In the

Supreme Court of the United States

FREDERICK E. ADAMS, Warden,
Petitioner,
vs.
ROBERT WILLIAMS,
Respondent.

No. 70--283

Washington, D. C.
April 10, 1972

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Monday, April 10, 1972.

The above-entitled matter came on for argument at 1:02 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DONALD A. BROWNE, ESQ., Assistant State's Attorney for Fairfield County, County Court House, Bridgeport, Connecticut 06604; for the Petitioner.

EDWARD F. HENNESSEY, ESQ., Robinson, Robinson & Cole, 799 Main Street, Hartford, Connecticut 06103; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-233, Adams against Williams.

Mr. Browne, you may proceed.

ORAL ARGUMENT OF DONALD A. BROWNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BROWNE: Thank you, Your Honor.

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

This matter evolves from a petition for writ of habeas corpus, which was filed by the present respondent, Robert Williams, in 1969, in the Federal District Court for the District of Connecticut.

Mr. Williams had been arrested in the city of Bridgeport, Connecticut, in October of 1966. He had been charged with a number of State criminal violations relative to his possession of a quantity of heroin, a pistol, and a machete. In those State prosecutions, Mr. Williams had filed motions to suppress those items, to prevent them from being used as evidence in his State trial. These motions were denied. Mr. Williams was subsequently convicted. He took an appeal to the Supreme Court for the State of Connecticut, which affirmed his conviction and likewise ruled that the items which had been taken from his possession by a Bridgeport police officer had not been taken illegally or in any violation of his constitutional rights.

Thereafter, Mr. Williams filed the instant petition in the District Court for the District of Connecticut. That court ruled likewise, that his rights had not been violated, and affirmed the prior decisions of the Connecticut court.

Thereafter the matter was appealed to the Circuit Court of Appeals for the Second Circuit. Initially that court again affirmed the lower court, the District Court ruling by a divided court, 2 to 1 decision, the respondent thereafter petitioned for a rehearing, and the rehearing en banc was granted; the result of which was a per curiam decision which reversed the lower court, the prior court decision, and ruled in fact that the Bridgeport police officer had no constitutional basis or no valid reason for removing certain items from Mr. Williams' possession.

I think that factually the facts are not in great detail, it is a relatively simple factual situation, in that on the early morning of October 30th of 1966 a Bridgeport police sergeant by the name of John Connolly, who was a veteran of twenty years' service on the Bridgeport police department, was on duty, on patrol duty alone in the City of Bridgeport in a particular area of the city which was noted for a high incidence of crime.

At that time he was in a gasoline station at the intersection of two public streets in the city, he met and he had a conversation with a person whom he knew, who was known to

him. That particular person indicated to him that there was another person seated in an automobile nearby on a street known as Hamilton Street, and that that person who, incidentally, developed to be the respondent Robert Williams, that he had drugs and that he had a pistol in his waistband.

Thereafter the officer proceeded out of the gasoline station, across the street, Hamilton Street, to the particular automobile. He knocked on the window of the car. He asked the respondent to open the car door. In response thereto, Mr. Williams rolled down the automobile window on the passenger side. The officer immediately placed one hand in through the open car window, inside the respondent's coat, which was open, and directly onto the handle of a pistol, which he seized and removed from the respondent.

Apparently the coat was open, he apparently didn't touch Mr. Williams' body at all, other than the inside of his coat. The revolver was fully loaded. He then proceeded to place Mr. Williams under arrest; advised him of his constitutional rights relative to statements. Then a further search was conducted of the person of Mr. Williams, which disclosed a quantity of heroin at two locations on his person; and a search was conducted of the automobile there on Hamilton Street, which disclosed a large machete concealed under the passenger seat where Mr. Williams had been seated.

As I indicated earlier, there were motions made

within the State court to suppress these items as evidence. There is no dispute that they were timely made. They were overruled. The matter was affirmed by the Connecticut Supreme Court and the United States District Court reversed, in a per curiam opinion,from which my client, the Warden, in actuality the State of Connecticut, petitioned for certiorari, which was granted.

The State, the Warden, petitioner, in the various courts in which this has been presented, has tried to urge that the issues here be framed in the dual consideration which is presented within the decision of the Terry case, more particularly at page 20 of the Terry case.

I think it goes without saying that it's the position of the petitioner that many statements contained within the decision of Terry vs. United States [sic; Ohio], both within the majority decision and the concurring decision, are uniquely applicable to the factual situations in the case of Robert Williams.

In the Terry decision, at page 20 of the reported decision, the Chief Justice urges that a dual consideration must be inquired into in determining, in this type of a situation, where an officer is making a self-protection search and the first consideration is whether the officer's actions were justified at their inception; and the second consideration is whether the activities or actions were relative or related

reasonably in scope to the circumstances which justified the interference.

I would respectfully submit that the actions of the officer, Officer John Connolly, in leaving the gasoline station, after he received this particular information, which, as I indicated, was from a person whom he knew by name and who he had had prior conversations with, and whom he believed to be a person who was trustworthy and reliable, that his actions in leaving the gas station, on the basis of that information, and going over to the automobile to make the investigation, a further investigation, were completely justified.

I would point out that in most of the reported cases, I think that most of the cases that I have read, which relate to street investigations in which an officer receives information and then proceeds to make some sort of an investigation, I think the great majority of those cases involves situations where the officer receives his information from someone who is unknown to him, from a person who comes up to him and relates to him that some unusual activity or some type of criminality is taking place and then he makes his decision to proceed or not to proceed, or whatever he is going to do.

I think that it's of considerable importance here. If that was not the situation here, this is not the situation where a person, who is a stranger to an officer, comes up and indicates information to him, on the basis of which he makes his

investigation. I think it's relevant because, in the case of an unknown or unnamed individual, the individual, after giving the information, can go about his ways and quite possibly never be located by the officer again; whereas, this is not the situation here, the officer knew this individual, knew him by name, and of course if the information had been incorrect he could have come back and located that person officially and inquire as to why it had been made to him.

The officer arrives at the side of the car in which Mr. Williams was seated, the window is lowered, and I think that then he had to make the decision which, in all probability, is the crux of this particular case, and that is whether or not he was justified in reaching his hand in through the open window and into the waist of the respondent, where he found, came in contact with the handle of the revolver and removed it.

Q Did the officer testify that the man's coat was open?

MR. BROWNE: Yes. That appears at several places within the Appendix, in his testimony. I don't have the pages right in front of me, but it does appear within the Appendix on several occasions that the coat was open, it was not buttoned.

Q Mr. Browne --

MR. BROWNE: Yes?

Q -- he was convicted on three counts here, wasn't he?

MR. BROWNE: Yes, he was, sir.

Q I can't make out from the record whether those are concurrent sentences or consecutive ones.

MR. BROWNE: He received a sentence on the possession of the heroin of not less than three and not more than six years in the State's prison; received one-year sentence, which was consecutive, on the possession of the pistol without a permit; and an additional one-year sentence on the possession of the machete, both of which are added to the maximum sentence in the State of Connecticut,so his effective sentence was not less than three and not more than eight years on all of the charges. That was the total sentence.

Again, it's the position of the petitioner here that the crux of the case amounts to, or evolves to whether or not the particular officer was justified in reaching into the automobile and placing his hand on the handle of the revolver and removing it.

And again we would submit that it was a decision which the great majority of trained police officers in that circumstance, at that time, would undoubtedly have done.

