

In the
Supreme Court of the United States

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JAMES E. GUSTAFSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 71-1669

Washington, D. C.

October 9, 1973

Pages 1 thru 43

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STATE OF FLORIDA, :
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Respondent. :
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Washington, D. C.,

Tuesday, October 9, 1973.

The above-entitled matter came on for argument at
10:04 o'clock, a.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:

JAMES M. RUSS, ESQ., 441 First Federal Building,
Orlando, Florida 32801; for the Petitioner.

BARRY SCOTT RICHARD, ESQ., Deputy Attorney General,
State of Florida, Tallahassee, Florida 32304;
for the Respondent.

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James M. Russ, Esq.,
for the Petitioner

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In rebuttal

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Barry Scott Richard, Esq.,
for the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in No. 71-1669, Gustafson against Florida.

Mr. Russ, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES M. RUSS, ESQ.,

ON BEHALF OF THE PETITIONER

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

My name is James Russ. I represent the petitioner, James E. Gustafson.

This is an action of certiorari to the Florida Supreme Court. This is a case involving a felony conviction of the charge of possession of marijuana, and the case we bring to this Court involves a search and seizure, Fourth Amendment question.

The specific question is, involves the warrantless body search and seizure of a motorist who was arrested on a minor traffic violation. And the basic facts are that in January of 1969 Mr. Gustafson, while driving his automobile, was stopped by a Florida policeman. He was asked for his driver's license, and when he advised the policeman he did not have his driver's license in his personal possession, he was placed under arrest.

QUESTION: Why did the policeman stop him, Mr. Russ?

MR. RUSS: He stopped him because he observed him to be weaving, Justice Rehnquist. His testimony was that he weaved three or four times across a divider line between one lane and a second lane.

QUESTION: What time of day was it?

MR. RUSS: This was approximately 1:30 or 2 o'clock in the morning, Your Honor.

In any event, after Mr. Gustafson --

QUESTION: Now that you've been interrupted, may I do it again, just so I can understand this. I think I do. Do I understand correctly that in this case you do not question the constitutional validity of the arrest?

MR. RUSS: That's correct, Justice Stewart. We are challenging the constitutional validity of the search.

QUESTION: Yes. So in this case we proceed on the premise that the arrest was upon probable cause and was constitutionally a valid arrest?

MR. RUSS: Yes, sir.

QUESTION: Thank you.

MR. RUSS: For the charge of driving an automobile with no valid --

QUESTION: Yes, sir.

MR. RUSS: -- driver's license in his possession.

QUESTION: Yes, sir.

MR. RUSS: Now, after he was removed from the

automobile --

QUESTION: So, as far as that goes, you concede the validity of the stop, then?

MR. RUSS: Yes, we do, Justice White.

QUESTION: And then the validity of the arrest based on the fact that he had no license?

MR. RUSS: Yes, sir. Yes, sir.

And, of course, after he told the police officer that he did not have his driver's license with him, he was then arrested for that violation. He was taken out of the car, or he got out of the car by himself, and he was then spread-eagled against the police car, where, upon a pat-down, the police officer felt something in his coat pocket. He put his hand into his left coat pocket and removed a box of what appeared to be Benson & Hedges cigarettes.

At this point he put Mr. Gustafson in the back seat of his patrol car, and there was a passenger with Mr. Gustafson, a Mr. Moody; and the second police officer had arrived, Officer Levy. And at this point in time he told --

QUESTION: Who was in possession of the package of cigarettes at that time?

MR. RUSS: The police officer, Lieutenant Smith. He had physical possession --

QUESTION: When did he open it?

MR. RUSS: He opened it, apparently, a matter of a

few minutes later. In the interim he had advised the passenger to go ahead and drive off Gustafson's automobile, to follow them to the police station, and had told Officer Levy to check Mr. Moody to make sure he had a valid driver's license.

Then when he opened up the box of Benson & Hedges, --

QUESTION: Why did he open it?

MR. RUSS: Curiosity, Justice Marshall, I assume.

There was no legal justification for it.

QUESTION: Is it normal to arrest a man for driving without a license and put him under arrest in Florida?

MR. RUSS: I think it's normal to arrest in the --

QUESTION: Do you think or do you know?

MR. RUSS: I don't know specifically.

QUESTION: Well, that gets back to my question. I understood there was no question whatsoever in this case, the way you're arguing it, as to the constitutional validity of the arrest.

MR. RUSS: There is no question --

QUESTION: Normal or abnormal, that you do not question its validity.

MR. RUSS: That's right. Because the State law of Florida states that it's an offense to drive without a valid driver's license in your possession. It's sort of an inchoate offense. There's a back door to this thing, that if

you appear in court with your valid driver's license at a later date, then the whole matter is dismissed.

QUESTION: Right.

QUESTION: Was the automobile a Florida licensed automobile?

QUESTION: Yes.

MR. RUSS: Justice Powell, it had a New York license on it.

In any event, the --

QUESTION: I don't understand how you can arrest a man for a crime that you can't convict him of. I have a problem with that. Can you help me?

