

# Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

Docket No. 143

JAMES PALMER,

Appellant

vs.

CITY OF EUCLID, OHIO

Appellee

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C O N T E N T S

1	<u>ARGUMENT OF:</u>	<u>P A G E</u>
2	Niki Z. Schwartz, Esq., on behalf	
3	of Appellants	2
4	David J. Lombardo, Esq., on behalf	
5	of Appellee	20
6	<u>REBUTTAL:</u>	
7	Niki Z. Schwartz, Esq.	28
8		
9	* * * * *	
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11		
12		
13		
14		
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16		
17		
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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

JAMES PALMER,

Appellant

vs

CITY OF EUCLID, OHIO,

Appellee

No. 143

The above-entitled matter came on for argument at  
2:15 o'clock p.m. on Monday, January 11, 1971.

## BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

NIKI Z. SCHWARTZ, ESQ.  
1320 The Superior Building  
Cleveland, Ohio 44114  
On behalf of Appellant

DAVID J. LOMBARDI, Prosecutor,  
City of Euclid, Ohio  
City Hall  
On behalf of Appellee

1                                    P R O C E E D I N G S

2                    MR. CHIEF JUSTICE BURGER: We will hear arguments  
3 in Number 143, Palmer against the City of Euclid, Ohio.

4                    Mr. Schwartz, you may proceed whenever you are  
5 ready.

6                    ORAL ARGUMENT BY NIKI Z. SCHWARTZ, ESQ.

7                    ON BEHALF OF APPELLANTS

8                    MR. SCHWARTZ: Mr. Chief Justice and may it please  
9 the Court: the issue in this case is the constitutionality  
10 of Section 583.01(e) of the Ordinances of the City of Euclid,  
11 Ohio, which makes it unlawful for any suspicious person to be  
12 within the municipality and Part E definining a suspicious  
13 person as any person who wanders about the streets or other  
14 public ways or who is found abroad at late or unusual hours of  
15 the night without any visible or lawful business and does not  
16 give a satisfactory account of himself.

17                    Now, this question azises on the following facts:  
18 on April 19, 1967 an off-duty Euclid policeman who was a part-  
19 time job as a patrolman or watchman at a very large apartment  
20 complex in the City of Euclid, had his concern alerted by  
21 noticing a car driving slowly in the parking lot of the apart-  
22 ment complex at a speed he estimated at three to five miles an  
23 hour, with the lights off.

24                    Secondly, he testified that his suspicion was  
25 aroused by the fact that the car stopped and discharged a



1 "colored female" and he knew that no colored female lived in  
2 that apartment complex and this aroused his suspicion.

3 The third thing he testified to that aroused his  
4 suspicion was that after discharging the female, the car,  
5 which was ultimately determined to be driven by the Appellant  
6 or defendant here, James Palmer, turned on its lights, pulled  
7 out to the street, and parked.

8 Upon approaching the car the officer testified  
9 that he noticed the Appellant speaking over a Citizen's Band  
10 or two-way radio. As a result of these three things he asked  
11 Palmer to get out of the car; put him up against the car;  
12 demanded his license, driver's license, which was furnished,  
13 and asked him to explain what he was doing there. He explained  
14 that he had discharged the friend.

15 Further inquiry about the identity and purpose of  
16 the friend resulted in no response.

17 Q Does the record show that --

18 A The record shows that following the un-  
19 satisfactory response as far as the officer was concerned, he  
20 marched the defendant into the building at gunpoint, called  
21 for assistance from the police department and a search was  
22 conducted of the entire premises and the girl was not found.  
23 Subsequently the defendant finally agreed to state where he  
24 thought that the girl had gone; the specific apartment number.  
25 They went up to that apartment, but by this time it was 2:30

1 or 2:35, 3:00 o'clock in the morning and knocked on the door  
2 of that apartment, the police officer. And a male answered the  
3 door and was asked was a colored female on the premises and  
4 upon being informed that the answer was no, the officers left,  
5 continuing to search on the premises for the girl.

6 Q Does the record show any burglary incidents  
7 in the area in the immediate past?

8 A The record shows that there were no reports  
9 of any incident of any kind but there was not ever any report  
10 of any crime having been committed that night.

11 After Palmer was stopped, frisked, detained,  
12 arrested, searched, taken to the police station and interro-  
13 gated, the stolen car sheet checked, it was determined that  
14 absolutely no substantive offense had ever occurred, and that  
15 there was not a scintilla of evidence of any having ever  
16 occurred.

17 And subsequently, Palmer was charged with being a  
18 suspicious person, in violation of this section.

19 Now, at first blush, perhaps, this case seems to  
20 be another in a line of cases testing police investigatory  
21 powers such as individual liberty, many of which incredibly  
22 arise out of the Cleveland area: Mapp versus Ohio, Beck versus  
23 Ohio and Terry versus Ohio.