Q Do you, in this case, question, Mr. Browne, the availability of federal habeas corpus to attack the --

MR. BROWNE: No, I do not, Mr. --

Q -- admissibility of evidence in a State trial?

MR. BROWNE: No, we have never contested that. We

have never contested the availability of that particular remedy.

I would remark that this proceeding today is the seventh time in which this particular point has been judicially reviewed by a court or courts. In other words, it was reviewed three times within the State system. It was reviewed, prior to today, three times in the Federal system, and this today makes the seventh time in which it has been reviewed judicially.

Q In the Federal system, by the District Court and then twice by the Court of Appeals?

MR. BROWNE: Twice by the Circuit Court of Appeals for the second Circuit. And then today makes it the fourth time on this.

Q Mr. Browne, --

MR. BROWNE: Yes, sir.

Q -- you said earlier you felt the crux was whether there was sufficient cause for reaching into the car; but am I wrong, looking at the Appendix A to the petition, curiam phrases it "whether there was any other sufficient cause", that is, in addition to probable cause for arrest, "for reaching into Williams' waistband".

MR. BROWNE: That's correct; into the car and into his waistband. In other words, he reached into --

Q That's what it says, "for reaching into Williams'

waistband."

MR. BROWNE: Into the waistband, that's correct. Now, again, quite clearly --

Q Well, wasn't the window up? Didn't the officer ask --

MR. BROWNE: Williams rolled the window down. The window was up.

Q He was asked to?

MR. BROWNE: He was asked to open the door --

Q Yes.

MR. BROWNE: -- and he, in response, rolled the window down, and the officer then placed his hand into the automobile and right onto the handle of the revolver.

Q Well, is this implied, that there was sufficient cause for reaching into the car? But not until --

MR. BROWNE: I assume that the -- no -- I assume that the implication of the per curiam sentence is that there was no sufficient cause to reach into the automobile or into the waistband. I think it's a corollary that if he had no cause to reach into the waistband, he probably didn't have any cause to reach into the car.

Q Do you think it goes beyond that, and suggests that there was no probable cause to go over and tap on the window?

MR. BROWNE: Well, unfortunately, that's the way it

reads, and I have tried to frame the issues in the way that I have. Unfortunately, in the one or two sentences in the decision by the Second Circuit Court of Appeals, they did not indicate within that decision just whether they were saying that there was no probable cause for him to investigate further, or there was no probable cause for him to -- or sufficient cause, I should say, for him to leave the gasoline station and go over to the automobile, or whether they were merely saying that he may have been justified in going over to the automobile; but, in any event, there was no sufficient cause for him to reach in and remove the pistol.

I think that that is -- it's difficult because of the way they frame their opinion. They don't say necessarily whether they're including the fact that his investigation was improper or not. Although I feel, and my brother may correct me, he, at least in his brief, has not briefed, to my knowledge, any claim that it was improper or imprudent by the officer to make this investigation in the manner that he did.

I think the claim is that once he got to the automobile he should not have inserted his hand in and onto the handle of --

Q Well, Judge Friendly, I gather, in dissenting, -- or do I read that correctly? It seems that -- that is, in the panel dissent.

MR. BROWNE: That is correct.

Q He seems to indicate that it turned on whether or not he should have approached the car, he didn't have probable cause for arrest, but was he justified in approaching the car on the basis of the information from the unnamed informer?

MR. BROWNE: I don't think that -- my recollection of the opinion of Judge Friendly, the dissenting opinion, I don't think he ever comes out and says categorically that Connolly should never have left the gasoline station and gone over to respondent's car.

Q Well, I'm just looking at the sentence: "Almost everything must therefore turn on what the unnamed informer said, and the value of his statement", and then he goes on, in his judgment did not satisfy the requirements of Draper and those other cases.

MR. BROWNE: Right. My recollection of the dissent of Judge Friendly was, he held that there was not a sufficient basis for a stop. Now, where the stop was, whether the stop was -- well, he actually, obviously, didn't stop Mr. Williams from proceeding in any manner, because Mr. Williams wasn't proceeding any place, he was just sitting there; so that there wasn't a stop in the idea that he stopped his momentum or he stopped his walking or he stopped his activity.

Q So it simply has to be on these facts, whether

he was justified in approaching the car at all?

MR. BROWNE: Whether it's justified, first, in approaching the car; obviously, if he wasn't approaching --

Q Well, surely, if he was justified in approaching the car, then I expect no one could say that he then reached for the gun in open view?

MR. BROWNE: Well, that would be my position, that --

Q Well, then, it does have to narrow down to whether he was justified in approaching the car at all?

MR. BROWNE: Right. And again I have taken that into -- tried to frame it in two particular issues, as I indicated, under the law in Terry: one, whether he was justified in leaving the gasoline station, walking across Hamilton Street to the automobile; and then, two, once you put him next to the automobile and the window goes down, is he secondarily justified in reaching in to remove the individual's pistol.

Q Is it clear, in your view, that he received the information -- or I'll put it this way: where you say this record shows that the police officer received the tip.

MR. BROWNE: Well, the Appendix, I think the testimony of the officer is clear that he received the tip in the gasoline station. Now, there was a hearing by Judge Clarie in the United States District Court to clear up what he considered to be a discrepancy between the officer's earlier

testimony and the officer's testimony in the Superior Court motion to suppress and in the trial, and there was a hearing for that specific purpose, at the conclusion of which, in this memorandum of decision, the judge expressly accepts and finds the findings of the Superior Court to be completely correct, and he adopts them as a findings of the United States District Court.

So I don't think that, as far as this Court is concerned, that there is any question at this time but that he did receive that information in the gasoline station in the manner in which he testified and acted accordingly.

Q Mr. Browne, --

MR. BROWNE: Yes, sir.

Q -- following up on Justice Stewart's question of a moment ago, if this crime took place in 1966 and the ultimate decision of this Court should be to hold that the evidence was improperly seized in 1972, I take it you would agree that if the purpose of the ruling is to discipline the police, it would have a somewhat attenuated effect if it was handed down six years after the event.

MR. BROWNE: Well, there's no question about it. In the case of Officer Connolly, I happen to know that he has since retired, he is no longer a member of the Bridgeport police department, it then would have no effect on Officer Connolly, obviously.

The effect that it's going to have on other brother police officers, if Your Honor please, I think it's going to deter them from making any investigation in the streets when they receive information, unless they can categorically substantiate a feeling, that they can categorically substantiate that they are not going to be criticized, or that any evidence which their investigation discloses is not going to be -- is not going to be ruled -- suppress the evidence in subsequent proceedings.

If anything, I think it's going to substantially deter proper police protection, and I would -- I hesitate, but I would state that the Supreme Court for the State of Connecticut, rather than indicating or making any claim that Officer Connolly acted with insolence or acted imprudently, that they went out of their way to indicate that they felt he was a brave man, that he displayed a degree of courage in going over to the particular automobile, even though he felt that there was an individual in there with a pistol, which obviously could have been used against him. And I don't think there has ever been any claim made by the respondent himself that Officer Connolly acted imprudently, that he acted --

Q Well, didn't Terry proceed on the assumption that -- and circumstances, such as in Terry -- officers wouldn't be deterred at all, because they felt that the situation demanded some action, and it was no use trying to deter them?