MR. RUSS: Justice Marshall, I have problems with it, too, but --

QUESTION: Well, why do you admit it?

MR. RUSS: Well, because we think that the key issue in this case for this Court's consideration is the matter of the scope of the search.

QUESTION: Well, you want to win it in one way only.

MR. RUSS: No, we want to win it one way or another.

QUESTION: Well, whatever our problems might be, and I confess I share in my brother Marshall's problems, I understand that's just simply not in this case. Is that right?

MR. RUSS: Yes, sir.

QUESTION: That's what I thought.

MR. RUSS: Yes, sir.

The issue in this case, as we see it, is: Is the scope and the intensity of a custodial body search, which is made incidental to a warrantless arrest for an evidenceless minor traffic offense, limited by the reasonableness clause of the Fourth Amendment?

QUESTION: If the action by the police officer had been confined to a Terry type pat-down, would you have -- would you be here this morning?

MR. RUSS: No, sir.

QUESTION: So you draw the distinction between the search and the pat-down?

MR. RUSS: Yes, sir. And we're complaining essentially about the search, the body search, the going into the man's pocket and the taking out of the cigarette box, and the opening of the cigarette box.

QUESTION: Well now, are they separate things? Is the opening the cigarette box, in your submission, a different -- create a different problem than going into his pocket and taking the box --

MR. RUSS: No. No. As far as we're concerned, the constitutional wrong in this set of circumstances occurred when the police officer put his hand into the man's pocket and took out the cigarette box.

QUESTION: And you don't argue that even if that were all right, opening the cigarette box was improper?

MR. RUSS: Well, that's just a further compounding of the wrong; yes, sir.

But our essential complaint is the going into the pocket, the body search.

QUESTION: Could he have done that under a Terry search, under the Terry case?

MR. RUSS: No, Mr. Chief Justice, we don't believe so. We say that --

QUESTION: If he found, on feeling the man's pocket from the outside, that there was a substantial package in there that was firm, do you say he could not go into that pocket under the Terry case?

MR. RUSS: Well, we say that under the Terry case, he has to have a reasonable belief that what he feels is of such substance that it could qualify as a weapon.

QUESTION: Do you think this package could have conceivably qualified as a weapon?

MR. RUSS: No, sir. We do not.

QUESTION: Was it a soft Benson & Hedges package?

MR. RUSS: It was a box, as I understand it, Justice Brennan.

QUESTION: Well, I mean a hard box or a --

MR. RUSS: Yes, sir. Yes, sir.

QUESTION: If -- I suppose you'd be making the same argument if this defendant had been arrested in his home for stealing television sets, and assume there's a valid arrest for that. They had probable cause, they went into the house and properly arrested the man. And then took a Benson & Hedges box out of his pocket and looked in it.

MR. RUSS: Well, not necessarily, Justice White. It's our essential contention, as regards the search for evidence, that it is proper for the police officer, incident to a lawful arrest, to search for the fruits, instrumentalities and evidence of the offense, upon which the arrest was made.

QUESTION: But you don't find the fruits of it in a Benson & Hedges box, if it's a television set, do you?

MR. RUSS: No. But we don't know what the circumstances of your hypothetical theft is. It could be -- there could have been a screwdriver that was associated with the break-in, there could have been an invoice associated with the television.

QUESTION: Well, on that basis, there could be a driver's license in a cigarette box, if you're going to argue like that.

MR. RUSS: But he wasn't charged with having a driver's license, he was charged with not having a driver's license.

QUESTION: Well, I know, but he may not have -- he may have lied about his identity. You could have found any-

thing in it, in a cigarette box.

MR. RUSS: Well, we submit that under the Fourth Amendment --

QUESTION: Something about the car, the ownership of the car, it could be anything.

MR. RUSS: We submit, under the Fourth Amendment, that the police officer doesn't have the authority to search for anything. He has the authority, in a body search, to search only for the fruits, instrumentalities and evidence related to the offense upon which the arrest is based.

QUESTION: Well now, the officer obviously didn't know, did he, that this was a cigarette box, as he patted the petitioner down? He didn't know what it was?

MR. RUSS: Well, he always referred to it in his sworn testimony as being a cigarette box, Justice Brennan.

QUESTION: I know. After he took it out. But did he know, before he took it out, that it was a cigarette box?

MR. RUSS: I don't know.

QUESTION: Did he testify as to that?

MR. RUSS: The specific question was never asked him.

QUESTION: Because you do concede, I gather, that the pat-down was proper.

MR. RUSS: Yes, sir. We concede, and part of our submission is that in such a situation, where you have an arrest for, like our case, a minor traffic offense, where

there is no evidence involved with the offense, there are no fruits, there are no instrumentalities associated with the offense, that it is still proper, under an extension of Terry, for the arresting officer, for his own self protection and to obviate the problems of potential escape, to pat down, in a Terry type frisk, the arrestee prior to putting him into the police car, or taking him into custody.