24 But there is one crucial difference in this case.  
25 In those cases the issue was: conceded the guilty man or woman

1 go free in order to serve some interest of constitutional  
2 liberty.

3 Here the issue is: shall an innocent man be  
4 convicted and incarcerated in order to serve some punitive  
5 interest in law enforcement or maintenance of order? And I  
6 am prepared to demonstrate that this ordinance on its face and  
7 as applied, does great violence to hallowed constitutional  
8 rights with no justification of necessity for law enforcement  
9 or maintenance of order.

10 Q Well, what sentence did this man get?

11 A The man was sentenced to pay a \$50 fine and  
12 costs or to serve 30 days in the Cuyahoga County jail.

13 Q Has he served this --

14 A No; by order of Mr. Justice Stewart, the  
15 serving of sentence has been stayed and originally pending  
16 filing of a jurisdictional statement and now pending the out-  
17 come of the case.

18 There are three fundamental tasks on this ordinance  
19 on its face, and as applied and time perhaps will not permit  
20 me to deal with all of them as fully as I might wish.

21 The first is vagueness. The rule of void for  
22 vagueness, serves three primarily interests: that of furnish-  
23 ing notice to those who wish to conform their behavior to law  
24 so that they might know what they may do and what they may  
25 not. The second purpose is limiting the discretion of law

1 enforcement officers of courts and juries within some des-  
2 cribed standards in order to prevent arbitrary and discriminatory  
3 enforcement.

4 And the third is to prevent the ordinance from  
5 being construed too broadly to encompass or trench upon con-  
6 stitutionally protected conduct.

7 Q Like what?

8 A Like what?

9 Q Yes.

10 A In this particular instance? Frequently the  
11 doctrine presents itself most often in terms of First Amendment  
12 activity.

13 In this particular instance the constitutionally  
14 protected conduct involved is the right to liberty without,  
15 except upon articulable suspicion or articulable facts that  
16 constitute, in effect, reasonable suspicion under Terry to  
17 justify a stop and frisk; probable cause to believe that a  
18 crime is being committed in order to justify an arrest and  
19 proof beyond a reasonable doubt that a crime had been com-  
20 mitted in order to justify a conviction and incarceration  
21 pursuant to that conviction.

22 And so there is a liberty of movement here, free-  
23 dom of movement, which is one of the constitutionally protected  
24 interests involved. Other constitutionally protected inter-  
25 ests are the right to be free of discriminatory enforcement.



1 These interests are served, these purposes are served by the  
2 vagueness doctrine.

3 Now, usually when a case comes here on the issue  
4 of vagueness, the whole case turns on the meaning of a single  
5 word or phrase, as we just saw in the last case. The real  
6 question was: what does "annoying," mean and is that suffi-  
7 ciently precise.

8 Here we've got four or five phrases which indi-  
9 vidually each is vague; together they are impossible.

10 "Wanders;" what is "wanders?" What does that mean? We see in  
11 judicial opinions that there are at least three competing  
12 interpretations of wander.

13 In the Ohio Supreme Court decision in Columbus  
14 versus De Long you have the majority striking down a statute  
15 on the ground that "wander," by virtue of being defined as  
16 aimless motion without any purpose, cannot include a criminal  
17 purpose, therefore it is limited to innocent conduct and  
18 therefore the ordinance was held unconstitutional.

19 On the other hand, the dissent says that within  
20 the context, that wander must necessarily mean or be limited  
21 to a criminal purpose, wandering for a criminal purpose or a  
22 wrongful purpose and therefore the ordinance should be upheld.

23 In Seattle versus Drew the Court struck down a  
24 similar ordinance because it said "wander," can mean either  
25 innocent or culpable conduct. And in that sense, being too

1       vague is too broad, as well.

2               "Abroad at late or unusual hours of night without  
3       visible or lawful business," is simply, it seems to me, a  
4       nighttime version of wandering and without visible and lawful  
5       business begs the question as to what it is that's prohibited  
6       and what it is that's protected.

7               Is Professor Wright's walking the streets at  
8       midnight visible or unlawful business when he has no defined  
9       purpose?

10              Then the question we come to, the most incredibly  
11      vague of all phrases, and the one that renders the ordinance  
12      most defective, in my opinion: "Does not give satisfactory  
13      account of himself." Satisfactory account to whom? Who may  
14      demand it? Who must be satisfied? Over what period of time  
15      must they be satisfied? Is a credible but untrue account  
16      satisfactory? Is a true but incredible account satisfactory?

