ER

IN THE SUPREME COURT OF THE UNITED STATES

W. T. STONE, Warden, Petitioner,	:	
v.	:	No. 74-1055
LLOYD CHARLES POWELL, Respondent.	:	

Washington, D. C.

Tuesday, February 24, 1976

The above-entitled matter came on for argument at 1 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

ROBERT R. GRANUCCI, Deputy Attorney General, 6000 State Building, San Francisco, California 94102 for the Petitioner.

ROBERT W. PETERSON, University of Santa Clara School of Law, Santa Clara, California 95053, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1055, Stone against Powell.

Mr. Granucci, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT R. GRANUCCI

ON BEHALF OF PETITIONER

MR. GRANUCCI: Mr. Chief Justice, and may it please the Court: This case is here on a writ of certiorari to review a decision of the Court of Appeals for the Ninth Circuit, which in effect orders the setting aside of respondent's California conviction of second degree murder.

The murder took place in San Bernardino in the evening of February 17, 1968. Respondent Lloyd Charles Powell with three companions entered a liquor store owned by Gerald and Mary Parsons. While one of the group was making a small purchase, respondent was observed in the act of shoplifting a half-gallon of wine. He struck Mr. Parsons in the mouth with his fist. A fight ensued. During the struggle respondent took Mr. Parsons' revolver from him and fired two shots. The first struck Mr. Parsons in the arm wounding him. The second struck Mrs. Parsons just below the neck, punctured her lung and resulted in her death the following morning.

The town of Henderson, Nevada, is located approximately 180 airline miles northeast of San Bernardino and 8 miles southeast of Las Vegas. Shortly after 10 a.m. on the morning

after the shooting, Henderson Police Officer Edward Lattin, while on routine patrol, observed two men walking across the parking lot of a shopping center. One of the two was respondent.

QUESTION: What time of day or night?

MR. GRANUCCI: Approximately 10 a.m. in the morning, your Honor.

As soon as the two saw the police car, they turned about and started rapidly in the direction they had been coming from. When Officer Lattin made a U-turn and started to approach them, the two split up. Officer Lattin honked his horn. Respondent kept walking rapidly toward the rear of the department store. Finally Officer Lattin got out and ordered respondent to stop.

Officer Lattin asked respondent for some identification. He replied that his identification papers had been stolen. He did give the officer his name and date of birth. The officer then radioed for a warrants check which came back negative. Respondent told the officer he had been staying with friends in Las Vegas for the past few days, but he didn't give their names and he didn't know their address. He stated that he was on his way to Michigan. The officer also tended to disbelieve this because the most direct route from Las Vegas to points east does not pass through Henderson.

A local ordinance makes it a misdemeanor for a person

to loiter without apparent reason or business and to refuse to identify himself and to account for his presence when asked by a police officer to do so when the surrounding circumstance would indicate to a reasonable man that the public safety demands such identification.

Officer Lattin arrested respondent for violating that ordinance. A search incident to the arrest turned up the murder weapon.

QUESTION: On his person?

MR. GRANUCCI: On his person, your Honor.

At respondent's trial in June 1968 in a San Bernardino County Superior Court, the revolver was admitted into evidence after the trial judge had heard and denied respondent's motion to suppress it as the product of an illegal search. The jury subsequently found respondent guilty of second degree murder.

Respondent appealed his conviction. One of his contentions was that his arrest and the incidental search were illegal because the Henderson vagrancy ordinance was unconstitutional. In October 1969 the California Court of Appeals affirmed the conviction holding it was not necessary to reach the merits of the search point because admission of the revolver into evidence even if it were error would not have affected the verdict.

Respondent did not seek a hearing in the California

Supreme Court. However, he did subsequently apply to that court for a writ of habeas corpus and his petition was denied.

In August 1971 State remedies having been exhausted, respondent filed an amended petition for a writ of habeas corpus in the United States District Court for the Northern District of California. That court issued an order to show cause. After receiving briefs and examining the record of the State trial, the district court denied the writ in February 1972. Significantly, in its order denying the writ, the district court declared the purpose of the exclusionary rule would not be advanced by ex post facto condemnation of an arrest which was apparently valid when made and the facts developed at petitioner's trial show that the arresting officer had probable cause to believe that he had observed the petitioner violate the ordinance.

On December 4, 1974, the Ninth Circuit Court of Appeals reversed, ostensibly directing further proceedings in conformity with this opinion, but actually ordering the writ granted and petitioner released -- excuse me, your Honors, respondent released. Its opinion, a triumph of logic over justice, reasoned as follows:

Under Papachristou v. City of Jacksonville, the Henderson vagrancy ordinance is unconstitutional. Therefore, respondent's arrest was illegal. Therefore, the revolver found in the incidental search was illegally obtained evidence.