QUESTION: Well, this gets back to the Chief Justice's question, then, I gather, under your submission. If it had been of a different form, if it had been shaped like a gun or something like that, even though it turned out not to be a gun but a screwdriver.

MR. RUSS: Let's say it was a Peters case, where the arresting or the searching officer, the frisking officer felt something hard and substantial in the man's pocket, and which he thought might have been a knife. In that case, this Court held that that was proper for him to, after the frisk, to go into his pocket and bring out what turned to be a kind of a mini burglar tool set.

QUESTION: Well, then your case must turn on that -- when he patted this object inside his pocket, not knowing what it was, it didn't have the shape or form of something that might be a weapon; is that your point?

MR. RUSS: Yes, sir. Yes, sir. That's our -- our concession is that.

QUESTION: Then you have to say that under no conceivable stretch of imagination this hard package of the Benson & Hedges cigarette box could not have been a small pocket-sized automatic pistol, for example?

MR. RUSS: Your Honor, as we read Terry and Sibron and Peters, it's our understanding of those cases that this doesn't give a wide-open subjective approach on the part of the police officer, that he can't simply come to the trial court afterwards and say, "I intuitively, or believed that it might possibly have been a weapon of one sort or another"; that this is something that is subject to objective evaluation. Otherwise, the Terry frisk is really a wide open authority to search in a --

QUESTION: Don't you have to get over another point, though? This isn't just a Terry type stop. You concede this was an arrest.

MR. RUSS: Yes.

QUESTION: And it's a question of a search incident to arrest, not a Terry pat-down.

MR. RUSS: Right.

QUESTION: You're already assuming that the only thing a person can do, the officer can do is to do what he does after a Terry stop. But here was a valid arrest.

MR. RUSS: Yes, sir. The point is that there has to be a reasonable relationship for the reasonable arrest --

weight on that at all?

MR. RUSS: Justice Marshall, I don't attribute to the police officer any legal authority to open the package once he takes it out of the man's pocket. I would say --

QUESTION: Well, why don't you make that point?

MR. RUSS: As I answered Justice Brennan --

QUESTION: Or are you giving that point up, too?

MR. RUSS: No, sir. I'm simply saying that's a compounding of the constitutional wrong that began when he put his hand in his pocket.

QUESTION: Yes. I think you answered me earlier that you don't argue independently of, as putting his hand in the pocket, that opening the package, in and of itself, was a Fourth Amendment violation.

You don't argue that?

MR. RUSS: No, I say that it alls in one package, though. I'm not giving it away, I'm not conceding it. I'm saying that from the time that the officer put his hand in the man's left coat pocket, that the Fourth Amendment was violated from that point on and thereafter.

QUESTION: Even if it was a gun?

MR. RUSS: No. No. Because --

QUESTION: Then you're judging the search by its fruits, are you not? If it was a gun, it's all right; if it's heroin, it's not all right. Is that it?

MR. RUSS: No, Your Honor.

Let me go back over the theme again. The point is that on the frisk, if the police -- our position is that if the police officer frisked, under Terry, and felt what he believed to be, objectively speaking, was a weapon, then he had lawful authority in this minor traffic offense arrest to search further, to remove the weapon from the man's person, and to take control of it.

QUESTION: Suppose when he opened that Benson & Hedges box, there was not a pistol, an automatic, as Justice Marshall suggested, but a folding knife, a rather common weapon that folds in three sections of about two and a half inches each. Would you say then, too, that the search was not proper; unreasonable?

MR. RUSS: Well, I'm going back to the basic putting his hand in the pocket.

QUESTION: Well, now he's got his hand out of the pocket, we've got the box out, and he finds a weapon. Do you say that's an unreasonable search?

MR. RUSS: I say the opening of the box is unreasonable. I say that taking the box out of his pocket was unreasonable. That there is no rational connection between taking the box out of his pocket and the arrest for not having a driver's license in his possession.

QUESTION: How about protecting himself against the

possible weapon that might be concealed in the box?

MR. RUSS: Mr. Rehnquist, Justice Rehnquist, we believe that unless there's a rational objective showing that when the officer feels on the frisk is a weapon, or falls in that category of an object that could be used to hurt the police officer or the arrestee, or to effectuate the escape, that it becomes unreasonable for him to extend the frisk into a body search.

QUESTION: The officer can't, then, just because he uncovers an object that could contain a weapon, but that he can't show in advance probably contains a weapon, he can't go further into that, that object?

MR. RUSS: That's our position, yes, sir. Because the answer to it is that if it's left to the police officer's own subjective interpretation that there might have been a weapon in whatever this object is that he feels through the outer clothing, rather than an objective standard, an objective test, then every Terry frisk is going to develop into a full body search.

QUESTION: Mr. Russ, as I think my brother White has already pointed out, you're kind of assuming the answer to the basic issue in this case, are you not? The question is, whether, when there's a lawful arrest, a lawful arrest, perfectly constitutional, full arrest, whether, when the offense is an offense such as this, the arresting officer

is limited to a Terry type search. That's the basic question, isn't it?