17              It's purely subjective; it purely just throws open  
18      the door to the police officer in the first instance; the  
19      judge and/or jury in the second instance, to decide whether  
20      it's satisfactory, and even to decide who must be satisfied.  
21      Is the issue at trial whether the officer was satisfied or is  
22      the issue whether the judge and jury are satisfied?

23              Now, the same principles, same defects in here in  
24      discussing this in terms of its propensity for arbitrary and  
25      discriminatory enforcement: ordinarily a statute which is

1 inordinately vague simply by virtue of its vagueness, facili-  
2 tates arbitrary or discriminatory enforcement. But here,  
3 explicitly it authorizes arbitrary or subjective enforcement.  
4 And it is what the Court has previously described in other  
5 cases, as government by a moment-to-moment opinion of the  
6 police officer on the beat.

7           The law as it's drafted on its face can't possibly  
8 be indiscriminately enforced across the board. It is incon-  
9 ceivable that that could be done. The Law Review literature  
10 is replete with discriminatory enforcement of these kinds of  
11 ordinances, against Hippies, Yippies, beatniks, bums, people  
12 of unconventional dress, behavior, length of hair and so on. And  
13 against Black persons.

14           What would you say, counsel, about the  
15 arguments that they have increasingly in the case of speed,  
16 reasonable speed under the circumstances. Is that not subject  
17 to discriminatory enforcement against certain categories of  
18 people?

19           This is --

20           A     Well, Ohio has exactly such speed laws and  
21 of course, any law could be subjected to discriminatory en-  
22 forcement in the sense of arrest and prosecution and so on.  
23 On the other hand, in dealing with the question of was the  
24 speed reasonable under the circumstances, there are objective  
25 indicia that one can look at to determine reasonableness. For

1 example: how many cars were on the highway? What were the  
2 weather conditions? What was the width of the highway? How  
3 much access was there? On a side road were there traffic  
4 lights?

5 So, all of these things are objective indicia  
6 that one can look at to determine reasonableness.

7 Q Coming back to the disposition of those  
8 cases is it not true as a practical matter that invariably  
9 or almost invariably the evidence consists of the evidence of  
10 the arresting officer and the accused person?

11 A More often than not that is the case.

12 Q Much as you have in this type of situation.  
13 Each of them is susceptible of abuse.

14 A I think any law is susceptible of abuse, but--

15 Q These two in a very parallel way; aren't they?

16 A Well, enormously different in degree if not  
17 in kind, Your Honor, in terms of the propensity of the lan-  
18 guage to facilitate this kind of thing.

19 We don't have to speculate on the capacity for  
20 arbitrary enforcement here by, in terms of the other cases  
21 of the Law Review article; we have right in this very case an  
22 example of race being used as a factor. In fact, I might  
23 argue that race is almost an element to the offense here,  
24 because it's one of the key factors in why we are -- the  
25 officer testified that his suspicion was aroused.



1 In other words, this is a Black person in a  
2 white neighborhood at night and he shouldn't be there. He is  
3 automatically suspicious by reason of being there.

4 Q Did your client represent himself in the --

5 A Yes, he did. He tried the case himself and  
6 he handled the appeal all the way through the Ohio Supreme  
7 Court.

8 Q Is he a lawyer?

9 A No, he is not.

10 I confess from reading the record it's a fair  
11 question; whether he --

12 Q He did a good job.

13 A A remarkable job for a layman, I think. The  
14 first thing that struck me upon reading the record when he  
15 came to me.

16 But, to talk about --

17 Q Was this female companion ever found or  
18 identified?

19 A No.

20 Q Just they asked those two bachelors whether  
21 she was there and they said: no; was that it? And they were  
22 satisfied with the answers? Or at least they went away but --

23 A If they weren't --

24 Q They had no search warrants?

25 A No; they didn't, although they could

1 conceivably have stationed one officer at the door and sent  
2 the other officer after one.

3 But, to talk about vagueness here while the  
4 vagueness evils are legion, it's the least of the evils, be-  
5 cause vagueness is subject to -- it suggests a drafting  
6 problem; it's subject to being cured by greater precision  
7 drafting.

8 But, assuming you could get over all the vagueness  
9 hurdles by converting this into more precise language, you  
10 still have an ordinance which the fundamental purpose is  
11 rotten(?) because it punished the arousing of suspicion and  
12 a failure or refusal to dispel that suspicion. And that  
13 flies in the face of a number of important constitutional  
14 principles.

15 And, as I mentioned earlier, it permits various  
16 levels of deprivation of liberty -- well, it permits the  
17 ultimate deprivation of liberty: conviction and imprisonment  
18 on fact that may not even be sufficient to justify a stop and  
19 frisk under Terry. We don't have to decide whether it was  
20 sufficient to justify a stop and frisk under Terry; we don't  
21 have to decide whether it was sufficient to justify an arrest  
22 under Beck.