Second, that the arresting officer acted reasonably and in good faith is of no moment. Application of the exclusionary rule in this case is appropriate to preserve judicial integrity and to deter legislative bodies from enacting unconstitutional statutes. Admission of the revolver was not harmless error, therefore, respondent's California murder conviction must be set aside.

Thus the question before this Court in this case --

QUESTION: During this arrest was he charged with possession of the weapon?

MR. GRANUCCI: Your Honor, that does not appear in the record below. I think it is safe to assume that when the officer found the revolver in the incidental search, he forgot all about the vagrancy ordinance and continued to process and book respondent for the more serious charge of carrying a concealed weapon. But that is simply an assumption I make.

The question before this Court --

QUESTION: Before you get into your argument, could I ask another fact question?

MR. GRANUCCI: Yes, your Honor.

QUESTION: The respondent is now on parole, as I understand it.

MR. GRANUCCI: Yes.

QUESTION: Can you tell us at what point in the

State proceedings he began to serve his sentence? Is it after the conviction in the trial court or is it normally true in California they wait until the appeal process is exhausted?

MR. GRANUCCI: No, your Honor. Although a defendant in California is entitled to move for bail pending appeal, the granting of that motion is discretionary, and ordinarily a defendant sentence for murder begins to serve his sentence as soon as the judgment is pronounced in the trial court.

QUESTION: That's what happened here.

MR. GRANUCCI: Yes, your Honor.

The question for decision is whether a California murderer is to go free on Federal habeas corpus because he was arrested under a Nevada ordinance which may have violated a decision of this Court handed down two years after the conviction became final, four years after the arrest, and more significantly, more than four years after the ordinance was adopted.

The question specified by this Court in its order granting review, namely, whether in light of the fact that Officer Lattin had probable cause to arrest respondent for violation of an ordinance which at that time had not been authoritatively declared unconstitutional, respondent's claim based on the search incident to that arrest is one cognizable on Federal habeas corpus invites a preliminary inquiry that is even more fundamental, that is, whether 4th

amendment claims of State prisoners should be cognizable at all in such proceedings.

We raised this very question in Schneckloth v. Bustamonte, and Justice Powell treated it in his concurring opinion. Today we ask the Court to adopt Justice Powell's analysis. Rather than simply restating the basic argument presented in that case that the cost to society involved in relitigating 4th amendment claims on Federal habeas corpus outweigh any benefits to be gained thereby, we present an additional consideration.

QUESTION: You said relitigating?

MR. GRANUCCI: Relitigate, your Honor.

QUESTION: What about if it has never been litigated?

MR. GRANUCCI: Then, your Honor, the petitioner would be faced with two inquiries that were even more fundamental and would be dispositive -- whether he had failed to exhaust State remedies or whether he had bypassed procedure in the State court.

QUESTION: I just want to ask you, do you want the habeas corpus statute now construed to exclude from the power of the Federal court 4th amendment claims that had never been litigated in the State court?

MR. GRANUCCI: Yes, your Honor, where there has been a fair procedure available to litigate.

QUESTION: Where he had the opportunity --

MR. GRANUCCI: Where he had the opportunity.

QUESTION: Suppose there was some new information that came -- assume he was denied counsel illegally.

MR. GRANUCCI: And couldn't litigate the claim for that reason?

QUESTION: Let's assume he is excused in some manner for not having raised the claim in the State court.

MR. GRANUCCI: Our position is such claims should not be available at all. A denial of counsel would work --

QUESTION: Then let's just don't talk about relitigation, just say litigation.

MR. GRANUCCI: Litigated. I will accept that.

QUESTION: Be open for consideration ...

MR. GRANUCCI: That should not be cognizable, open for consideration.

QUESTION: But claims of denial of counsel would be independent of its own force.

MR. GRANUCCI: That's a personal due process right available to a defendant by its own force.

QUESTION: It would have no connection whatever with the 4th amendment claim.

MR. GRANUCCI: No, your Honor.

QUESTION: You don't take the position it should not be open in the Federal court if there is no State procedure

for even raising the question in the State court, do you? Isn't your whole case premised on the availability of a State procedure where it could be raised?

MR. GRANUCCI: Where the State provides an adequate procedure for the vindication of these claims, they should not be available on Federal habeas corpus.

Habeas corpus is a remedy for the vindication of personal rights. This is clear from Fay v. Noia, which says today's habeas corpus provides a mode for the redress of denials of due process of law.

QUESTION: Suppose the State has a good procedure but the State Supreme Court makes an error. Let's assume it denies him cross-examination in a suppression hearing in a manner that is plainly erroneous. Now, the hearing is flawed. Let's assume that it's flawed and everybody would concede it was flawed. You would still say that the Federal habeas court is closed to him or open?