MR. RUSS: Yes, sir.

That's our contention, that he is.

QUESTION: Right. And now, instead -- but instead of arguing that, you're rather arguing that you assume that he's limited to a Terry type search and now you're arguing that a Terry type search would not permit taking that box out of his pocket, which is a subsidiary and somewhat different question. But the basic question is whether the search is limited to a Terry type search, isn't it?

MR. RUSS: Yes, sir. It's our contention, of course, that it is, that this is within the concept of reasonableness under the Fourth Amendment, that there must be a rational connection between the reason for stopping and apprehending the citizen and this invasion of his privacy.

QUESTION: Where do you keep razor blades, for example? I mean, if you're going to have a Terry type stop, you're going to ask him a couple of questions for a few moments. It might be reasonable to say you could only pat down for weapons that might be drawn and used on the officer, which is like a gun or something, but if you're going to put a man in a police car and take him to the station, and things like that, shouldn't you be more careful about weapons and evidence -- what about a razor blade, for example?

MR. RUSS: Well, Justice White --

QUESTION: You can keep one anywhere, can't you?

MR. RUSS: Yes. If we're going to --

QUESTION: You may not be able to search for razor blades in a Terry type stop, but can't you search for razor blades if you arrest -- make a valid arrest and put him in a police car and take him to the station?

MR. RUSS: If you're going to search for razor blades, you're going to have to go right down to the very seam of his garments.

QUESTION: Well, all right. Let's assume he gets to the station, before they put him in a cell can they search his pockets?

MR. RUSS: Yes. This is assuming -- this is assuming they put him in a cell.

QUESTION: All right. But they get him to the station and are going to book him, and they're going to take a photograph of him, and can they ask him to empty his pockets there?

MR. RUSS: Not until such time as he goes from this booking stage to being an actual prisoner in the jail. And of course he certainly has the option, as in this case, to post bail right there at the station house.

QUESTION: Why can they make him empty his pockets when they're going to put him in the jail, put him in the cell

MR. RUSS: Well, as a matter of protecting the integrity of the whole jail system.

QUESTION: Because he might have a razor blade or something like that, or some other what?

MR. RUSS: Some other weapon or some other -- contraband of any type.

QUESTION: Some other weapon that you can't find except by emptying the pockets.

QUESTION: Well, other reasons come into play before a man is put in a cell. They want to take his money out of his pockets, for instance, and there are various other things, and make an inventory of it, for the protection of his property and for the protection against false claims against the police for taking his property, and so on.

There are all sorts of different grounds at the police station.

QUESTION: And his necktie and shoestrings. But that doesn't have anything to do with a package of cigarettes. I mean, once he's got the razor blades in the package of cigarettes, there's no way the prisoner can use those razor blades. Am I right?

MR. RUSS: Yes, sir. Yes, sir.

QUESTION: Well, why open up the package and look for them?

MR. RUSS: Well, we don't think it was necessary at

all to open the package, Justice Marshall.

QUESTION: On the other hand, if the policeman did find razor blades in a package of cigarettes, it would put him on the alert that he better do some more searching; is that correct?

MR. RUSS: Yes, sir. That's true.

QUESTION: How was he going to do that?

QUESTION: So there was a very good point under that theory of opening up the package.

QUESTION: But that's not this case.

MR. RUSS: There were marijuana cigarettes in this case.

But to answer Justice White's question so far as the booking at the jail, it doesn't absolutely follow that because a man is arrested on the street, that he ends up in a jail cell. Particularly in this type of motor vehicle violation, where, in the worst situation, as it occurred here, the man was taken from the street to the police station, whereas, the officer testified, bail was set in the amount of fifty dollars. And under normal circumstances, he would have been released upon the posting of that fifty dollars, and there never would have been any searching, there never would have been any incarceration in a jail cell.

QUESTION: Mr. Russ, what if the policeman, on searching, does find something that seems like a revolver in a

man's coat pocket, pulls it out and in the barrel of the revolver finds two or three nickel packages of heroin. May he seize those and charge the man with possession of heroin?

MR. RUSS: This is following a Terry frisk and --

QUESTION: Right. Following a frisk or search, whatever you may call it, in the circumstances of your man.

MR. RUSS: Yes, sir, I would concede that.

Our basic complaint is what followed after the frisk, that there should not have been any further intrusion into the man's privacy following the Terry frisk for weapons.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Richard.

ORAL ARGUMENT OF BARRY SCOTT RICHARD, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like to add a couple of facts to the facts as presented by the respondent.

At the outset, let me point out that the car was driving back and forth between the driving lane and the passing lane. The defendants, the record reflects, looked through the rearview mirror and upon seeing the police officer took evasive driving tactics. They drove behind a grocery store, and onto another street, in the opinion of the

officer, in an effort -- in the uncontradicted testimony of the officer, in an effort to evade him. One of the points that this Court was careful to point out in Sibron and Peters is an important factor in determining whether or not there is mens rea. Not -- yes, sir?