23 What we have to decide is: is there proof beyond  
24 a reasonable doubt of criminal activity that justifies the  
25 conviction?

1           And in addition to subverted, these standards  
2           constitutionally derive standards of proof for stop and  
3           frisk, arrest and conviction, but burden of proof by reason  
4           of the satisfactory account clause is thrust on the defendant.  
5           He's got to be able to explain away all of the ambiguities or  
6           suspicions of his behavior.

7           As far as the satisfactory account clause, it  
8           also has the defect of compelling a violation of the privilege  
9           against self-incrimination. I would rely, in the interest  
10          of time, primarily on my brief on that point or I would like  
11          to deal with the citation of the Appellee to the Miranda  
12          case here. This is not a Miranda case.

13          The issue here is not whether or not statements  
14          given by the defendant with sufficient advice and sufficient  
15          knowledge of his rights to be able to be introduced into  
16          evidence. The issue, rather, is whether or not the City of  
17          Euclid and a multitudinous other cities similarly situated,  
18          can compel, by threat of 60 days imprisonment, which is the  
19          statutory maximum, but the defendant here was only sentenced  
20          to 30 days, can compel him to face the choice of either going  
21          to jail as a suspicious person for failure to give a satisfac-  
22          tory account of himself or conversely, giving up his privilege  
23          against self-incrimination and incriminating himself.

24          Q     Well, could I ask you: under this ordinance if  
25          someone is found on the streets late at night: 2:30, 3:00

1 in the morning, and the officer asked him what he was doing  
2 and he says, "None of your business," and remains quiet, does  
3 all the state need to do to prove its case under this ordinance  
4 is to show those facts: he was found late at night on the  
5 streets and he remained mute. Is that the entire extent of  
6 the State's burden?

7 A That's a good question which I have an  
8 impossible time answering because the thing is so vague. I  
9 assume that in the Euclid Municipal Court one could get a  
10 conviction on those facts, but I --

11 Q Yes, but the ordinance says that the fact  
12 of being found on the street without lawful business. How  
13 does the State satisfy its burden of showing that somebody is  
14 on the street without lawful business?

15 A Without visible or lawful business.

16 Q Well, I know, but that just means lawful  
17 business.

18 A I don't know how we can just read that --

19 Q Well, it doesn't mean visible and lawful;  
20 it says visible or lawful.

21 A Visible or lawful.

22 Q Well, the State can certainly say there  
23 wasn't anything visible about -- he had no business that was  
24 visible, anyway. Now, how about lawful?

25 A Well, you see, if the "visible" weren't in



1 there and the State had the burden of showing of showing that  
2 he was engaging in unlawful conduct it would be a vastly  
3 different ordinance.

4 Q Well, I know, but --

5 A They take the visible or lawful to mean that  
6 it's -- the burden is on the defendant --

7 Q Well, it doesn't if the State has got some  
8 burden to show that he was on the street without lawful  
9 business.

10 A Well, --

11 Q Does it have the burden or not; it seems  
12 like that's part of the illegality is being on the street  
13 without lawful business.

14 A No; I read the State's case here as consis-  
15 ting of the fact that -- well, the officer testified that no  
16 law that he knows of was broken, including the minute, parking,  
17 driving, traffic and so on. There is no law to his knowledge,  
18 broken. Now, where is the unlawful activity?

19 Q Well, he was driving without lights; wasn't  
20 he?

21 A In the parking lot. He turned on his lights  
22 before pulling out on the street, and on the private parking  
23 lot it was not an offense to drive without lights. The  
24 officer so testified. It's in the record.

25 Q Then he was not trespassing either?

1 A He said he was not trespassing either.

2 Q Why wasn't he trespassing if it was a private  
3 parking lot?

4 A He was bringing a person to the apartment.  
5 We dont know for what purpose he brought that person to the  
6 apartment.

7 Q Did he give that explanation, or is that  
8 yours?

9 A No, no; he gave the explanation.

10 Q In those terms.

11 A He gave the explanation that he had come,  
12 that he had brought the friend to the apartment. Now, what he  
13 did not explain was who the friend was and what the friend's  
14 purpose was.

15 Q So that in that posture the officer could  
16 disbelieve him if he wanted and as could the tryer of facts;  
17 could he not?

18 A Could disbelieve him on the fact of his  
19 bringing her over --

20 Q When he didn't identify the circumstances.

21 A Certainly; certainly.

22 Q He didn't testify, as a matter of fact at the  
23 trial. When I relate what he said I am talking about the  
24 officer's testimony as to what he was alleged to have said on  
25 the premises at the time that the violation occurred.