MR. BROWNE: Well, I can't read necessarily Your Honor's conclusion into that particular decision; but I think that Terry clearly points out in a number of locations that, one, that there is no prohibition against the officer, for example, from stopping a person on the street and asking him questions. I think that that is the -- I don't think that -- I think that the --

Q Well, suppose, Mr.Browne, that --

MR. BROWNE: Yes?

Q -- instead of sitting in the car, Williams had been standing at the curb, and Sergeant Connolly acted on precisely the same information on which he did act here?

MR. BROWNE: Yes.

Q Would that be covered by Terry?

MR. BROWNE: Well, the distinction --

Q Would that be covered by Terry?

MR. BROWNE: It would be covered by a number of the general phrases contained within the Terry decision as to whether or not the officer is acting as a reasonably prudent person under all of the circumstances.

Obviously we get to the distinction, which is the distinction my brother urges upon the Court, and that is between some type of a furtive movement, which is observed by the officer himself, or whether he can justify a protective search, exclusively on the basis of the information which he receives.

And that, I think, is my brother's argument in his claim and at least as I read his brief, is that in order for any police officer to justify a protective search, a self-protective search, he must be able to point to some matter which he has personally observed himself, which he indicates makes him feel that his position is in peril, and that justifies him to go ahead and make this particular search.

I think he urges that no matter how strong the authenticity of the information which is received, that a police officer just cannot --

Q Well, do you think that this case should be decided as it would be decided if the hypothetical I put to you was the case; that he is just standing there, and the officer, acting on --

MR. BROWNE: Yes, I cannot -- I cannot submit --

Q The idea he's in the automobile doesn't make that different?

MR. BROWNE: No, I cannot submit to Your Honor any grave justification for a distinction between the fact that he was standing on the street corner or the fact that he was seated in the automobile, other than the fact that being in the automobile it might have been considerably more difficult for Connolly to observe a furtive movement, such as a movement to go for his gun.

Q But Judge Friendly, I suppose, would have

conceded, however, that if the informer had just simply said, "I saw the gun in his waistband", that the officer could have done what he did?

MR. BROWNE: I would assume on the basis of Judge Friendly's --

Q From a reliable informant, and there's a basis given for the informant's telling him?

MR. BROWNE: I can only submit that if the informant had said, "I saw the gun there", well, quitely possibly Officer Connolly may have had a basis to go over and make an arrest, and we wouldn't need to be --

Q Well, why wouldn't he? I mean, --

MR. BROWNE: I think -- I submit that he would have. I submit that he would have. If the informant had only added that one more piece of information that "I saw the gun", then I think that we wouldn't be here on the question of stop-and-frisk or protective search. I think Officer Connolly would have had --

Q Probable cause.

MR. BROWNE: -- probable cause to go over and make an arrest of Williams, without regard to --

Q Well, suppose Officer Connolly had been at the police station, blocks away, and the informant told him just what he told him at the gas station, and Connolly got in the squad car and went down and then everything happened that

happened here?

MR. BROWNE: Well, I submit that -- are you including the fact that he indicated that he saw the gun, or are you excluding that?

Q No, I'm taking precisely these facts --

MR. BROWNE: Precisely these --

Q -- except that he got the information at the police station several blocks away from the informant rather than at the gas station across the street.

MR. BROWNE: Well, then, of course, it relates again to the propriety of an investigation. Obviously he wouldn't have had probable cause for an arrest under that situation -- you wouldn't even know that he knew Mr. Williams' name, as a matter of fact.

Q But it would be stronger; wouldn't it be stronger? Because he actually went there and found what the information said he'd find? I mean, at least that there was a man there?

MR. BROWNE: That's right. That's correct. If that's -- there would have been substantially more corroboration of the information that he received: the existence of a man in his automobile on Hamilton Street at that particular time. That would have been corroborative of the information supplied by the reporting witness to him. I concur in that.

As I understand again, finally, my brother's position,

it would be that no matter how authentic the information received, if the informant had been a judge or if the informant had been three or four judges, still, unless Officer Connolly personally observed something in the nature of a furtive movement, a furtive action, he still couldn't proceed. It would be illogical or unreasonable for him to fear that his life was in peril, and, consequently, it would have been illogical for him to make the protective search at that particular time.

Q But the --

MR. BROWNE: Yes?

Q -- search of the car wasn't a protective search?

MR. BROWNE: No. The search of the automobile itself hinges upon, obviously, whether or not the disclosure of the pistol supplied sufficient probable cause for him to place him under arrest.

Q I thought you said he did place him under arrest.

MR. BROWNE: After he found the pistol, he proceeded to place him under arrest for possession of that pistol. Then he made his contemporaneous search of the person, which disclosed the heroin; and of the automobile, which disclosed the machete.

It is relevant as to those second two searches that

they, of course, followed the arrest, and they took place right there on Hamilton Street.

Q Well, where was the machete, Mr. Browne?

MR. BROWNE: The machete was under the passenger's seat of the front, in the car -- the passenger's side of the automobile. And that's where we --

Q You mean in open view or was it --

MR. BROWNE: No, it was under the seat.

Q -- underneath?

MR. BROWNE: Underneath the seat. And of course only Williams knew it was there, nobody else knew it was there, and so I think that it was -- it's not illogical to say that he still could have made an attempt to pull the machete out, even though --

Q Well, where was he when the cop searched the car?

MR. BROWNE: On Hamilton Street, right next to the automobile on Hamilton Street.

Q And how is he going to get the machete if he's standing out on the street?

MR. BROWNE: Well, it -- of course, he's standing right next to the automobile. He's the only one that knows the machete is there. I still can't say that even though the police are there, that it's unreasonable to consider that he would, could still make an attempt to get the machete. It's

far different from the case of Shipley --

Q It's actually that the policeman has got two guns?

MR. BROWNE: What's that?

Q The policeman now has two guns in his hand.

MR. BROWNE: That's correct, yes.

Q And still the guy might get the machete?

MR. BROWNE: I still say he could make an attempt to obtain it. I still -- I would submit to Your Honor that he could make an attempt -- it might be a foolish attempt, but he's standing next to the automobile. It's not --

Q You don't seriously think that that was a search to protect the life of the police officer?

MR. BROWNE: Oh, no, not the search that disclosed the machete. Oh, no. I don't submit --

Q Well, that's what I --

MR. BROWNE: -- that the search which disclosed the machete was a --

Q Well, what was the basis for the search of the car?

MR. BROWNE: That was a contemporaneous search, contemporaneous to his arrest there on Hamilton Street. I don't make any claim that the machete was disclosed by a protective search,not at all. After Mr. Williams was arrested, a search was made contemporaneous, incident to his arrest, of

his person and of the automobile which disclosed these items.

Q Well, there's nothing in the record about this informant except that he knew him.

MR. BROWNE: There is some -- there is a considerable description of testimony, in which he describes information that the informant had given him before, which did not lead to an arrest, but related to particular criminal activities taking place at a particular location, which the officer proceeded to investigate.

There is also a substantial cross-examination, in which the officer is inquired of, relating to the informant's past record, and he indicates a number of other items which he personally knew about the informant; of the informant himself.

I do want to make -- save a couple of minutes if I might for a rebuttal. But I would submit, in a nutshell, if I could, that the position of the petitioner in this particular matter is that when you put the officer on the street next to the automobile, that you want to balance off the intrusion involved against the possibility of the violent crime which could have occurred right then and there, which obviously could have included up to his being mortally wounded. It is the position of the petitioner here that balancing those two together, it's not illogical or unconstitutional to maintain that the officer was justified in taking whatever efforts he

did to protect himself.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Hennessey.