QUESTION: What, if any, traffic violation had he committed?

Didn't you stipulate that he hadn't committed any?

MR. RICHARD: No, Your Honor. The police officer indicated that at the time he saw that -- there was conflicting testimony. At one point he said that at the time of the weaving he didn't think there was a violation, that he stopped him to determine whether or not he was intoxicated. At another point he said there may have been a violation. But there was no arrest for the weaving violation.

He said he was stopping them to determine whether or not they were intoxicated, when he saw the car weaving.

QUESTION: Well, would marijuana make him intoxicated?

MR. RICHARD: It may, Your Honor.

QUESTION: Well, could it be that he was searching him for the evidence of marijuana?

MR. RICHARD: It may, Your Honor, and we are submitting --

QUESTION: You say it may?

MR. RICHARD: Yes, Your Honor.

We contend that in fact he had the right to do that. We submit that he had the right to search, for two reasons: one of them was for a weapon, and the second one was for marijuana.

And, with the Court's permission, I'd like to delay my response on that, so that I can deal with the questions raised by the respondent.

Let me just rapidly point out several more facts that have not yet been brought out, which I think are important.

After attempting to evade the police officer, he was stopped, and the police officer testified that he stopped him in order to determine if he was intoxicated, because the car had been weaving in this suspicious fashion. He said that after the respondent left the car, it was his impression that he was intoxicated, because of his actions and because of his bleary eyes.

The officer said that it was his impression, from observing him, that he was intoxicated.

Another point that I think it's important to note -- or let me answer some questions that were raised by the Court regarding the facts. Justice Marshal mentioned, asked the question: How can you arrest a man for a crime you can't convict him of?

I think it's important to note that he can be convicted of not having a driver's license. The police officer had no way of knowing, at the time of the arrest, whether or not the man had the driver's license. It's true that if the man had it and simply did not have it in his possession, that Florida does not convict. But the officer doesn't know that until the man arrives in court.

QUESTION: Is it usual in Florida to arrest the person for a traffic violation?

MR. RICHARD: Your Honor, the officer testified that approximately three or four --

QUESTION: I'm not asking what the officer said. You're speaking for the State of Florida. I'm asking what the law is.

MR. RICHARD: Your Honor, --

QUESTION: Is it normal in Florida to arrest a person for a traffic violation?

MR. RICHARD: I don't know the answer in terms of the factual statistics, Your Honor. It is permissible in Florida, it is lawful to arrest them for that purpose.

And I would suggest, Your Honor, that where the driver has an out-of-State license tag on his car, that it's not unreasonable for the officer to do that.

QUESTION: But you can't quote me any Florida law or regulation or anything, can you?

MR. RICHARD: I can tell Your Honor that it is legal in Florida for the officer to arrest. The man has committed a crime.

QUESTION: And you cite -- what?

MR. RICHARD: I don't know the statistical frequency --

QUESTION: Well, you can cite your opponent's brief among other things. That issue isn't in this case, is it?

MR. RICHARD: No, Your Honor, it is not. I think --

QUESTION: He concedes it's legal in Florida to do it.

MR. RICHARD: It is conceded. It is legal in Florida to arrest him. It is a crime to drive in Florida, I would imagine in most, if not all, States without a driver's license. And what's more, Your Honor, I would submit a serious crime, when we consider the fact that more people die --

QUESTION: Well, was he arrested? Was he handcuffed?

MR. RICHARD: The record does not reflect whether or not he was handcuffed, Your Honor.

QUESTION: Well, I ask you again: Is it normal in Florida to handcuff a man when you arrest him?

MR. RICHARD: I would imagine it may be, or --

QUESTION: You imagine. I give up.

MR. RICHARD: Your Honor, I must concede to the Court that I don't have a statistical analysis of the frequency with which police officers arrest or handcuff. I think that the --

QUESTION: I don't think that's involved here. It doesn't bother me that you don't have that statistic.

QUESTION: Well, it bothers me.

MR. RICHARD: If I might move on, Your Honor, so I don't get hung up on something I don't know, and go on to the things that I definitely do know.

Let me point out, as I said, that we are submitting two things here, Your Honor: that the search was reasonable, first for a weapon, and second for the marijuana.

With regard to the search for a weapon, it was pointed out by Justice White, and I think this is a critical point, that we are not dealing here with the Terry-Sibron-Peters situation. I think that that's critical. Terry-Sibron established a whole new concept, and a delicate one. It was an arrest without -- or, rather, a search without probable cause. It was a search without an arrest. Something this Court has never before permitted. And the Court felt compelled to create some serious restrictions upon this delicate new area, and we concede that point.

But here we're dealing with something that the Court has traditionally permitted: search incident to a concededly

lawful arrest. And that's an important distinction.

I would also point out, Your Honors, that there is a distinction here between the facts, not only dealing with the question of whether or not there was a lawful arrest, but what the officer was doing. In the Terry-Sibron situation, the officers were dealing at arm's-length on the street for a brief, momentary questioning period with men who they had the opportunity to completely concentrate on.