MR. GRANUCCI: That would be a due process error that occurred during a State proceeding. That claim of denial of cross-examination on a material issue in the State court --

QUESTION: Then what do you do about it? You entertain it in the Federal court but you won't reach the 4th amendment claim.

MR. GRANUCCI: I think the proper remedy, your Honor, would be to send it back for another suppression hearing in the

State court where he would have his right to cross-examination.

QUESTION: But you claim in that case, I suppose, that the Federal habeas corpus court would be a denial of the right of confrontation.

MR. GRANUCCI: Due process. Precisely.

QUESTION: Would you place any limits on that in terms of time frame?

MR. GRANUCCI: I think that such claims ought to be promptly raised. There shouldn't be a bypass of State remedies. There should be exhaustion.

QUESTION: In other words, something in the nature of a doctrine of latches should be applied in the criminal area.

MR. GRANUCCI: I think so, Mr. Chief Justice.

In Fay v. Noia, this Court said vindication of due process is precisely the historic office of the writ of habeas corpus, but the historic office of the exclusionary rule on the other hand is entirely different. This Court has thoroughly discredited the notion that a defendant has a personal right to the exclusion of evidence. In United States v. Calandra and United States v. Peltier the Court has stated that the exclusionary rule is a judicially created remedy designed to safeguard 4th amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved. The exclusionary rule furthers a general societal interest rather than a personal right.

QUESTION: Those terms sound more like supervisory power rather than constitutional, do they not? If there is no personal constitutional right, then the only other reach of this Court or of the Federal courts would be under supervisory power. Or is there a third alternative?

MR. GRANUCCI: I think that decisions of this Court up to this point have tended to blur the notions of constitutional rights and personal rights.

QUESTION: I am just taking the language that you were reciting. Does that language not comport more with supervisory power than it does with defining an individual personal right?

MR. GRANUCCI: I think so. I think so. Although the theory of Mapp v. Ohio, as I understand it, is this: The Constitution requires an exclusionary rule that can be asserted at trial in order to discourage the police from making unlawful searches.

QUESTION: Certainly this Court has no authority other than the Constitution for imposing the exclusionary rule on the States.

MR. GRANUCCI: That is correct, your Honor.

QUESTION: So we not necessarily had to hold that the exclusionary rule was constitutionally required.

MR. GRANUCCI: Yes, but it doesn't necessarily -- the fact that it is constitutionally required doesn't mean that it

must be applied at all stages. It doesn't mean that it is required on collateral attack.

I think this is clear from United States v. Calandra. John Calandra's rights were arguably violated by an illegal search, but the violation of that constitutional right didn't necessarily mean that he had a personal right to assert the exclusionary rule at all stages of the proceedings. In determining whether Mr. Calandra was entitled to make a suppression motion to challenge evidence which was being considered by the grand jury and which was being used to formulate questions asked of him, this Court balanced the effect, the negative impact of allowing suppression there in the form of an undo interference with the functioning of the grand jury against any positive effects that application of the rule would have in further deterring unlawful searches, keeping in mind that the evidence would be inadmissible at trial.

QUESTION: The language that you were quoting earlier came from Calandra, not Mapp v. Ohio.

MR. GRANUCCI: That is correct, your Honor. It came from Calandra and it was quoted in Peltier.

Of course, the disadvantages of allowing State prisoners to raise 4th amendment claims on Federal habeas corpus had been recounted before. I simply touch on them. This practice taxes scarce judicial and prosecutorial resources. It causes frictions between Federal and State courts whose decisions

are second-guessed. It undermines public confidence in the administration of justice by the litigation of matters years after the fact that bear no relationship to the guilt or innocence of the defendant. And it is totally inconsistent with any idea of rehabilitating criminal offenders. In the words of Professor Paul Bator, the idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.

At this point it may be suggested that we have proved too much, that the disadvantages of collateral attack are so great that no constitutional right should be available once a conviction has become final as a basis for habeas corpus. However, where personal rights are involved, balancing is inappropriate, but where a societal right is involved and where a defendant has no personal right to the exclusion of evidence, then he should be permitted to invoke the rule only where it will actually serve to deter unlawful searches and seizures.

QUESTION: You aren't suggesting, are you, Mr. Granucci, that the 4th amendment rights themselves are some sort of second-class nonpersonal rights?

MR. GRANUCCI: No, I think history would argue exactly the contrary.

QUESTION: By their very terms, it says the 4th amendment confers a right upon each of us to be secure in his person, his house, and his effects from unreasonable searches

and seizures.

MR. GRANUCCI: That's right.

QUESTION: There is nothing more personal than that.

MR. GRANUCCI: That's right. But, your Honor, Mr. Calandra's rights were violated by that search, but that didn't necessarily mean he had the right to make a suppression motion. The exclusionary rule is simply a judicially created doctrine to further the protection against unreasonable searches and seizures.