1                   Now, as to trespass, I don't know any facts that  
2 would render this a trespass, in the sense that this is an  
3 enormous apartment complex in which, with a kind of quasi-  
4 public-private parking lot. When I say "private," I mean it's  
5 not a dedicated thoroughfare such that the traffic laws  
6 requiring lights at night are applicable. It's quasi-public  
7 in the sense that it's an enormous parking lot for the use of  
8 residents and visitors as well.

9                   Q     You mean to say that it would be all right to  
10 drive around without the lights on on that parking lot?

11                  A     As far as the laws requiring one to have his  
12 lights on in his car at night is concerned; yes.

13                  That's the officer's testimony in the record; it's  
14 not my interpretation.

15                  Now, having briefly demonstrated the constitutional  
16 defects of this ordinance, both on its face and as applied  
17 here, the question arises: is there any necessity in the  
18 demands or needs of order or law enforcement to justify these  
19 infringements. If there ever was a need for this kind of a  
20 law it has been dissipated.

21                  The argument for this kind of a law historically  
22 has been Fourth Amendment concepts of probable cause and Fourth  
23 Amendment concepts of probable cause had been inadequate to  
24 allow the police to engage in pre-probable cause, investigation  
25 and inquiry.

1           This Court, I think, by a decision in the Terry  
2 case, has taken the question of police right to inquire and  
3 to investigate prior to probable cause on a point that they  
4 wish to analyze by itself, but does it have to be attached to  
5 a subsequent charge of a substantive offense. And there are  
6 a host of, a lot of questions unresolved by Terry which don't  
7 have to be resolved here.

8           But, without passing from the constitutionality of  
9 any of his alternatives, such alternatives as the American Law  
10 Institute's Model Code of Pre-Arrest Procedure and the  
11 Uniform Arrest Act; the New York Stop and Frisk Law; the  
12 common law authority recognized in Terry versus Ohio in the  
13 state version of the case. All of these alternatives are  
14 available to the City of Euclid, to the State of Ohio, to law  
15 enforcement officers, or possibly available to them, obviating  
16 the necessity for making a substantive offense out of what is  
17 merely cause to investigate.

18           Q     Well, do you think the state could have or  
19 could the city have an ordinance establishing a curfew saying  
20 no one should be on the streets after 2:00 a.m. except for  
21 going to and from employment or going to and from a doctor or  
22 hospital?

23           A     No; I don't think so. I think that's too  
24 large an infringement on freedom of movement without some  
25 particularized --



1 Q Well, what if your answer would have been  
2 contrary, that the city could have that? Do you think that  
3 has any bearing on your case?

4 A Well, if my answer were that the city could  
5 have that, then certain portions of my argument about the  
6 defects of this ordinance would be limited. Those that would  
7 not would be: quasi-vagueness and the complaints about compel-  
8 ling violation against the privilege against self-incrimina-  
9 tion.

10 Q On the last one, presume you had a statute  
11 like that in the District and a man in ragged overalls was  
12 walking in front of the Mayflower with a woman's sable coat  
13 off his arm; do you think a policeman could ask him: "Begging  
14 your pardon, sir, but what are you doing with that coat?"

15 A With a woman's what?

16 Q Sable coat.

17 A Certainly he could ask him; no question about  
18 it.

19 Q The point I want to get in this: are you  
20 objecting to the questions the officer asked or are you really  
21 objecting to the fact that he was punished?

22 A I'm not objecting to the officer asking  
23 questions; I'm objecting to the fact that after all the  
24 questions were asked and all the searches and frisks and in-  
25 terrogations are conducted there is no evidence of a crime

1 having been committed and the man is supposed to go to jail for  
2 30 days.

3 The key point, the whole theme of this case is  
4 that we're not talking about the scope of police investigatory  
5 powers. That should be dealt with directly by this Court, on  
6 its own merits. And it should not be necessary to have  
7 subterfuge substantive offenses in order to deal with the  
8 question of what's the appropriate scope for these investiga-  
9 tive powers.

10 I would like to reserve the rest of my time for  
11 rebuttal.

12 MR. CHIEF JUSTICE BURGER: Very well.

13 Mr. Lombardo.

14 ORAL ARGUMENT BY DAVID J. LOMBARDO, ESQ.

15 ON BEHALF OF APPELLEE

16 MR. LOMBARDO: If the Chief Justice please and may  
17 it please the Court:

18 The saying that bad facts make bad laws does not  
19 apply in this case and we would both agree, my adversary and  
20 myself that whatever the outcome of this hearing that the fact  
21 issue, the fact situation in this case is a classic case of  
22 suspicious person arrest.

23 Q Of what?

24 A Of an arrest under this ordinance.

25 I think this is the type of activity that was

1 intended by the legislature to be prohibited. So we can't  
2 argue that the facts are bad.