Here, Your Honors, we're dealing with an officer about to place a man in the back seat of a police car, to concentrate on his driving and taking him under arrest to the station.

I'd also point out, Your Honors, Justice Marshall asked whether there was any fear on the part of the officer. The important point, I think, here is that -- and this is a point which is raised continually in the argument of the respondent -- the important point is not the nature, the purpose of the arrest, but the fact of the arrest.

QUESTION: In other words, you suggest this is no different than had the officer seen this petitioner holding someone up and arrested him for attempted armed robbery?

MR. RICHARD: Well, I would suggest, Your Honor, it is certainly different.

QUESTION: Well, it may be different in kind, but you're suggesting, in respect of the legality of the search

incident to the arrest, it's no different. That's what you're saying, isn't it?

MR. RICHARD: That's right, Your Honor.

QUESTION: Just so long as there's a proper arrest, whatever may be the offense, --

MR. RICHARD: Absolutely.

QUESTION: -- then this kind of search is permissible. That's what you're saying.

MR. RICHARD: Absolutely. And I think the reason it must be is that the officer who arrests that man for driving without a license has no way of knowing whether that same man has committed five robberies before the arrest, and, hence, doesn't want to be arrested.

The important point here is that he is being arrested, and there's no way of knowing how dangerous the man being arrested is and what completely unforeseeable reasons he may have --

QUESTION: I was told that your argument is quite irrelevant. As long as he is making a lawful arrest, then this is a lawful incidental search, without a warrant?

MR. RICHARD: I agree, Your Honor.

QUESTION: All right. Whether he's afraid or not afraid.

MR. RICHARD: I agree, Your Honor.

QUESTION: Is that your position?

MR. RICHARD: Yes, sir.

QUESTION: Don't say you agree. I don't suggest it. That's my view of it. That's your position.

[Laughter.]

QUESTION: Just say "yes" in answer to his question.

MR. RICHARD: Perhaps it would be more appropriate to say: Yes, Your Honor, I hope the Court agrees.

QUESTION: That's right.

MR. RICHARD: I think perhaps the reason --

QUESTION: And the point is that if an officer were arresting somebody whom he saw, as an eyewitness, holding another person up and searched him, the same claim could be made that no search of that person could adduce any additional evidence of the holdup. Isn't that correct? I mean --

MR. RICHARD: Yes, sir, that is our position.

QUESTION: The same argument could be made against you, that search would have to be a limited one because nothing that could be found in that person's pockets could give any additional evidence of that particular holdup that the officer saw.

MR. RICHARD: Well, Your Honor, this goes to the other issue, which is the search for evidence as opposed to the search for weapons, which I'd like to get to in just a moment, if I can dwell on this for one more moment.

I wanted to point out that the reason this concerns

me is that the respondent dwells upon the fact that there was no fear here on the part of the officer being injured, and that this was a minor traffic violation. And of course this Court -- what he's asking this Court to do, I think, clearly, is impose, for the first time, upon search incident to arrest the new restrictions which the Court created in Sibron and Peters and Terry.

QUESTION: Yes, but in your brief you're rather making the same argument, it seems to me, and you suggested it in your oral argument, i.e., that this particular search may have been justified because he thought the man was drunk.

MR. RICHARD: That's an additional reason, Your Honor, that I think --

QUESTION: I thought your argument was, and constitutionally ought to be, that, just as Justice Brennan has outlined it, that when there is a constitutionally valid arrest there can be a complete search, period, regardless of what the arrest is for.

MR. RICHARD: I think that's true, Your Honor.

QUESTION: That is, if there's an arrest of a man to take him down to the station house in a police car.

MR. RICHARD: That is precisely what we're arguing, and I would agree --

QUESTION: Would that go for spitting on the sidewalk?

MR. RICHARD: Well, Your Honor, I think the important

point here is that the Court, the fear that Your Honor raises, is that the officer will use the arrest as a ruse to search or to harass.

QUESTION: I didn't say a thing about that, I said would that allow me, if a policeman says I spit on the sidewalk, he can walk up to me, arrest me and search me?

MR. RICHARD: If, Your Honor, there was a valid statute and it were lawful to arrest for spitting on the sidewalk, and the officer lawfully arrested the person and placed him in the squad car to take him to the station, I think it would be perfectly reasonable, Your Honor.

I think the significance --

QUESTION: Well, what protection do I have?

MR. RICHARD: You need not spit on the sidewalk, for one thing, Your Honor.

QUESTION: Well, I didn't say I spit, I said I was arrested for spitting.

MR. RICHARD: Well, of course, --

QUESTION: There's a difference, you know.

[Laughter.]

MR. RICHARD: Well, again -- then, Your Honor, I think what Your Honor is saying is that you fear that the officer will use an alleged violation as a ruse to search, and my response is that the courts have the obligation to determine that factor. And, as a matter of fact, the Florida

Supreme Court in this case cited several cases in which the State of Florida has overturned convictions, based upon the fact that they found that the arrest was a ruse, and that in fact there was no good-faith, lawful arrest.

