detention short of arrest and the probable cause required to justify that kind of custody traditionally denominated an arrest. *Wilson vs. Porter,* 361 F. 2d 412.

Due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from totality of circumstances that the detaining officers could have had reasonable grounds for their action, and a founded suspicion is all that is necessary, that is, some basis from which the court can determine that detention was not arbitrary or harassing. *Wilson v. Porter, supra.*

When the detention of defendant by police, initially for purpose of investigating his identity, became an arrest was to be determined under state law subject to such minimum constitutional standards as the United States Supreme Court had prescribed. *Wilson v. Porter, supra.*

Here upon the discovery of the revolver the police were confronted with a felony. (Ohio Revised Code 2923.-01.) For this there was probable cause to arrest. *Commonwealth v. Ballow, Jr.*, 217 N. E. 2d 187 (1966). *Commonwealth v. Phelps,* 209 Mass. 396, 404, 95 N. E. 868. *Commonwealth v. Holmes,* 344 Mass. 524, 525, 183 N. E. 2d 279; *People v. Mickelson,* 59 Cal. 2d 448, 450, 451, 30 Cal. Rptr. 18, 380 P. 2d 658 and cases cited. *People v. Rivera,* 14 N. Y. 2d 441, 447, 252 N. Y. S. 2d 458, 201 N. E. 2d

32, cert. den. sub nom. *Rivera, v. N. Y.*, 379 U. S. 978, 85 S. Ct. 679, 13 L. ed. 2d 568.

The test to be applied in determining whether search and seizure is unreasonable is whether the thing done, in sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected. *State v. Hagan,* 137 N. W. 2d 895. *United States v. Haskins,* D. C. E. D. Tenn. 1962, 213 F. Supp. 551; *United States v. Cook,* D. C. E. D. Tenn. 1962, 213 F. Supp. 568; *Schwimmer v. U. S.*, C. A. 8th (1956), 232 F. 2d 855, cert. den. 352 U. S. 833, 77 S. Ct. 48, 1 L. Ed. 2nd 52.

Presence of automobiles near scene of crimes under suspicious circumstances, however slight, imposes upon police the duty to stop and question the occupants, inspect or search them, and remove incriminating evidence found therein. To hold otherwise would make a farce of the police protection to which all citizens are entitled. *State ex rel. Ogg v. Iahash,* 140 N. W. 2d 692.

In *State v. Herdman,* 130 N. W. 2d 628, the Supreme Court of Minnesota uses the following language.

> "In the argument before this court it appears to be the claim of the defendant that the evidence used against him was the product of an exploratory search without probable cause in violation of his rights under the 4th and 14th Amendments. It seems to be further urged that since Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 1081, police officers are not permitted to accost a suspicious character on a public street for questioning. While the Mapp case and numerous decisions recently handed down by the United States Supreme Court clearly establish that under state and federal procedure citizens are entitled to uniform protection from unreasonable

> searches and seizures, we do not understand that these decisions have gone so far as to require or suggest that state police officers follow precise procedures in making arrests, searches and seizures. The Fourth Amendment protects the individual only from 'unreasonable' searches and seizures; and whether a search and seizure is 'unreasonable' must depend upon the particular facts of each case.
>
> "Nor do we feel that the legality of the arrest of defendant is tainted because the police officers accosted and interviewed defendant without actual information that he was carrying stolen property in his automobile. Under the circumstances here, the police officers did no more than what they were required to do in performance of their duties. * * *
>
> "Persons found under suspicious circumstances are not clothed with a right of privacy which prevents police officers from inquiring as to their identity and actions. The essential needs of public safety permit police officers to use the faculties of observation and to act thereon within proper limits."

To justify the seizure of a weapon which could be used against the arresting officer we shall not draw a fine line measuring the possible risk to the officer's safety. The officer should be permitted to take every reasonable precaution to safeguard his life in the process of making the arrest. *State vs. Riley,* 402 P. 2d 741 (1965).

Circumstances short of probable cause to make an arrest may still justify officers stopping pedestrians or motorists on streets for questioning, and if circumstances warrant, officer may, in self-protection, superfically search suspect for concealed weapons, and should investigation then reveal probable cause to make an arrest, officer may arrest suspect and conduct reasonable search incidental thereto. *People v. Machel,* 44 Cal. Rpts. 126 (1965).

While rule permitting temporary detention for questioning is operative under circumstances short of probable cause to make an arrest, there must exist some suspicious or unusual circumstance to authorize even this limited invasion of citizen's privacy. *People v. Machel, supra.*

Reasonable investigatory techniques may be pursued by police indoors as well as outdoors, and it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purpose. *People v. Machel, supra.*

Generally police officers may detain and question persons when circumstances are such as would indicate to reasonable man in a like position that such course is necessary to proper discharge of duty. *People v. Machel, supra.*

Reasonable search without warrant is valid where it is incidental to lawful arrest, and a seizure during such a search of evidence used in commission of crime for which arrest is made is permissible. *People v. Machel, supra.*

"Reasonable Cause" had been generally defined to be such state of facts as would lead man of ordinary care and prudence to believe and consciously entertain an honest and strong suspicion that person is guilty of crime. *People v. Machel, supra.*

Question of probable cause to justify defendant's arrest and search must be tested on facts which records show were known to officers at time arrest was made. *Supra.* Also *People v. Hernandez*, 40 Cal. Repts. 100.