ORAL ARGUMENT OF EDWARD F. HENNESSEY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The only additional facts which I would add, in order to give some clarification to the situation as it existed in 1966, when Officer Connolly met this informant, was that after Officer Connolly received the information, at that juncture Officer Connolly had a certain set of facts in his mind. He had been told something by a person whom he says he knew, and he had been -- he says he believed this person to be reliable because once before the person told him something that he couldn't substantiate, but he nonetheless believed that what they told him was true, notwithstanding that there was no basis for believing it to be so.

When Officer Connolly was told: "There's a man in that car with a gun at his waist, and drugs", he was looking across the street at a car with a man seated in the passenger side. He saw the man. He saw the car. At that point he then called the station and elicited help, asked them to send another cruiser. Having dispatched another cruiser, Officer

Connolly then started across the street, proceeding, in uniform, towards that vehicle, walking to the front of the vehicle, where he was obviously in plain view of the passenger inside, up to the side of the car and knocked on the side window, and said, "Open the door."

At that point the window was rolled down, which would infer possibly that the person wanted to find out why the officer was knocking on the window. And that's about as much as one might reasonably draw from that.

When he looked inside he saw a man he didn't know, he saw nothing out of the ordinary; the man didn't do anything; the man didn't say anything. He couldn't see any gun. He couldn't see anything in the car that would indicate contraband or criminal activity.

He then reached -- and the record tends to show he reached partially under the man's coat, apparently the coat was in a loosened position, down and his hand reached the waistband and did touch a gun; he then withdrew the gun.

At that point Officer Connolly, I would submit, under Connecticut law, still had no probable cause to believe that any crime had been committed, because in Connecticut it's not a crime to carry a gun at your waist. Unfortunately, or -- well, I won't bother to comment on my feelings about those laws.

But Connecticut appears to be a pro-gun State. Our

constitution protects the right of individuals to carry guns in their own defense. We have statutes which permit people to carry guns around at their waist or in their car, or hidden on their person, concealed wherever they please; the only requirement being either that they come in within one of approximately ten exceptions in the statute, which permit people to carry guns without permits, or that they have a permit.

So when Officer Connolly knew a man had a gun, that's all he knew. He didn't know that the man was committing a crime.

When he withdrew the gun from Mr. Williams' waistband, he still didn't have probable cause, I would submit, to arrest him.

Q May I ask, Mr. Hennessey --

MR. HENNESSEY: Yes, Your Honor?

Q --of what crime in connection with the gun was he convicted?

MR. HENNESSEY: He was convicted of a crime under 29-35, which is carrying a gun without a permit. And then he was -- the machete --

Q In other words, he didn't fall within one of the exceptions where he didn't need a permit?

MR. HENNESSEY: As it was ultimately proven at trial, he was not, for example, carrying the gun as part of transporting his household goods or carrying his gun for merchandis-

ing purposes, or carrying a gun from a dealer to his home.

Q Well, was it likely that he would have fallen under those circumstances, being found as he was in this area at 2:00 o'clock in the morning?

MR. HENNESSEY: Well, I would submit it would be likely that a man could be out at 2:00 o'clock in the morning with a gun at his waist and have a permit for it. I would think, frankly, that very often people do carry their guns at 2:00 in the morning.

Q Well, isn't the burden of proof on the person to show that he has a permit after the gun is found?

MR. HENNESSEY: Not under the statute in Connecticut, no. No, the statute in Connecticut, as it's construed by our courts and in cases where it's tried, requires the State to prove the negative, that he did not have a permit, in order to sustain its burden.

Q What does an officer do in that situation, if he discovers a man with a gun and doesn't believe he's within the ten exceptions? Is he supposed to go back and find out whether he has a permit, or does he ask the man whether he's got a permit?

MR. HENNESSEY: I would say they usually ask the man. Frankly, at that point, if they didn't believe him, they would probably determine from the man where he got the permit and would contact them, since, under the State statutes, permits

are issued by a number of authorities, including any municipal officer or any chief of police of any particular town. So that the permit that a man carries is generally issued from one jurisdiction, such as, say, the town of Windsor. They could get on the radio and determine whether or not a permit was issued to a particular individual.

Q Well, there's no indication that Mr. Williams made any representation that he did have a permit, is there?

MR. HENNESSEY: No. Mr. Williams, according to the record was never -- one, he was never asked. The gun was taken and the policeman said: "Get out of the car, you're under arrest."

He was then body searched and that's the time when the heroin was seized. And also at that point, of course, the two other officers had arrived on the scene. Williams is then out of the car, immobilized and in the custody of the other two officers, --

Q Well, I don't get this --

MR. HENNESSEY: Excuse me, Mr. Justice.

Q He was arrested, the basis of the arrest was the gun, wasn't it?

MR. HENNESSEY: That's right.

He was arrested because the officer withdrew the gun from his waist.

Q And you suggest that the mere fact that he has

the gun does not justify, under Connecticut law, an arrest; is that it?

MR. HENNESSEY: That's right. Because there's no crime for carrying a gun. There's only crime for carrying an unregistered, or gun without a permit. So at the point, for example, I could be carrying a gun in Connecticut, and --

Q And you say --

MR. HENNESSEY: -- with a permit.

Q -- you say that Sergeant Connolly had to know, or have probable cause to believe, in order to make an arrest for possession of the gun, --

MR. HENNESSEY: That's right.

Q -- that he did not have a permit for it?

MR. HENNESSEY: That's right. I would say that would be -- that goes -- actually that impacts on the second search. There were, in effect, three, I would submit, three searches. He initially --

Q Well, before you get to that, when you find a man with a gun on the street in Hartford, Connecticut, and you take the gun out of his belt, what do you do? What does the policeman do at that stage?

MR. HENNESSEY: In Hartford, they arrest him. They take him down to the station, and if, after they check him out, they find out he's all right, they let him go.

Q What's wrong with that?

MR. HENNESSEY: Well, because -- because --

Q Well, what would you suggest they do?

MR. HENNESSEY: Well, the first question is: Did they have a right to lay a hand on him in the first place? Before we get to that.

Q Well, you see a man walking down the street, with his coat hanging wide open, and a .45 stuck down in there --

MR. HENNESSEY: Right.

Q -- and a policeman walks up and says, "Do you have a permit?" And the guy says nothing.

MR. HENNESSEY: Right.

Q What can the police do?

MR. HENNESSEY: I would say that the policeman -- that would then come into the issue of whether or not the policeman has the right to make an investigative detention, which is often discussed, as to whether or not, at that point, they have a right to hold the man for purposes of checking.

Q Well, Mr. Hennessey, --

Q What do you think the policeman should do in that case?

MR. HENNESSEY: All right. What they do do is they hold him and check --

Q What do you think they should do?

MR. HENNESSEY: I think they should hold him and check. I think so.

Q Well, what did they do in this case?

MR. HENNESSEY: This was not -- this -- at this point they had already seized the gun. This was not -- your example is a plain-sight search.

Q Well, if a man has a loaded revolver, and if -- the policeman is going to hold him, but he can't take the gun away from him?

MR. HENNESSEY: Yes, he can take the gun away from him, I would submit.

Q Well, I thought you meant that.

MR. HENNESSEY: Yes, sir. But the point --

Q And they could detain him; you admit that?