QUESTION: Then you'd do the same thing in the 5th amendment area, compel self-incrimination if the compulsion has been exerted by the trial.

MR. GRANUCCI: If it has been exerted prior to trial, the right is not completely violated until either the confession or its fruits are admitted in the trial. Remember, the 5th amendment is about testimony --

QUESTION: Some people think that they are further damaged in their 4th amendment interests by the disclosure at the trial of private matters seized from their house. Similarly, a lot of people think their 4th amendment rights are violated if conversations which have been overheard are repeated at trial.

MR. GRANUCCI: Yes. But the defendant has no personal right to the suppression of evidence. It's not what the defendant feels; it's the remedy that the court makes available.

QUESTION: So you would, then, apply the same rule to compel self-incrimination issues where the compulsion has been exerted by the trial to secure a statement?

MR. GRANUCCI: Yes, that right is not violated, though, until the evidence is admitted at trial because the 5th amendment is uniquely a trial right.

QUESTION: You are making a distinction now between a systemic rule that is for the benefit of the system as distinguished from a doctrine or rule that is for the benefit of the particular individual.

MR. GRANUCCI: That is correct, your Honor.

QUESTION: That's what you meant by using the term "societal."

MR. GRANUCCI: Societal and systemic, I think, mean the same thing.

QUESTION: Counsel, I wonder if you're right. You are suggesting that if the police extort a confession from an individual brutally and do not admit it in the trial as evidence, that individual would have no 1983 remedy against the police.

MR. GRANUCCI: No.

QUESTION: Then his right has been violated before the confession is introduced in trial. I don't understand your distinction.

QUESTION: Does that not go to the reliability and

trustworthiness of the confession as distinguished from no challenge to the reliability and trustworthiness of the pistol found in the pocket of this man?

MR. GRANUCCI: That's one distinction that has been drawn between statements and physical evidence, but I think the question of Mr. Justice Stevens was somewhat deeper.

There is no-- the question assumes, and I would agree that the defendant who was injured by officers acting under color of State law would have a right. He would also have a right if he were simply the victim of a search for a damage action, assuming that the defenses of good faith and other related defenses were not present. But he has no personal right to the exclusion of that evidence.

QUESTION: He would have a pretty tough job maintaining a civil suit from a jail cell, wouldn't he?

MR. GRANUCCI: I don't know, your Honor.

QUESTION: How can he carry his 1983 suit from the jail cell?

MR. GRANUCCI: Probably by retaining counsel.

QUESTION: Well, he can maintain it when and if he is free.

MR. GRANUCCI: Yes, of course.

QUESTION: That is assuming the statute of limitations has not run.

MR. GRANUCCI: Yes.

Now, it well may be that the Court is unwilling totally to eliminate the cognizance of 4th amendment claims on Federal habeas corpus. If so, the facts of this case suggest a principle by which habeas corpus jurisdiction could be limited to those instances where availability might actually serve the purposes of the exclusionary rule. We suggest the following limiting principle: A search made in reasonable and good faith reliance upon a coordinate branch of government should not be cognizable on Federal habeas corpus.

Up to now we have argued that the exclusionary rule should not be applied on collateral attack because the costs in applying it far outweigh any minimal effect it might have --

QUESTION: If it is in fact intentional and knowing violation, it would be excluded? Is that the line you are drawing?

MR. GRANUCCI: I am drawing the line on Federal habeas review. If the Court --

QUESTION: All right. May there be Federal habeas review of a knowing violation of the 4th amendment to have excluded --

MR. GRANUCCI: This is essentially a fallback position, your Honor. In other words, if the Court is not prepared totally to overrule Kaufman and the related cases, then it can limit review to those cases in which the deterrent purpose of the rule is actually served.

QUESTION: That is where there is an allegation that the illegal search was knowing and intentional.

MR. GRANUCCI: Yes.

QUESTION: Is this something along the lines of the English rule that only flagrant violations would be the subject of an exclusion?

MR. GRANUCCI: I think so, your Honor, although I am not sufficiently prepared on that point to speak with any great degree of confidence.

You see, when an officer has made an arrest or a search in reasonable and good faith reliance on the action of a coordinate branch of government, in this case the Town Council which adopted the vagrancy ordinance, and, for example, in the previous case the magistrate who issued the search warrant, his action is commendable. It shouldn't be deterred at all. In terms of influencing police conduct, application of the exclusionary rule in the setting where the officer has reasonably relied on a coordinate branch of government, is actually contraproductive because to the effect that it influences police conduct at all, it invites officers to speculate about the constitutionality of the statutes and laws they are sworn to enforce or search warrants they are directed to execute.