3 Again, we've got to take into consideration what  
4 the facts are. The time of the morning: 2:30 in the morning.  
5 You have a large apartment complex where the police officer  
6 did testify there had been burglaries, larcenies and break-ins,  
7 numerous. You've got an automobile without lights moving  
8 very slowly. You have an automobile discharging a woman that  
9 the police officer knows not to be a tenant there. The fact  
10 that she was colored is useful in her identification and we  
11 will talk about that later.

12 Q Why do you know that she wasn't a visitor  
13 there?

14 A She could have been. She wasn't a resident  
15 there.

16 Q The fact is she was, apparently. Whether on  
17 legal or illegal business she did go into the apartment  
18 building.

19 A I don't argue that. She was a visitor. But  
20 he knew she wasn't a resident.

21 Q Why?

22 A Because there were no colored living in that  
23 apartment at that time.

24 Q And the policeman knew that?

25 A Yes, sir.

1                   That's what he so testified to.

2                   Q     How many residents were there?

3                   A     I think there's approximately 1500.

4                   Q     I mean I just wondered if they had blood  
5 tests and all -- never mind.

6                   A     Well, since you raise that point, let's get  
7 to it now. The other argument in the Appellant's brief is  
8 that this is a racial type thing; it was brought up in his  
9 argument. Nothing could be further from the truth. The only  
10 mention of race in this entire trial, in the entire procedure  
11 from the lower court to here, is when the police officer  
12 said --

13                  Q     But you mentioned it within two minutes of  
14 your argument.

15                  A     That's right. This is one of the things he  
16 saw. Now, suppose I had said that a policeman had testified  
17 that a one-armed woman got out of the car and there were no  
18 one-armed women in the apartment. Would he then be discrimina-  
19 ting against one-armed women?

20                  Of course not. We can't -- being Black is a  
21 fact; and being Yellow is a fact and being Italian is a fact.

22                  Q     You are about to convince me.

23                  A     No, all I am saying is that when a policeman  
24 sees someone or anyone does for a short period of time, race  
25 is sometimes, no matter what the race, the most obvious thing



1 about the person. And certainly I could say I saw a colored  
2 woman or I saw a Chinese woman or I saw an Indian. It doesn't  
3 mean it's discrimination. Not only that, but we've got to  
4 look at the entire proceedings.

5 Now, my adversary said that Palmer was an  
6 amateur(?) that he represented himself; that he did a marvelous  
7 job in the trial and I think it is obvious from the record at  
8 the trial that he was given much more latitude in the trial  
9 than any attorney would have. I think he was treated fairly  
10 and justly all the way through this thing.

11 All I am saying is that in this case race is a  
12 valid thing to bring up only as to identification of the  
13 person. That's all.

14 Getting back to the original fact situation. The  
15 driver then stopped his car after he pulled out of the park-  
16 ing lot, put his lights out, communicated on a two-way  
17 radio which the policeman testified the modern-day criminal is  
18 using more and more in his criminal activities.

19 Now, at this point the police officer would have  
20 been nothing short of remiss had he not proceeded further  
21 to interrogate the Appellant. There is no question that he  
22 was proper in going forward to ascertain just what he was  
23 doing there. The Appellant then refused to give an explanation  
24 of what he was doing.

25 Now, we hear arguments that we cannot leave the

1 determination of what is reasonable to the police officer.  
2 You must leave it to the police officer. The uniformed  
3 patrolman is our first line of defense. If he cannot be  
4 trusted to make a judgment on the street then why do we hire  
5 other policemen?

6 Q Was this man in a uniformed patrolman at this  
7 time?

8 A Yes. He was in uniform, Your Honor; yes, sir.

9 Q When he was on private duty.

10 A Yes, he was on private duty but he was in  
11 uniform.

12 Q Well, then he is not called a municipal  
13 authority at this time?

14 A Well, I believe that a police officer is a  
15 police officer 24 hours a day as to those terms involving a  
16 breach of the peace.

17 Q Is that true -- are you suggesting that is a  
18 proposition of law under the Ohio statute?

19 A Yes, sir.

20 Q Was he on private duty for that apartment  
21 house?

22 A Yes, sir.

23 Q The all-white apartment house?

24 A At that time it was.

25 Now, the argument that we're asking you to extend

1 to Terry is the same fact situation of the right to pat down  
2 and make an arrest, I can't argue with, because that is  
3 exactly what we're asking you to do.

4 Because, in the Terry case the fact situation  
5 would have been the same; that Officer McFadden in that case  
6 approached Terry and Terry had not been able to give an ex=  
7 planation of what he was doing there, but under this ordinance  
8 he could have arrested him. I'm not going to stand here and  
9 tell you that there is a difference, because there isn't.  
10 We're asking you to extend Terry, very simply.