MR. HENNESSEY: No, I don't -- I don't get to the point of arguing whether or not that is constitutionally permissible, no. I'm saying -- you ask me what do they do, and I said that's what they do.

Q No, I asked what you suggest they do.

MR. HENNESSEY: Right.

Q Now, let's try it again.

MR. HENNESSEY: All right.

Q Under the constitution, what would you suggest is the most that the policeman could do, looking at a loaded .45 in the man's belt?

MR. HENNESSEY: I would say in Connecticut -- in Connecticut, if the officer observed a man walking down the

street. He may have the right to stop him to inquire as to what he's doing, --

Q And the man wouldn't say anything?

MR. HENNESSEY: Yes. And the man doesn't say anything.

The suggestion I would make is that in the Connecticut law he would not have an right to hold him.

Q Because your point, as I understand it, Mr. Hennessey, is that under Connecticut law the possession of a gun is no more a badge of criminality than the fact the man might have a hat on?

MR. HENNESSEY: That is true.

Q Or golf clubs, or anything of that type.

MR. HENNESSEY: Right.

Q It's perfectly -- it's as innocent as a golf club.

MR. HENNESSEY: Right. Well, it isn't to me. But it is under our law.

Q Well, I'm trying --

MR. HENNESSEY: Yes, there's no crime in carrying --

Q Let me ask you this hypothetical question.

MR. HENNESSEY: All right.

Q Suppose, in exactly the circumstances of the information that came to the officer in this case, except that the automobile is removed one block away, so that it's out of sight, and the tip is exactly the same. And the policeman

goes around the corner and down and finds the car, but instead of finding the driver in the driver's seat he finds him crouched behind the car, aiming the pistol over the hood or some part of the car --

MR. HENNESSEY: Right.

Q -- do you think he could do anything?

MR. HENNESSEY: Oh, yes.

Q Well, what?

MR. HENNESSEY: If he saw -- if he saw a man crouched, pointing a gun at him --

Q No, no. Pointing -- just pointing a gun somewhere; not at the policeman.

MR. HENNESSEY: Yes, I think at that point he would have some indication -- you would have some indication of an additional element of criminal activity. This is at the point where the man is --

Q All right, let's take it right there now. He goes up to the man and taps him on the shoulder and says, "Excuse me, what are you doing with that gun?" And the man says, "I'm defending myself; there's a man around the corner trying to shoot me."

MR. HENNESSEY: All right.

Q On your theory of the immunity of gun carriers in Connecticut, could he do any more to that man than he could to the man sitting in the car?

MR. HENNESSEY: He may, because he may -- he doesn't have to believe the man, and he does have some indication in the first instance that the man actually assaulted --

Q Well, suppose the guy says, "Here's my permit" --

MR. HENNESSEY: Yes, sir.

Q -- and he hands it to the officer?

MR. HENNESSEY: Right.

Q The same set of facts the Chief Justice gave, what then?

MR. HENNESSEY: Well, then the question would be -- would go down -- you might get into the right/privilege dichotomy which is applied to automobile operation, the question being --

Q No, there's no --

MR. HENNESSEY: Right.

Q -- just use the hypothetical the Chief Justice gave.

MR. HENNESSEY: All right.

Q He sees he's pointing the gun and is crouched over pointing it, and the officer comes up, "What are you doing?" and --

MR. HENNESSEY: Right.

Q -- he gives the same story the Chief Justice suggested, but then he adds to it, "And here's my permit".

MR. HENNESSEY: All right. Well, he still is confronted

with the situation of potential assault. He's not just confronted with a situation of possession, he's confronted with a situation of use of a deadly weapon. There's a distinction.

Q Well, but my hypothetical included an assumption that he answered, and I'll add Justice Brennan's, "Here's my pistol license, and I am exercising my right of self-defense. There's a man over here, out of sight, who's going to attack me."

MR. HENNESSEY: Well, I think -- I think the police officer is justified in acting then. I don't think the police officer has to rely on a citizen's characterization of the legality of the conduct.

Q Well, why, if, as you say, Connecticut lets him carry a gun for self-defense, why should the officer disbelieve him? It might be true.

MR. HENNESSEY: Because -- excuse me. Why should the officer disbelieve him?

Q Yes.

MR. HENNESSEY: It's not -- I don't think the officer's ultimate determination at that juncture is to decide facts of belief or not. The question that the officer has to do is to respond to what -- the facts as he sees them; and the facts as you have presented them indicates a person holding a deadly weapon in an assaultive position, and further advising that he

has some indication he wants to use that gun for an assaultive purpose.

Q Well, if Connecticut lets people carry guns so freely, for their own defense, what's so bad about doing what I suggest in my hypothetical question?

MR. HENNESSEY: Well, that may be a question --

Q Do you just carry it in your belt to frighten people, or to use it?

MR. HENNESSEY: Well, that -- I seem to be going at cross purposes, but the point is not whether or not it's good or bad; the point is whether or not the policeman was justified in interferring with that citizen's liberty, or takes some action vis-a-vis that citizen at a point where the citizen has told him he's holding the gun with an intent to use it. Notwithstanding that he tells him he intends to use it for defensive reasons.

And I think that the point is that the policeman is justified in acting, notwithstanding whether or not the person might have the right to use it for that reason. That the two are distinct.

Now, I think that -- excuse me.

Q Is it your claim that the officer wasn't entitled to go to the car at all?

MR. HENNESSEY: Yes. I would submit, yes, that that is -- that is part of my claim, but that even if it were

not, that it makes the case no weaker. Because the basic -- the basic point is: when does a policeman have a right to confront a citizen? That's where you start, I believe.

Q Well, now, assuming that he had -- assuming that he had a reasonable suspicion under Terry to stop the person and make -- and ask some questions.

MR. HENNESSEY: Yes.

Q Now, to protect himself during that period, he could have a frisk, couldn't he?

MR. HENNESSEY: No. I would -- it depends on --

Q Under Terry. I said, assume reasonable suspicion under Terry.

MR. HENNESSEY: All right. No. Well, that depends on how one reads Terry. I didn't read Terry to suggest that --

Q Well, especially when the reasonable suspicion is that he does have a gun?

MR. HENNESSEY: Right. Well, if there is -- I think, as I read Terry, trying to square it with the Fourth Amendment limitations on any invasion, I read Terry as saying that where situations arose which justified a police officer, in making an initial stop, or interfering with a citizen's liberty for the purpose of inquiry, that there may also be a contemporaneous right to make a body search or a body frisk, a pat-down, for defensive purposes. But I don't think that it follows that every time a police officer has a right to make

a stop, that he has a concomitant right to make a frisk.

Q Well, I'm just saying here the suspicion that he had included that of a gun, and he would have had some reasonable suspicion to think he might be in a dangerous situation.

MR. HENNESSEY: Well, that -- that takes you --

Q If you assume --

MR. HENNESSEY: -- even further.

Q If you assume the reasonableness of the suspicion.

MR. HENNESSEY: Right. Well, no, no, I don't know. The question there again is: did Terry say that any time a police officer has reasonable cause to believe that a person may be stopped, he may also contemporaneously frisk him; or did Terry say he has reasonable cause to believe that the person has a right -- he has a right to stop the person, and he further has reasonable cause to believe that the person may be armed and presently dangerous to his -- to the officer or to the public. The question then is: Is a citizen in Connecticut, even assuming you have a suspicion that he, or a reasonable cause to believe that he's armed, does that, ipso facto, make that citizen a person who you have reasonable cause to believe is presently dangerous?