The Ninth Circuit based its decision on judicial integrity. We note only that judicial integrity was a rationale

articulated by this court in the exercise of its supervisory authority over the lower Federal courts, and it has been assimilated into the deterrent rationale. This is clear from United States v. Peltier. It's inappropriate to apply the exclusionary rule for the stated purpose of deterring legislatures from enacting invalid statutes because the very word "deter" assumes that legislatures act in bad faith. This is contrary to the basic principles of democratic government.

QUESTION: Your argument really, while it's directed to the point that was isolated in your colloquy with my brother Brennan, really the argument you are making now is equally to the effect there was no 4th amendment violation in this case, is it not?

MR. GRANUCCI: Yes, that raises a question of characterization. If you say the 4th amendment only is aimed at prohibiting unreasonable searches, I think we can leave room for a reasonable mistake of law, reasonable good faith mistake of law, just as in Hill v. California --

QUESTION: I think your point was that an arrest made under a statute or in this case an ordinance that was validly passed by a City Council in a municipality in the State of Nevada which had never been held to be invalid and that a search incident to that arrest was a perfectly valid search and no violation of the 4th or 14th amendment whatsoever. And if that's true, then none of these other questions arise.

MR. GRANUCCI: That's right. That's right. We think it's quite properly correct to characterize this as a totally reasonable search. On the other hand, if it is a violation of the 4th amendment to make an arrest or a search which is unauthorized by an ex post facto application of an invalidating decision, then it is only a technical violation and applying the exclusionary rule on habeas corpus is meaningless.

You see, in this case, what the Ninth Circuit did was free a California murderer simply to censure the Town Council of Henderson, Nevada, for its alleged legislative misjudgment. This is a gross abuse of federalism, an intolerable miscarriage of justice, and it can't be allowed to stand. And I would like to reserve what remains of my time.

QUESTION: Does it also have any effect of deterring police officers in this town in Nevada from enforcing a dubious ordinance?

MR. GRANUCCI: Well, we are advised that in the town of Henderson, Nevada, they are no longer making arrests under the vagrancy ordinance. But, again, why punish California? Why set aside this conviction? It doesn't serve the purposes of the exclusionary rule.

MR. CHIEF JUSTICE BURGER: Mr. Peterson.

ORAL ARGUMENT OF ROBERT W. PETERSON

ON BEHALF OF RESPONDENT

MR. PETERSON: Mr. Chief Justice, and may it please the Court: Mr. Powell was was walking in an open shopping center in Henderson, Nevada on February 18, 1968, when he was approached by a Henderson, Nevada, police officer, asked a few questions, and then arrested under the Henderson, Nevada, ordinance. That arrest was unreasonable. It was unreasonable in the 4th amendment constitutional sense for a number of reasons: It was unreasonable because the police officer did not have probable cause to believe that he had violated the ordinance, and it was also unreasonable because the ordinance --

QUESTION: The ordinance is here somewhere, isn't it?

MR. PETERSON: Yes.

QUESTION: Where, in the petitioner's brief?

MR. PETERSON: I think it's in all the briefs in a number of different places.

QUESTION: You say that the police officer should reasonably have known that this was an unconstitutional ordinance?

MR. PETERSON: I think so. I don't concede for a moment --

QUESTION: I thought the argument you were just making assumed that the ordinance was constitutional, nevertheless there was no probable cause.

MR. PETERSON: I think that's exactly true.

QUESTION: But that isn't the ground on which the judgment we are reviewing rests.

MR. PETERSON: It's not on that ground simply because the Ninth Circuit did not reach that ground.

QUESTION: Would we independently reach a proximal matter like that if it hasn't been passed on by the lower courts?

MR. PETERSON: I suppose it might be appropriate if you were to decide that it is constitutional to arrest someone under an ordinance that authorizes unreasonable searches and seizures that this case would have to be sent back to --

QUESTION: That may be, but that doesn't get rid of the issue we have here.

MR. PETERSON: No, it doesn't get rid of the issue that we have here, and that's why I am going to go on to the ordinance.

QUESTION: This seems to be the only grounds that the Ninth Circuit rested on?

MR. PETERSON: I don't think so. I think, for example, that you might well decide to dispose of this case on the probable cause grounds in order to avoid deciding the constitutional issue, because the probable cause ground tends to narrow it down.

QUESTION: Well, that's no constitutional issue.

MR. PETERSON: I mean the constitutionality of the State law.

... QUESTION: (Inaudible) in this case and the Terry case.

MR. PETERSON: This case is worse than the Terry case.

QUESTION: This case, I understand the facts as given that when the police approached him he ran?

MR. PETERSON: In the Terry case.

QUESTION: No, in this case.

MR. PETERSON: No, he did not run. When the police approached him, he was walking, walking according to the officer, at a quick pace.

QUESTION: I thought Mr. Granucci said he was --

QUESTION: Your colleague said he was hurrying on or something.

MR. PETERSON: Walking quickly, that's the way the police officer characterized it.