11 Now, this Court has often said that it's not so  
12 much the words of an ordinance which determines whether or not  
13 it's constitutional, but the action that it allows; the con-  
14 duct it authorizes.

15 Okay, let's go back to this fact situation: you've  
16 got a policeman who observed some activity that might make him  
17 believe that criminal activity was afoot. He had the right to  
18 a further investigation. What part of the constitutionality  
19 of this ordinance would not be an open door to police abuse?  
20 I still think that before any conviction could stand under this  
21 ordinance the standards set out in Terry would have to be  
22 applied to it.

23 In other words, you cannot just see a man walking  
24 down the street and we say: what are you doing here and expect  
25 an explanation. This isn't it. The policeman in court, as he

1 did in this case, would have to quote these specific articul-  
2 able facts and say: I saw this, this and this; therefore my  
3 suspicions were aroused. I proceeded further.

4 Q Yes, but in Terry they found a gun in his  
5 pocket and they prosecuted him, not under that ordinance --

6 A I understand --

7 Q -- but for possession of the gun.

8 A Yes, Your Honor.

9 Q It's a little different here.

10 A Oh, I agree with you.

11 Q Thank you.

12 A So, he then goes forward and asks the  
13 suspect: what are you doing? IF the man refuses or is unable  
14 to give a satisfactory account of himself to the policeman  
15 and it is again the policeman's judgment at this time, as I  
16 think it must be, then he's subject to arrest.

17 It's necessary that there be a combination of  
18 both and both are going to be absolutely necessary for con-  
19 viction. First you've got to have the ascertainment of the  
20 facts that the policeman observed; why did he approach him in  
21 the first place and then the refusal or inability of the sus-  
22 pect.

23 Now, if the policeman -- strike that.

24 Would you not feel that this is open to discrimina-  
25 tory enforcement as was brought up a little earlier in the



1 case prior to this? If a policeman is going to discriminate,  
2 he's going to discriminate no matter what the law is.

3 You mentioned traffic. Of course in any traffic  
4 case it's the policeman's word against the individual's word  
5 and the judge almost always believes the policeman. And we  
6 have courts and we have juries and this is what this is for.  
7 That's why they are for.

8 I am going to be very brief because I think the  
9 issue is clear. You get down again to the old argument of  
10 the individual's rights against society's rights. You've  
11 only got to look at the crime rate on the streets -- I'm not  
12 crying wolf; it's true. You can't walk down the street in this  
13 town or most other big cities.

14 You've got to give the policeman on the beat --  
15 that's your first line, and sometimes the only line of defense.  
16 You've got to give him the power to combat this. Merely  
17 patting someone down, like in the Terry case I believe it was,  
18 they said: well, if he doesn't find anything after the fact  
19 then he should watch him a little bit longer. That's not the  
20 answer. A pat down alone is not going to be enough.

21 I think an arrest for a misdemeanor is necessary.

22 MR. CHIEF JUSTICE BURGER: Since you have indi-  
23 cated you are going to be brief, if you can finish by three  
24 minutes to three, we can finish the case tonight; otherwise  
25 we will go over. Your friend has three minutes left.

1 MR. LOMBARDO: Let me just say this: In Terry,  
2 in Sibron, this Court started to give the streets back to the  
3 people and I would ask you in this case to take the next step  
4 and give them back.

5 Thank you.

6 MR. CHIEF JUSTICE BURGER: Mr. Schwartz.

7 REBUTTAL ARGUMENT BY NIKI Z. SCHWARTZ, ESQ.

8 ON BEHALF OF APPELLANT

9 MR. SCHWARTZ: An awful lot of argument and  
10 debate took place before Terry about whether or not the  
11 limited intrusion of a stop and a frisk should be justified on  
12 less than probable cause. Now you are asked to extend Terry.  
13 You are asked to extend Terry to permit convictions on facts  
14 that at most under Terry would justify stop and frisk.

15 They would extend Terry to cover Katz. Katz was  
16 the third of the three persons frisked by McFadden in the  
17 Terry case; Katz didn't have a gun; the other two did. He  
18 wants to convict Katz, too.

19 Now, my position boils down to this: no question but  
20 there is a crime problem and it's an interest in reducing it,  
21 but that this ordinance is not necessary to reduce it because  
22 of other available means. While the American Law Institute  
23 debates whether 20 minutes is fair time to allow police in-  
24 vestigation, the Uniform Arrest Act allows two hours, only  
25 three or four states have adopted it in 30 years because of

1 concern over its constitutionality.

2 The City of Euclid wants the law to detain him  
3 overnight, convict him and send him to jail for 30 days.  
4 While the nation debates preventive detention, the City of  
5 Euclid wants preventive conviction.