And I go back to the Connecticut law on that.

Q Supposing there was no gun involved in this at all --

MR. HENNESSEY: Excuse me?

Q Suppose there were no gun involved in this at all --

MR. HENNESSEY: Right.

Q -- but the machete, the informant had simply said to the officer: "This fellow is a heroin addict, and he's got a machete on his person", and --

MR. HENNESSEY: Yes.

Q -- if you're not careful, he's likely to use it?

MR. HENNESSEY: It's no different because you have a right to carry a machete in Connecticut. Connecticut is not only a gun State, it's also a machete State.

[Laughter.]

Because --

Q Well, not a machete, but he's got an iron, a 5 iron on him.

MR. HENNESSEY: Yes.

Q He'd use that as a weapon if he had to.

MR. HENNESSEY: Right.

Q Suppose it had been that?

MR. HENNESSEY: Well, that would make it -- that's not even a registerable -- a golf club has, in fact, been held in Connecticut not to be a deadly weapon and not subject to registration. There was a case on that.

The point that I have been trying to make is: let's assume there was no gun at all, let's assume this same person said to Officer Connolly, "There's a man in that car with drugs", and let's accept the fact that the term "drugs" was sufficient to place in Officer Connolly's mind "illicit drugs", and in fact, I believe, at one time the word "narcotics" was used and in most other testimony the reference was to "drugs".

My claim would be that at that juncture Officer Connolly had no right to make this confrontation; and having no right to make the initial confrontation, whether Williams was standing on the street or seated in a car or seated in a house, then, therefore, nothing followed as a matter of right from that, including the right, then, to make a body search, limited or otherwise.

Q Well, suppose the informant in the filling station had said to the officer, "There's a car over there and I think there's a holdup of that bank going on, but watch out, because he's got a gun in his belt" --

MR. HENNESSEY: Yes.

Q -- and when the officer approached the car, the engine was running.

MR. HENNESSEY: Yes, sir.

Q What's your position about the scope of the officer's duties and powers then?

MR. HENNESSEY: Well, I think that -- I think the scope

-- it's really not my opinion as to the scope of the officer's duties or powers. I think that the problem becomes whether or not, under the Constitution, the officer has a right to intrude upon the liberty of any individual, and if the officer is advised as to a certain course of conduct, the officer may then elect to go and investigate that course of conduct.

The question would still come down to whether or not, in the course of that election to investigate further, he had a right to search a person, a right to search any citizen. And I would say, under the facts as you've given them to me, it would have no doubt caused him to investigate further, but I don't believe that it would have justified any intrusion.

Q Investigate further by doing what?

MR. HENNESSEY: Well, first of all, he would --

Q Tap on -- could he tap on the window?

MR. HENNESSEY: Well, I would assume, if the -- the officer would probably be more interested in what was going on inside the bank, not what was going on inside the car. If the -- under the facts you --

Q Well, should he wait to see if a bank robbery is really completed and then try to have a shootout as they come out of the bank to the getaway car?

MR. HENNESSEY: Well, that -- I suppose different -- one policeman might assume that the greatest source of

concern to the public at this juncture is what's going on inside the bank, and might elect to go inside the bank. Another officer might say, Maybe I should stake them out and see what I can do when they come out; because this might be the safer course from a public point of view.

So it comes back -- always it evolves down to the officer's judgment, and I don't believe every officer would act the same way.

Q Well, that's a cutback, that every officer would not act the same way; but has not this Court and other courts as well said on many occasions that the conduct of the police officer must be judged ultimately as it was seen through the eyes of an experienced, prudent police officer at the time and place and in all the circumstances?

MR. HENNESSEY: No, I don't believe this Court has ever said that totally, I think this Court has said: In judging the conduct of a police officer, consistent with Fourth Amendment limitations on that officer's rights, due regard can be given to the officer's experience and to a subjective standard, based on the subjectivity of experienced police officers, or a subjective-objective standard; but that at some point this Court -- I understand it to say, you have to stop just deciding whether or not every policeman would do the same thing and start deciding whether or not any policeman can do that.

Q You don't think that the motor of the car running adds any dimension that would alter this case?

MR. HENNESSEY: I think it adds -- yes, I think it would add a fact. I think it would add another fact, I can't say whether it adds up to probable cause; I don't think it does. But I think -- I think in every case, and I think Terry pointed that out, it has to be judged, and it's extraordinarily difficult to set limits within the context of this set of facts.

My initial reaction to this case, in the light of Terry, is that: Was Officer Connolly justified in going across and making a search? Because when Officer Connolly went across the street, he didn't have Terry vs. Ohio in mind, because Terry vs. Ohio was two years away at that time.

Officer Connolly knew that there was a man -- he was told there was a man with a gun at his waist, and drugs; and when he walked over to that car, he went over with one thing in mind, and he did that one thing. He executed a body search of that one man to seize the gun. And having seized what he was told he would find, he decided, at that point, he was going to arrest him.

And that, to me, is what happened here. To me, this is not what I conceptualize to be a Terry situation which I read as being an attempt to relate the street experience problem of the police officer to the limitations of probable

cause. Otherwise, I find it difficult to square Terry with the Fourth Amendment.

But if one says that the police officer has legitimate reason at certain points to make a confrontation, and having made that confrontation where the facts present themselves, he then has a right to conduct a limited pat-down for his own safety, or for the safety of citizens; then it's more reasonable to relate the Terry situation to the Fourth Amendment.

Q Certainly there's language in Terry, though, that goes beyond your rather narrow reading of it, isn't there?

MR. HENNESSEY: Yes, depending on -- I'd say depending on whose opinion one draws upon. Some of the opinions I read as being much broader than that; yes.

But I -- yes, sir?

Q But Terry wasn't -- the officer in Terry was a man of some forty-odd years of police experience in that type of work in that area.

MR. HENNESSEY: That's right.

Q But I don't think Terry is limited to that at all. Do you?

MR. HENNESSEY: Well, looking at the facts in Terry and those that seem to be most persuasive were that when the Officer McFadden in the Terry case went towards the three suspects, he at that point believed that he was looking at a daylight stickup. That's what part of it was.

Q But that wasn't his business. His business was protecting the store, the department store.

MR. HENNESSEY: That was Officer McFadden's business? Well, it did not appear to me that at that point that was what he considered to be his business.

Q That's what I'm saying, I wouldn't try to give the particulars out, but I think the Terry case says that if an officer has reasonable grounds to believe that a crime is about to be committed, and on the basis of that goes up to question, and when he gets there he feels his life is in danger, he has a right to pat the man.

Now, in Terry, there were three or four guys standing there, and each one of them was twice as large as the detective.

MR. HENNESSEY: That's right. [Sotto voce]

Q So I think that's Terry. Now, it seems to me in your case if the informant's information was equivalent to what the police detective in Terry had, he had a right to go there and pat him down. So your point, it seems to me, is whether the informant's information was equivalent to what the detective saw in Terry. Isn't that right?

MR. HENNESSEY: That is -- yes. That is, in the context of Terry, that seems to be one of the suggestions of Terry. And the implication, as I read Terry, was that it was -- that's why I said that it seemed in Terry that this Court

was speaking in terms of the street confrontation situation, and that --

Q Well, wouldn't you say that if this was a reliable informant, who had given this man or some other policeman six different pieces of good information, which had led to six criminal convictions, that that would give him the same rights that the detective in Terry had?