QUESTION: I stand corrected. He was going this way and then he turns around when he sees the police officer and he walks quickly the other way.

MR. PETERSON: Yes, quickly, in a shopping center towards one of the department stores.

QUESTION: Towards one of the department stores.

MR. PETERSON: That's right.

QUESTION: And isn't that what happened in ?

... Terry? In Terry he was forced to stop three times, but this was once.

MR. PETERSON: I believe in either Terry or Sibron, I have forgotten which one, where the person walked back and forth in front of the store some 25 times.

QUESTION: That was Terry.

MR. PETERSON: Yes, some 25 times back and forth looking like he was casing the store, a number of times.

QUESTION: Yes, but he's in a vacant lot and he walks away. Didn't the police have a right to stop him?

MR. PETERSON: I don't think the police officer in this case did have the right, but for the purpose of argument, I will concede that the way he was walking would authorize the police officer to make a limited Terry stop.

QUESTION: And would he have a right to frisk him?

MR. PETERSON: No, he would not have a right to frisk him, because Terry requires, before you can frisk him, that you have some founded suspicion that he was armed, and this police officer did not have any founded suspicion. He had none whatsoever. Indeed, the Attorney General has never argued that there was ground for frisk.

QUESTION: There was a gun on him.

MR. PETERSON: He did have a gun, but there was no reason for the officer to believe that.

QUESTION: What was the founded suspicion in Terry, Mr. Peterson?

MR. PETERSON: The appearance of casing a place for a possible robbery.

QUESTION: What does that have to do with the likelihood or nonlikelihood of his having a pistol in his pocket?

MR. PETERSON: Well, that's the way robberies are usually committed.

QUESTION: Usually?

QUESTION: But that's not the ground in Terry. The ground in Terry permitting the frisk was the self-protection of the officer while he detained him for a question.

MR. PETERSON: When he thought that the individual might have had a gun. I don't think that you can frisk every person that you can stop under Terry. I am sure this Court has never held that. I think that would be wrong.

But in this case --

QUESTION: Terry didn't say that. Terry said when he stopped him, he had a right to frisk him, once he stopped him.

MR. PETERSON: Every case that has a right to a stop has a right to a frisk?

QUESTION: No, he said in that case when he stopped him, he had a right to frisk him for his own protection, that's

what Terry said.

MR. PETERSON: I think because in that case the reasonable suspicion that the officer had was that this person was about to commit a robbery or something which normally includes a gun or some kind of weapon.

QUESTION: Now that's a pretty good generalization. It's probably an equally good generalization that some of these gentlemen engaged in that activity very carefully avoid carrying a gun in order to avoid a higher degree of crime. I suggest that this second generalization, hypothetical, is just as valid as yours, either one of them very valid.

MR. PETERSON: Either one very valid. Well, I think in this case the Ninth Circuit was correct when they pointed out in the case that the Attorney General makes no suggestion that there was a right to a Terry type frisk because there was no suspicion at all that this person was armed, from whatever source that suspicion might come from. It just wasn't there. They just saw someone walking in a shopping center and thought that that was a suspicious person.

In any event, the ordinance in this case under which he was arrested itself authorizes unreasonable searches and seizures, because the ordinance allows a full custodial arrest for what under Terry at the most would be a brief detention and if there was reason to believe there was a gun, a frisk. In this case not only can he be arrested, but he can also be

prosecuted, simply for being a suspicious person.

It also was an unreasonable arrest under the ordinance because the ordinance was not clear enough to advise either the police officer or someone who is trying to hue his conduct to the standards of the ordinance of what the prescribed conduct is.

There are other violations of this ordinance. The ordinance is also unconstitutional because it violates the 5th amendment. The ordinance makes the crime in this case for someone to refuse, a suspect, a criminal suspect, to refuse to give a narrative account to an investigating police officer of his conduct. I think that is a gross violation of the 5th amendment.

The Attorney General in this case argues that the police officer acted in good faith when he arrested under this ordinance, and I would suggest that if good faith were the standard at the time that this arrest were made, there could not have been made in good faith, because if either Officer Lattin or the Henderson, Nevada, City Council had bothered to take a look at the law as it existed at that time, they would have found cases beginning with Boyd in 1886, and certainly would have found the Miranda case, which requires a police officer to advise someone that he has a right to remain silent, and they would have found Davis v. Mississippi, a case in which this Court said that while a police officer may ask

questions about unsolved crimes, he has no right to compel answers. Those cases were both on the books at the time that this arrest was made. And I fail to see how a police officer who on a daily basis advises people of their Miranda rights could possibly believe in the constitutionality of an ordinance that made it a crime to refuse to answer the police officer's questions.

The vagueness doctrine was hardly a novel one in 1968. Many of the cases of this Court at that time were venerable. There is the Lanzetta case, the Cox case.