6 It seems to me that the prices to be paid for for  
7 what the City of Euclid has asked is too great and that it's  
8 not necessary for law enforcement, given the fact that there  
9 are other alternative means dealing with regulating and per-  
10 mitting police investigatory power.

11 Q Does the record show where Mr. Palmer lived?

12 A The record -- I believe the affidavit shows  
13 his address on Court(?) Road, Cleveland, Ohio.

14 Q Does the record show what his occupation was?

15 A I don't believe it does.

16 Q He gave the police officer three different  
17 addresses, did he not?

18 A Yes, he did. The police officer testified  
19 that he gave him three different addresses when he was being  
20 interrogated at the police station, which of course was after  
21 the arrest had taken place. The third addresses the officer  
22 testified, turned out to be a correct address. There is no  
23 evidence as to whether or not addresses one and two were cor-  
24 rect in the sense of being alternative residences or places of  
25 business.

1 Q Did he ever state who owned the car?

2 A No, he did not state who owned the car. The  
3 police officer testified that their check of the stolen car  
4 sheet revealed that this was not a stolen car.

5 Q Was what?

6 A Had not been reported as such.

7 Q Did it have a license on it?

8 A Yes, sir.

9 Q Did it show whose license it was?

10 A It's not in the record. Only the fact that  
11 it was not stolen.

12 Q That it was not what?

13 A That is was not a stolen car. That's the  
14 only fact in the record. There is no evidence in the record  
15 as to whose car, in fact, it was.

16 Q Was there any evidence in the record linking  
17 this car radio telephone up with any legitimate business en-  
18 terprise?

19 A No, there was not, which goes, it seems to  
20 me, to the question asked by Mr. Justice White earlier as to  
21 whether or not visible or lawful goes together. In other  
22 words, where does the burden lie here?

23 Q Who has the responsibility of showing that  
24 his use of the citizen's band radio was linked up to an unlawful  
25 enterprise. Or does he have the burden of proving that it is



1 not linked to unlawful enterprise, and that's one of the  
2 defects in the statute.

3 Q Does the record show whether he was white or  
4 colored?

5 A Mr. Palmer? Yes, the record does show that,  
6 and that's an interesting fact, because unfortunately, in the  
7 printed appendix it's hard to tell what is printed and what is  
8 form on the affidavit and what is written, if you want to  
9 confirm this you can look at the original record. But, under  
10 -- on page 3 of the appendix under the affidavit, it calls  
11 for information of form. It says: birthdate, and then the  
12 officer fills in 5-17-32. Then it says: sex, and the officer  
13 puts M-colored. No informational request on the form for the  
14 defendant's race. It's wholly gratuitous, and I think that's  
15 perhaps not incidental.

16 Q Who made that out?

17 A Officer Zapanic.

18 Q The arresting officer?

19 A Yes.

20 Q And was he an officer on the police force of  
21 the City of Euclid, but he also, apparently had another job  
22 and that was as an employee of this apartment house; is that  
23 right?

24 A Right.

25 Q And in which job was he performing on the

1 night of the arrest?

2 A Well, I think he was performing in both of  
3 them. There was a case tried in Cuyahoga County a year or  
4 two ago in which the issue was that an off-duty police officer  
5 was killed, under circumstances where no premeditation or  
6 deliberation could be shown.

7 Q So, it was a first degree murder case if he  
8 was a police officer and carrying out his duty.

9 A That's right. And the court charged that he  
10 was.

11 Q I remember that case. But, that's, I think,  
12 the law of Ohio generally, where a police officer is a police  
13 officer 24 hours a day. I wonder if the record shows what his  
14 hours were as an employee of the police department of Euclid  
15 and what his hours were as an employee of this apartment  
16 house, this all-white apartment house where he kept Negroes  
17 out.

18 A Now, this is quite different from an apart-  
19 ment house; this is a massive apartment complex which the  
20 officer testified had a parking lot for 2,000 cars.

21 Q Yes, and which was he that night?

22 A Both.

23 Q You mean getting salaries from both of the  
24 two employers?

25 A Well --

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Q What does the record show?

A Well, I doubt that he was being paid by the City of Euclid for those precise hours.

Q He was moonlighting on a security job.

A He was wearing the City of Euclid police uniform. He made an arrest of the defendant at gunpoint and he called in his fellow officers. It seems to me he --

Q Well, the testimony, I don't have it right here, but I -- it rather struck me: he didn't refer to his fellow officers; he said he called the Euclid Police Department; not "my department," or "my fellow officers." I don't have it here; perhaps I misread it.

A I don't recall.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:00 o'clock p.m. the argument in the above-entitled matter was concluded)