Would you go that far?

MR. HENNESSEY: I'd go farther. I would go farther at that point. I think if you're talking about a policement being informed by what would satisfy the standards of reliability of contemporaneous criminal conduct being committed, then he has the right, notwithstanding Terry, to go forward and to make an arrest.

Q You mean as probable cause?

MR. HENNESSEY: Yes, if he has probable cause. And this then gives him the right to go forward and actually confront him, and then it would have been irrelevant. And that's why, to a certain extent, even the application of Terry by the Connecticut Supreme Court was irrelevant, because the Connecticut Supreme Court decided that there was a reliable informant here, and this then framed one of the issues, which was that issue of reliability. Since I would submit this person, as a matter of law, was not reliable; and I would also submit that under those circumstances that Terry did not

intend to fashion a new doctrine which would permit police officers, in substance, to make searches on less than probable cause.

Q Do you think we can redetermine the credibility issue in the case here? Or are we bound by the fact determination made in Connecticut and endorsed by the highest court of Connecticut?

MR. HENNESSEY: Well, I think this Court can make that inquiry to determine whether or not the case presents one that requires a certain decision. I don't think that you can make the basic credibility determination, no. I think if -- I think the credibility problem might cause the Court to feel that this was not the appropriate case for a particular decision that it sought to render. But the credibility issue is not substantially in dispute, other than that we were faced with a situation wherein it appeared that the officer relied on something quite different from what he subsequently testified he relied on. Because we did have somewhat of a conflict between the lower court testimony of Officer Connolly and the Superior Court testimony.

But taking the testimony of Officer Connolly as 100 percent true, you're still left with, I submit, the fact situation that does not lend itself to any right of a police officer to go forward and conduct a search, based on an undisclosed informant, who did not meet the test of reliability,

either test of reliability.

Q What was deficient about the -- about his -- about the informant, insofar as telling the truth was concerned?

MR. HENNESSEY: No, I said it's not in telling the truth, I said insofar as the test of reliability. The informant in this case, according to Officer Connolly, had once, six months before, told Officer Connolly there was homosexual activity going on in the Bridgeport railroad station.

Q Well, now --

MR. HENNESSEY: And -- excuse me.

Q -- I thought that Judge Friendly indicated that if the informer had said, in addition to who he was and what his experience with the police had been, if he had said in addition, "I saw the gun", that there would have been probable cause.

MR. HENNESSEY: No. I don't agree with that at all, as being what Judge Friendly said. Judge Friendly went at some length to discuss the basic reliability of the informant. He even, for example, went so far as to say, in his dissent, that "Let's assume that this tip that the officer had received, the homosexual conduct, had been verified and had led to an arrest". Judge Friendly also said that in his mind he did not believe that this would make this person a reliable informant on crimes of narcotics.

So, no, Judge Friendly did not --

Q Well, let's -- assuming for the moment that the informer was reliable in the sense of the first leg of informer reliability --

MR. HENNESSEY: Right.

Q Let us assume that.

MR. HENNESSEY: Yes.

Q That the officer was justified in believing the informer was telling the truth.

MR. HENNESSEY: All right.

Q Your position still is that that doesn't give him reasonable cause or reasonable suspicion under Terry to make a stop?

MR. HENNESSEY: Yes, that's right.

Q Well, don't you go beyond that, that even if it did, even if it did, that that would not justify the fact that he could make a stop, would not justify the seizures of the machete and the narcotics and the rest?

MR. HENNESSEY: Ultimately, yes. Yes. But that again is -- I'm sorry, my time has expired.

MR. CHIEF JUSTICE BURGER: You may answer. Complete your answer.

MR. HENNESSEY: Oh. Excuse me.

My ultimate position is that the case should be viewed not just as an application of Terry vs. Ohio to Connecticut or Sibron vs. New York to Connecticut, but it also

ought to be viewed in the context of the Connecticut law; and that the Connecticut law, as I view it, is different totally from the Ohio law and the statute involved in Terry vs. Ohio was printed, I believe, at page 1, and it's like the Sullivan law that applied in New York; but unfortunately Connecticut does not so legislate.

Q Well, Connecticut, apparently, has decided, though, that under its law, when an officer finds a gun in somebody's waistband, they can be arrested and convicted for it?

MR. HENNESSEY: Well, yes, but they -- but again that issue --

Q Well, that's the result of the State court proceedings, isn't it?

MR. HENNESSEY: Yes, but the Terry application was merely dictum to that, because the court found, in nineteen sixty- -- in nineteen- -- that there was a reliable informant, and it therefore went on to find the rights of an --

Q Well, I know, but --

MR. HENNESSEY: -- arrest based on a reliable informant.

Q -- that doesn't get you very far, because your point is, even if the informant was reliable, when he finds the gun, you can't arrest; because it doesn't give you probable cause to arrest.

Connecticut's decision is quite the contrary in this case, under Connecticut law.

MR. HENNESSEY: Well, no, because -- you see, because then the tip, if it came from a reliable informant, was a tip of two crimes: one being the gun and the other being drugs.

If -- they said that the officer had reliable -- a reliable informant who told him, "There's a man sitting over there" --

Q I know, but --

MR. HENNESSEY: -- "with drugs."

Q -- they let him be convicted of carrying the gun.

MR. HENNESSEY: Of course.

Q And they let him seize the gun.

MR. HENNESSEY: That would be true. That would make no difference whether or not the gun was ever mentioned, because the drugs themselves would have given him the right to arrest, and the finding of the gun would have been permissible as an incidental body search, after he had the initial right to arrest.

Q But you don't have a right to take from -- to take everything you find in an incidental body search, unless it's contraband or used in committing a crime, do you?

MR. HENNESSEY: That's right.

Q And I take it your argument is that the gun was -- doesn't meet those tests.

MR. HENNESSEY: Oh, I think he had the right to remove it temporarily, and then the question would be whether or not he had the right to return it. And then -- and, additionally, whether or not he had the right to having -- well, excuse me. He has the right to remove it, as a part of the self-protective body search. I think that would be so. And that would be because he has probable cause to believe that this man's committing a felony. So he has the right to remove the gun.

He may not be able, ultimately, to charge him, because the carrying of the gun may be lawful.

Q Well, now, when we come to trying to evaluate what is the law of Connecticut under the statute that you've been arguing, namely, that he can lawfully sit there at 2:30 in the morning with a loaded gun in his belt, is not the decision of the Supreme Court of Connecticut, the State law, binding on this Court?

MR. HENNESSEY: Well, my only answer I can give you to that, Your Honor, is that the State Court decision in Williams, which was decided in -- actually the whole case was framed before Terry was even thought of, and when the Connecticut Supreme Court decided, if you examine the facts of the Connecticut Supreme Court, they said that this was an

officer acting on what, they use the term "reliable informant", which has been defined in Connecticut to mean an informant who conforms to the Aguilar-Spinelli test, who had probable cause to believe that a man was committing a drug crime. And that being so, he had a right to arrest Williams, and therefore they said, also by way of, what I would submit, dictum that Terry vs. Ohio was a part ofthe common law of Connecticut.

And -- I'm sorry, I'm way beyond my time; I can't argue that. But I don't think it ever was, and I don't believe that statutorily it can be.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hennessey.

Mr. Browne, do you have anything further?

MR. BROWNE: I would, if I have time left, but I don't know whether I do or not -- apparently, I do. I would like to address myself very briefly to the question --

MR. CHIEF JUSTICE BURGER: Let me say we'll enlarge your time three minutes, to conform with the additional time. So you've got time enough.