QUESTION: What if you stop short of that, Mr. Peterson, and say that the refusal to answer the questions may be considered by a court and by the policeman in the first instance in whether or not he should make a search?

MR. PETERSON: In whether or not he should make a search?

QUESTION: Yes.

MR. PETERSON: I think that that would be attaching a penalty to the exercise of the 5th amendment right.

QUESTION: Couldn't Terry attach some disabilities to Mr. Terry?

MR. PETERSON: I don't think for his refusal to answer questions. I think that Mr. Justice White's concurrence in that case made it clear that the officer had no right to compel answers and may not consider the refusal to answer as

part of the basis for the probable cause. That attaches and undue penalty on the exercise of your constitutional right not to incriminate yourself.

QUESTION: But walking up and down even 20 times is prsumably prima facie as much of a constitutional right as refusing to answer the question, as you pose it.

MR. PETERSON: Perhaps walking up and down within an apparent attempt to -- well, with an apparent plan to rob a place is not a constitutional right.

QUESTION: But Terry didn't concede in any sense that his conduct gave the appearance of possible commission of a crime.

MR. PETERSON: Oh, I think Terry did.

QUESTION: I am speaking of the defendant himself, Mr. Terry. The opinion, however, the court drew some inferences and said that this was enough to warrant a cautious and prudent policeman to take some steps, including a complete search of the man.

MR. PETERSON: Because his conduct was consistent, I think this is the proper reading of Terry, consistent with the possibility that he was armed. I don't think that every police officer who has a right to stop someone has a right to frisk them. I don't think every police officer who pulls someone over for a traffic violation has the right to frisk them unless there is some founded belief that the person might also have a

weapon.

QUESTION: I think some of our cases would have something to say about that, long after Terry.

MR. PETERSON: That the police officer has a right to require the suspect to answer his questions?

QUESTION: To search after a stop.

MR. PETERSON: If there is going to be a full custodial arrest, I think that's right. If you are going to take the person down to the jail, then you do have a right. And I suppose that is the basis for the search in this case. He was being arrested for vagrancy, and since he was now going to be taken to jail, then he could be searched. But that arrest was unconstitutional for the reasons that I am outlining, and so that search has to fall.

QUESTION: You say the policeman has the right to ask the question.

MR. PETERSON: I think so. I think the police officer has the right to ask the question, but he has --

QUESTION: The man answered.

MR. PETERSON: -- I don't think he has the right to demand answers at all.

QUESTION: But here the man did answer.

MR. PETERSON: He was arrested because in the officer's view he had refused to answer. That was the crime.

QUESTION: I thought he answered and said he was on

his way from Vagas to Michigan. Isn't that correct?

MR. PETERSON: Yes, he was on his way to Michigan.

QUESTION: And did the officer say that he was staying with some people in Vagas?

MR. PETERSON: That's right.

QUESTION: And then he wouldn't --

MR. PETERSON: He couldn't remember their names, that's right. As one of the witnesses could not remember where he was staying when he testified at his trial.

QUESTION: So he did answer the question.

MR. PETERSON: Yes. I think the Attorney General was in a dilemma because the critical element of the offense is "refuse to identify yourself and account for your presence." Now, either he was not asked to account -- I don't think he was; he was never asked why he was walking the way he was in the shopping center, in which case there was no probable cause for the arrest, or he refused to answer, in which case he was arrested for exercising a constitutional right that he has, or he did not refuse, he accounted, in which case there is no probable cause to arrest.

QUESTION: I thought he did say he had no identification, that it had been stolen.

MR. PETERSON: He did identify himself, though. He gave his true name and he gave his birth date.

QUESTION: But he didn't have any written

identification.

MR. PETERSON: No written identification, but the Henderson, Nevada, ordinance does not require that.

QUESTION: Mr. Peterson, what if a policeman makes a Terry type stop and asks the man he stops, "Do you have any weapons on you?" And the man says, "I refuse to answer." Is it your position that the officer cannot take that refusal into account in determining whether or not (a) to frisk him or (b) to arrest him?

MR. PETERSON: I would take that position that he has no right to require that answer. That would attach a penalty to it, and the penalty would be search.

QUESTION: But it's not necessarily the same to say that you can't require an answer in the sense of beating it out of a person and to say that you can attach some significance to silence if a normal person would consider it relevant. You can say they both should go both ways, but they are not exactly the same inquiry.

MR. PETERSON: Not exactly, but I think that this Court has consistently held that you cannot attach a penalty to silence. In Griffin v. California you could not comment on the fact that the defendant did not take the stand.

QUESTION: That was testimonial silence.

MR. PETERSON: That's right, but in Davis v. Mississipp it was not, and in Mr. Justice White's concurrence in Terry v.

Ohio it was not. I will say that that is an undue price to exact for the exercise of the constitutional right. You have a right to remain silent. You can't penalize that. That would be my position.