"The right of police to investigate gives rise to right to conduct reasonable search for weapons in order to protect safety of officer." *People v. Garrett*, 47 Cal. Rpts. 731 (1966).

The rule that circumstances short of probable cause to make an arrest may still justify an officer stopping pedestrians or motorists on the street for questioning does not

conflict with United States Constitution, Fourth Amendment forbidding unreasonable searches and seizures, but strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement, and wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified. *People v. Mickelson*, 59 Cal. Rpts. 2d 448 (1963).

If we recognize the authority of the police to stop an individual and inquire concerning unusual street events (*U. S. v. Vita*, 294 F. 2d 524, 530: *People v. Marendi*, 213 N. Y. 600, 609; in a similar direction, *U. S. v. Bonamo*, 180 F. Supp. 71, 81, 83, which although reversed on other grounds sub nom. *U. S. v. Bufalino*, 285 F. 2d 410, was cited on this point with approval in *Vita* at page 530), we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger and the safety and welfare of the officer (the public's interest) could be very great. The frisk for weapons is a reasonable and constitutionally permissible precaution to minimize that danger in the interest of safety and welfare.

We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers encountered in performing this kind of public duty.

We submit, therefore, that the "stop and frisk" (for weapons) based on probable cause is constitutionally permissible as inuring to the benefit of an agent for society (the policeman) in establishing law and order and protecting the interest (safety and welfare) of society.

**III. The decision of the Eighth District Court of Appeals, which the petitioner is seeking to have this Court overturn, does not contravene federal constitutional standards of reasonableness prescribed by the Fourth Amendment.**

The search most commonly made by law enforcement officers and the subject of the petitioners' complaint herein is that of the person of the accused whom the officer had arrested. Searches of the person, if made, must conform to federal constitutional standards. The Fourth Amendment provides, in part, that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

A person may be searched by a search warrant, although this method is seldom used. The vast majority of searches of the person are made incidental to lawful arrests. It is the law on this question of search with which we will deal.

The English and American law has always recognized the right on the part of the government to search the person of the accused when legally arrested. *Weeks v. U. S.*, 232 U. S. 383, 392 (1914); *Abel v. U. S.*, 362 U. S. 217 (1960).

> "The law on this subject has long been so well settled that it is useless to do more than state it whenever the occasion arises." *Lefkowitz v. U. S. Attorney*, 52 F. 2d 52 (1931), aff. 285 U. S. 452.

The right to search applies to arrests for misdemeanors as well as to those for felonies, *U. S. v. Snyder*, 278 F. 650 (1922); *Davis v. U. S.*, 328 U. S. 582 (1946) assuming an arrest in the full sense of the term.

The legal basis of the right to search is given by law to the arresting officer for three reasons:

1. to protect the officer against harm;
2. to deprive the prisoner of potential means of escape; and
3. to prevent destruction of evidence by the arrested person.

Mr. Justice Frankfurter, dissenting in *U. S. v. Rabinowitz,* 339 U. S. 56 (1950); *Abel v. U. S., supra* at 236.

If the arrest of the person is unlawful, any subsequent search made incidental to arrest is unreasonable. *U. S. v. DiRe,* 332 U. S. 581 (1948); *Brandon v. U. S.,* 270 F. 2d 311 (1959), Note 5, cert. den. 362 U. S. 943; *Bynus v. U. S.,* 262 U. S. 465; *Williams v. U. S.,* 237 F. 2d 789 (1956).

No matter how valid the arrest may be in a technical sense, if the court finds that it was used by the officers simply as a pretext to make a search of the person, the search is unreasonable. *Taglavore v. U. S.,* 291 F. 2d 262 (1961). "An arrest may not be used as a pretext to search for evidence." *U. S. v. Lefkowitz,* 285 U. S. 452 (1932).

The search of the person, incidental to arrest should be made by one or more of the arresting officers. *U. S. v. Grieco,* 25 F. R. D. 58 (1960).

The officer's right to make a search of the person incidental to arrest being predicated upon the arrest, the search must follow the arrest, not precede it. *White v. U. S.,* 271 F. 2d 829 (1959); *U. S. v. Hamn,* 163 F. Supp. 4 (1958).

At this point the distinction made by the trial court and the appellate court comes into this case. It is submitted that the foregoing rule in the *White* and *Hamn* cases and the decision in the *Mapp* case *will not* outlaw

a state officer's frisking or even a search of the person made prior to arrest. Under the Uniform Arrest Act, adopted with modifications in Delaware, New Hampshire and Rhode Island, "a peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in Section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person." *The Uniform Arrest Act*, 28 Virginia Law Review 315 at 344 (1942).