QUESTION: I read that.

MR. RICHARD: And I think, Your Honor, that this is the obligation of the courts to determine, and when they determine this, that --

QUESTION: Well, why do you ask for such a broad general rule? You don't need to.

MR. RICHARD: Your Honor, I think --

QUESTION: Do you?

MR. RICHARD: I'm not asking for a rule any broader than the Court has laid down before, and the reason I think we need to is because --

QUESTION: Well, which one did this Court lay down that applied to spitting on the sidewalk? I can give it to the other one, Shuffling Sam, which was a different case.

MR. RICHARD: Admittedly, Your Honor, I know of no instance in which the Court has addressed itself to the question of driving without a license, but I --

QUESTION: But we did address it to disorderly conduct.

MR. RICHARD: I think, Your Honor, --

QUESTION: It did involve search and seizure.

MR. RICHARD: I think, Your Honor, that the Court of course can go to the question of whether or not a crime is too incidental to warrant an arrest.

QUESTION: All right, to warrant. I hate to press you, but I don't want your time to run out. I'm very interested in your point about the search for evidence.

MR. RICHARD: Okay, Your Honor, let me just conclude --

QUESTION: I think what you're really --

MR. RICHARD: -- with one sentence, then. That being that I think the intent to discord in Terry and Sibron and Peters was to give the police officer a broader flexibility in protecting himself from hazards. And I think if this Court were now to impose the restrictions in Terry and Sibron and Peters on the search incident to arrest, the over-all result would be precisely the opposite. The officer would be faced with a much more hazardous situation than he ever had prior to Terry and Sibron. And I think a situation which certainly is not warranted by the statistics which this Court cited in those cases and in the Adams case regarding assaults on police officers, particularly when they approach automobiles.

Your Honors, if I might then move on to the second point in our argument and again I think it not necessary, since I think that first point sufficiently justifies the

search in itself.

But if I might move on to the second one. We think, in addition, that the officer here was entitled to search for intoxicants. And I would remind the Court again, respectfully, that the record clearly reflects, by uncontradicted testimony, that the officer saw the defendants, saw the respondents weaving back and forth on the highway at 2:00 a.m. in the morning, that upon his approach behind them they attempted to evade him by leaving the highway, driving behind an alley in the back of a grocery store to another street. And that when the respondent left his car, he was, in the impression of the officer, intoxicated, bleary-eyed; and, by other actions, intoxicated.

These factors have been traditionally upheld as sufficient probable cause to arrest for intoxication. I think that it's important here to note something that the Florida Supreme Court said. They said that, "In today's proliferation of illegal drug use which affects the faculties, checking only for liquors is no longer adequate."

And I would suggest, Your Honors, that that point is well taken, particularly where the officer smelled no alcohol, he had the right to attempt to find other intoxicants, including marijuana, and there's no place more reasonable to search for marijuana cigarettes than in a cigarette box.

We're dealing here with a serious hazard on the

streets of the city, and I know of no way, Your Honors, in which a police officer -- and I would point out that in all of the recent cases, Adams and Terry and Sibron and Peters, this Court has reflected its concern for the --

QUESTION: But the difficulty with this argument is that he was not arrested for intoxication, whatever may have been the cause. He was arrested only for not having a driver's license. So this then again, doesn't it, has to turn on the scope of the search incident to a lawful arrest, whatever reason he may have been arrested, as long as the arrest was lawful.

MR. RICHARD: The critical point, Your Honor, I think is that there was probable cause to arrest him for intoxication. And I think Justice Harlan made an excellent point in Peters in this regard, Your Honors, when he pointed --

QUESTION: I know, but we're not -- we're not --

MR. RICHARD: He said --

QUESTION: We're concerned here, as I understood it, with a search incident, it's claimed and indeed conceded, to a lawful arrest, namely, an arrest for not having a driver's license.

MR. RICHARD: Yes, but --

QUESTION: Isn't that what this case is? Isn't that what we have to decide?

MR. RICHARD: Well, I think two things, Your Honor. That's the first thing. And I think that the State ought to prevail on that. But the second point, which was made in Peters in the concurring opinion, was that it doesn't matter whether he in fact makes the arrest before he searches, so long as there's probable cause to make the arrest.

Justice Harlan's point was that the man can't be heard to come before this Court and say "my conviction should be reversed because he didn't arrest me before he searched me, even though he arrested me afterwards, even though he had probable cause to arrest me."

Now, Your Honors, the same point exists here. Assuming the probable cause existed to arrest for intoxication, and assuming that he searched based upon the probable cause, even though he may have used the more expedient route of arresting for not having a driver's license, he didn't have to re-arrest the man for another crime, he was already arrested.

The important point here is not whether or not he arrested him for two things, but whether or not he arrested him, whether or not he had probable cause to arrest him for intoxication.

QUESTION: You're making this argument only if we reject your broader argument, aren't you?