REBUTTAL ARGUMENT OF DONALD A. BROWNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BROWNE: Thank you, sir.

The question of the possibility of the pistol permit appears for the first time in 1970, when the matter is argued in the Second Circuit Court of Appeals. In other words, in the Superior Court in Connecticut, in the Connecticut Supreme

Court and in the United States District Court, counsel for Mr. Williams never advanced the argument which is being made here to you gentlemen this afternoon, or which was concededly made in the Seconrd Circuit Court. That beinq the possibility that he might have had a permit, and, consequently, if he had had a permit, then his possession of that pistol might not have been a crime.

So, consequently, the petitioner -- the warden or the State or what-have-you -- never presented to any of the lower courts any evidence regarding the frequency with which pistol permits are issued by the Superintendent of Police in Bridgeport.

In other words, for Mr. Williams' possession of the pistol to have been legal and not a violation of this particular statute, he would have had to have obtained a permit from the Superintendent of Police in Lridgeport.

Now, that particular issue itself was never framed in any of the arguments at all before the State Court; that was never presented. It was never framed within the pleadings of the petition itself for a habeas corpus; it was never argued in any fashion whatsoever before the District Court. So it took Williams four years, from '66 to '70, to determine that possibly he might have had a permit and that possibly he might not have been guilty of this particular statute which relates to carrying a gun.

And I submit that accordingly the State or the petitioner here had never -- has never presented any particular evidence on that point.

I think that it follows, also, as to whether or not Officer Connolly was justified in arresting him for carrying a pistol without a permit, that, one, once he found out that the pistol was there, once he removed that pistol, I think that that attaches a tremendous amount of reliability or credibility to the balance of the information received, in addition to the pistol he also had narcotics.

In other words, I think that it's a freer conclusion that Officer Connolly could legitimately reach, that if the man has a pistol and if he has narcotics, that he doesn't have a permit to carry that pistol, because, I'm sure the evidence would have shown, that pistol permits are not granted without any consideration to anybody that applies for one. Pistol permits are granted only upon a substantial cause that a person is entitled to have one.

Finally, the last argument that I would make about the pistol permit is, of course, that all that was necessary for Officer Connolly to arrest Robert Williams was probable cause that Mr. Williams had committed a particular crime of carrying a pistol without a permit. It wasn't necessary that he prove it without a doubt.

And I think that, again, Connolly would have justifi-

ably relied upon his twenty years' experience as a police officer, in saying that when he placed this man under arrest for carrying a pistol without a permit, that if the man had in fact had a permit he would have told him so. And I think he would have told him so emphatically that "You can't arrest me for this particular charge; I do have a permit issued by your Superintendent of Police."

And, of course, finally, that there is no claim at all, that I can see, that in fact he was illegally arrested because he had a permit. I think it's conceded that he did not have one.

Again, I submit, and it would be our position, that there is absolutely no indication here whatsoever that Officer Connolly knew Robert Williams before this incident, that he was acting out of any desire to harass Williams, that he was acting out of any motive, any improper motive of any sort whatsoever, I submit.

Q Mr. Browne, --

MR. BROWNE: Yes.

Q -- do I get your State's position accurately, that you do concede that you can't support the search, that is the machete and the heroin seized from the person, without a finding that the arrest was on probable cause?

MR. BROWNE: The arrest for carrying the pistol?

Q Yes.

MR. BROWNE: Abstolutely no. No. Without question, the subsequent searches have to stand or fall on the basis of the --.

Q In other words, you don't try to support them on any theory that this was a Terry kind of search, and to the extent that -- I mean Terry kind of detention, and, to the extent it was, that that would support the search?

MR. BROWNE: We maintain Terry supports his seizing that pistol.

Q Yes, but not -- not --

MR. BROWNE: Step two is then we submit he is legally arrested for possession of a pistol without a permit, and step three, we submit that he is validly contemporaneously searched, incidental to his arrest, which disclosed the heroin and which disclosed the machete under the seat.

And, incidentally, for the purpose of the record, as long as the machete is more than four inches in length, it is a crime in the State of Connecticut to carry it. It is not a crime to carry a knife with a blade less than four inches, and it was represented that the machete was --

Q And you don't claim the informer's tip was probable cause to search for heroin?

MR. BROWNE: No. No, I don't. I don't submit that the informer's tip was probable cause to search for heroin, but I do make the claim, relative to the possession of the

pistol, that the location of the pistol should --

Q This was Terry: reasonable suspicion?

MR. BROWNE: The search and the seizure of the pistol, yes. But I would like, too, to represent that the information that he also had narcotics, and the existence of the pistol is substantial to corroborate that he did not have a permit for his pistol, on the claim that a person with narcotics would not have a permit for his pistol.

Q Well, you aren't making the argument that the finding of the gun was corroboration enough of the informer's tip, are you?

MR. BROWNE: To proceed to arrest for narcotics? I have not, as yet, obviously, by two briefs advanced that argument, but I --

Q You haven't made the Draper argument?

MR. BROWNE: I have not as yet, no, but I would submit --

Q You're about to? You're about to, is that it?

MR. BROWNE: Well, of course, obviously, if the -- it depends again as to whether or not the pistol is validly seized. If the pistol is not validly seized, I think as corroboration it would go out as the fruit of an illegal search in any event.

But again I -- yes, I'm sorry.

Q Well, the informer did tell the officer that the

man sitting in the car across the street had narcotics in his possession.

MR. BROWNE: Yes.

Q And the officer testified that he had reason to believe this was a reliable informant.

MR. BROWNE: That's correct.

Q Why wasn't there -- why don't you at least argue that there was probable cause to search for narcotics?

MR. BROWNE: Well, essentially on the basis that there has been no showing sufficiently that this informer, himself, had previously presented sufficient information to make him a reliable informant; or, two, that he doesn't state the basis of his knowledge, he doesn't say that he saw the narcotics or that Williams told him he had the narcotics.

The whole question, of course, of street arrest is a field of its own. I'm not making any claim that anything other than the law set forth in Whiteley would be governing the situation here.

Q Well, Judge Friendly said there's a difference between an expert on homosexuality and an expert on drugs. Do you agree?

MR. BROWNE: I can't dispute with Judge Friendly on that.

Q This is an age of specialization!

[Laughter.]

MR. BROWNE: I go along with the Justice's remarks.

The only other thing I would say is that I was a little surprised this afternoon when my brother did make the claim that he felt that it was improper, illegal, unconstitutional -- whatever you have -- for Connolly to walk out of the gas station, across Hamilton Street, in view of his statement in his brief that the case law recognizing the right to stop applies fairly broad standards in support of such action, the right to execute a search is more rigidly defined; so that this was the first time that he had claimed, to my knowledge, that there was an improper activity in moving out of the gas station and across, next to the automobile.

And again, as far as the final action in the -- of the officer in reaching in and seizing the pistol, I think that the one sentence of the Chief Justice, in the Terry case, that it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties, was completely applicable to the activity of Sergeant Connolly in doing what he did. As I urged in my earlier argument, I think it's a balance of the intrusion involved as against the possibility of a substantial injury or a violent crime upon himself.

And I think that the election which he did was completely valid.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Browne.

Thank you, Mr. Hennessey.

The case is submitted.

[Whereupon, at 2:09 o'clock, p.m., the case was submitted.]

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