The petitioners argue, of course, that a frisking is a search in the full meaning of that term. The frisk as it is described in the actual events that occurred in this case, however, and as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried. The frisk is less such an invasion of the person in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person.

This is exactly the distinction the trial judge made:

> "The constitutional restriction is against unreasonable searches; not against all searches. And what is reasonable always involves a balancing of interest: here the security of the public order and the lives of the police are to be weighed against a minor inconvenience and petty indignity. A similar police procedure has long been sustained in California." *People v. Martin*, 46 Cal. 2d 106 (1956).

As the Court of Appeals noted, a State is not precluded from developing workable rules governing searches to

meet the practical demands of effective criminal investigations on law enforcement if the state does not violate the constitutional standard of what is reasonable. *Ker v. Calif.*, 374 U. S. 23, 34, 31 LW 4611.

It is therefore urged that the issue raised by the petition for certiorari has been effectively disposed of in the decisions of the Ohio courts sustaining the legal authority of a police officer to stop and question persons upon some probable cause and, if need be, to frisk for weapons to insure the protection of the officer and the safety and welfare of the community.

It is argued by the petitioners that the trial court made a finding that the arrest was unlawful and that after making such a finding of illegal arrest the court should have suppressed the evidence. We cannot agree with this. The trial court never held that these men were illegally arrested in this case. The court merely said that had the arrests preceded the frisking of the men, such arrests would then have been illegal. The court then delineated the distinction between "frisking" as commonly practiced by police officers when they stop a suspect and the search of the person incident to arrest.

If we accept the law of "stop and frisk" as a benefit to society in the interest of safety and welfare, the subsequent factual situation must be looked into in the light of that law to establish whether we have a legal arrest and a search incident thereto.

There appears to be no question but that the trial judge, defense counsel and the prosecuting attorney all agree that up to the point the petitioners were frisked by the detective probable cause for an arrest did not exist. Petitioners contend that the arrest occurred when the men were stopped notwithstanding the decision of the Court of Appeals that the stopping did not constitute an arrest.

What, then, was in the mind of the officer after he had observed the activities of the petitioners which led him to conclude that they were "casing a place for a stick-up"? From the testimony it can only be concluded that the officer approached the three men solely for the purpose of routine interrogation and had no intention of detaining them beyond the momentary requirements of that mission. Upon identifying himself as a police officer and asking them their names and their responding by muttering something incomprehensible, coupled with his conclusions made from his prior observations ("they were casing a job, a stick-up"), the officer was confronted with only one course of action to a good police officer. Frisk for weapons for protection of his own life. "I wanted to see if they had any guns." (R. 137.) To this point in our facts there is no basis for an arrest. Had the officer frisked and found nothing there would have been no grounds for an arrest.

The officer while frisking, through his sense of touch felt a bulge in the upper left breast pocket which he decided was a gun. We must at this point recall that here is an officer with thirty-nine years experience and training, who has had countless opportunities to recognize the presence of weapons concealed under a suspect's clothing. Applying this to the observations of these men which he had made previously, the only intelligent conclusion that a trained police officer could make was that the defendant was at that time committing a felony in the presence of the officer by carrying a concealed weapon. To this point there has been no arrest, no search. Arrest followed immediately thereafter when the men were ordered to move inside the store and place their hands against the wall. Where there was no previous intent to detain, there is now; where there was no previous probable cause to arrest, there is now. The defendants are not free

to go at liberty. They were under arrest. Even though technical words of "you are under arrest" were not spoken, a valid arrest had been made.

Arrest is to deprive a person of his liberty by legal authority. The seizing of a person and detaining him in the custody of the law. R. C. Section 2935.01, *Bouvier's Law Dictionary,* Baldwin's Revision.

An arrest in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime. 5 *O. Jur.* 2d, Arrest Sec. 3.

Arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subject the person to the actual control and will of the person making the arrest. 5 *O. Jur.* 20, Arrest Sec. 2, 57 *O. Jur.* 2d Words & Phrases 70.

It was not until after the act of arresting these men that an actual search of their persons was made.

Thus, here we have a lawful arrest after, not before, the frisk. The search of the person incidental to said arrest is therefore lawful. *Weeks v. U. S., supra; Abel v. U. S., supra; Lefkowitz v. U. S. Attorney, supra.*

In discussing all the facts and law pertaining to this case, in addition to the state's position being sustained by the law there is sound public policy reasons which dictate that the Court of Appeals' ruling should be upheld. As was indicated in the *Rivera* case, *supra,* "The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. * * * if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

A consideration of the law, public policy, and the interest of the community compels the conclusion that the conduct of the police was not violative of the federal constitutional standards of reasonableness prescribed by the Fourth Amendment and that the decision of the Court of Appeals upholding such conduct properly applied such constitutional standards.

Since there is no justiciable issue that has not been decided in accordance with applicable law, we respectfully submit that the petition for a writ of certiorari be denied.

Respectfully submitted,

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