MR. RICHARD: Of course, Your Honor. This argument

is unnecessary if the Court --

QUESTION: Right.

MR. RICHARD: -- never need get to this argument.

Of course Your Honors --

QUESTION: Now you're inviting us to say that the law is that the scope of the arrest depends upon the particular evidence in a particular -- in the particular circumstances of when the, what the officer saw before he arrested him.

MR. RICHARD: I think, Your Honor, I'm really saying that this is only an issue incident to this given case.

QUESTION: Right.

MR. RICHARD: I think this Court has always recognized that the question is not when the technical arrest took place, but when the probable cause to arrest existed, in exigent circumstances as here, where you can't go for a warrant. And I don't really think there's a constitutional issue to be changed here.

All I'm saying to the Court is: Should it disagree with the State's position on the constitutional issue, --

QUESTION: Right.

MR. RICHARD: -- the first issue, that --

QUESTION: In any event, in this particular case, --

MR. RICHARD: In this given case, --

QUESTION: -- there was, yes.

MR. RICHARD: -- the conviction should be upheld.

For that reason.

QUESTION: Yes.

QUESTION: Then, with that conjecture, we don't have to reach the constitutional issue in the first question? If you're right on the second, we can sustain this conviction?

MR. RICHARD: Yes, Your Honor, --

QUESTION: Without reaching the constitutional question?

QUESTION: There is still the constitutional issue, of course.

MR. RICHARD: You would have to reach the constitutional issue in the case, which has been taken in tandem, where there was no, concededly no basis for searching for evidence. And we would submit that even in that case the search was reasonable for weapons.

And so the issue would have to be raised in one of these cases and met.

QUESTION: You mean the next one?

MR. RICHARD: Yes, sir.

Of course, if the issue is raised and met in the next one, and if the Court agrees with our position, then it need not go to the second issue in this given case.

QUESTION: Yes.

MR. RICHARD: Thank you.

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

Mr. Russ, you have about seven minutes left.

Let me begin with a question to you: If, in the circumstances of this stop-and-arrest, in feeling the pocket, he had felt the same package and had withdrawn it and found that it was a small flask, in which there was some vodka or whiskey, let's assume vodka because he said he smelled no whiskey here. Would that probable vodka, flask of vodka be admissible in evidence?

REBUTTAL ARGUMENT OF JAMES M. RUSS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. RUSS: Your Honor, my answer --

QUESTION: On a weaving, driving while intoxicated charge?

MR. RUSS: In this specific case, I would say no, Your Honor, because I respectfully disagree with the attorney for the State of Florida as to what the record shows in this case on this question of intoxication.

Now, my reading of the record, and this intoxication claim has been raised by the State of Florida for the first time in its brief before this Court, after we've been through the intermediate Court of Appeals and the Florida Supreme Court. The record clearly shows that this police officer's attention was drawn to this automobile by the fact that it weaved very slightly over a divider line three or

four times in the course of three-quarters of one block. That he thereafter followed this car for another six blocks, having already made the determination that he was going to stop the car because of the weaving. And everything he saw about the man, the way he got out of the car, the way he stood, the way he smelled, the way he walked, the way he conducted himself, objectively showed that the man was sober.

QUESTION: Well now, when he found, if he found, in my hypothetical question, this small flask of vodka, would there not be some connection between the flask of vodka and the weaving? Or could not the courts find that there was some connection between the two?

MR. RUSS: I would say this, that under our fact pattern here, that if he arrested the man for no driver's license, and then he had the Terry pat-down, he felt the flask, if he could reasonably and objectively say "I earnestly believed that that was a weapon of some sort that could be used to hurt me or could be used to effectuate an escape," then I would concede that he could thereafter go into the pocket and take out the flask.

Now, whether he could thereafter open it and determine what was inside it, I would say no. That he had satisfied the element of self protection by going into the pocket and removing what he honestly believed to be a weapon.

QUESTION: But do you concede that it would be

admissible in evidence against him?

MR. RUSS: I do not concede that he would thereafter have the constitutional authority to open the flask and determine what was inside it, without a warrant.

QUESTION: Well, what was he going to do with that flask while this fellow is being tried, just impound it somewhere and give it back to him?

MR. RUSS: No, I think he could go to a magistrate in a court and simply state "I have seen this man drive this way, I've taken this from his pocket under a lawful frisk, and I now ask for a court approval on a showing or probable cause under oath to open it and inquire what its contents are."

To just settle on this intoxication argument, I would reiterate by saying that throughout the testimony of the police officer it shows, both by his testimony and by his actions -- now, the fact that he didn't arrest him for driving while intoxicated, the fact that he never searched the automobile for any evidence of intoxicants, the fact that he testified under oath that he didn't even have enough evidence to charge him with the most minor of all offenses, which was careless driving by weaving, belays the argument now raised by the State of Florida that this search can be justified under the theory of intoxication.

Thank you.

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

Thank you, Mr. Richard.

The case is submitted.

[Whereupon, at 10:48 o'clock, a.m., the case
in the above-entitled matter was submitted.]