In this case, in any event --

QUESTION: In .. terms it's a privilege, I guess, not a right, isn't it?

MR. PETERSON: A privilege, a privilege to remain silent. Yes.

If, again, the police officer had consulted the law in 1968 on the issue of good faith, or the Henderson, Nevada, City Council had done that, they also would have found that the Ninth Circuit in 1931 had held unconstitutional a local ordinance that made it unlawful to loaf, loiter, or idle, and that ordinance was held unconstitutional on the grounds that it would undoubtedly be enforced discriminatorily and it penalized the constitutional right to wander around, something you have a right to do in the United States.

If they had looked further, they would have found Federal cases that had struck down good account and satisfactory account statutes. Baker v. Binder and United States v. Margeson had struck those down in 1966 and 1967. The Supreme Judicial Court of Massachusetts had struck down a similar statute, and the Supreme Court of Washington in 1967 held unconstitutional an ordinance that read as follows: "It shall be unlawful for

any person wandering or loitering abroad or abroad under other suspicious circumstances from one-half hour after sunset to one-half hour before sunrise to fail to give a satisfactory account of himself upon the demand of any police officer." That was on the books at that time. That, I suggest, is a more narrowly drawn ordinance than the one that's involved in this particular case.

QUESTION: It's your basic position, I gather, on this aspect of the case that it's not only the right, I would say privilege, of a police officer, but also his duty simply to take it upon himself not to enforce ordinances duly enacted by the governmental unit by which he is employed if he has a bona fide belief that they are not constitutional laws.

MR. PETERSON: I think that's the Attorney General's position. The Attorney General's position, and they set it forth on page 4 of their brief, is that the officer's belief in the validity of the ordinance must be in good faith.

QUESTION: So that's not your position?

MR. PETERSON: That's not my position. My position is that if this ordinance authorizes unreasonable search and seizure, then the evidence must be suppressed.

QUESTION: No, no. But the reason, on this aspect of the case, you say it's an unreasonable search and seizure is that the arrest was made under the authority of an ordinance that was unconstitutional.

MR. PETERSON: That's right.

QUESTION: And it would follow from that, I suppose, that it's the duty of a police officer to take it upon himself not to enforce ordinances that he in the exercise of reasonable care should know are unconstitutional.

MR. PETERSON: I don't think that that is his duty. I think that he should enforce the ordinance if it's on the books and then it will be declared unconstitutional in a suppression hearing or in a prosecution. And after that, he will no longer enforce the ordinance.

I don't take the position that the Attorney General does that the police officer should exercise his own judgment as to the constitutionality or unconstitutionality of the laws. I think that is an unworkable rule.

QUESTION: Is this ordinance unconstitutional as of right now?

MR. PETERSON: As of right now? This ordinance has not been declared unconstitutional except by the Ninth Circuit.

QUESTION: So what does the policeman do now? Does he enforce it or not?

MR. PETERSON: Right now he would enforce it, unless he was told by his superiors not to.

QUESTION: What's the difference between that and this particular case?

MR. PETERSON: I am not sure I follow that.

QUESTION: Well, you say the ordinance is still on the books, has still not been declared unconstitutional, it's still valid. Then it was valid when the policeman arrested this man.

MR. PETERSON: No, I think the police didn't know that it was invalid, and until this Court rules, they don't know for sure in the sense that we have a case right squarely on the point that it's invalid.

QUESTION: The Court of Appeals in this case held that it was invalid.

MR. PETERSON: That's right. But this Court has taken that case, and so it's in somewhat a state of limbo.

QUESTION: So all the police officers are in limbo, too.

QUESTION: The grant of certiorari casts some cloud in that sense over the ordinance. We might have been taking it, for all anyone knows, to simply determine strictly whether in the eyes of the policeman, to take Chief Justice Warren's language out of the Terry case, he observed unusual conduct which led him reasonably to conclude in the light of his experience that something was afoot.

MR. PETERSON: You might have taken it for that reason, but one of the questions which you granted certiorari on was the question of the constitutionality of the ordinance.

QUESTION: The question.

MR. PETERSON: That's right.

QUESTION: But then you are suggesting that there is already an answer.

MR. PETERSON: Well, we have the Ninth Circuit's answer. And I think we are going to have this Court's answer, I hope.

QUESTION: You lose if we disagree with the Ninth Circuit on the constitutionality of the ordinance?

MR. PETERSON: No, I don't think I lose at all because the police officer did not have probable cause to arrest under it even though it is assumed to be constitutional.

QUESTION: Otherwise, unless we address, as the Ninth Circuit did not, the probable cause question.

MR. PETERSON: In which case I think that the only thing the Court should do then would be to send it back to the Ninth Circuit to get their judgment if the Court chooses not to make that judgment itself. I would hope you wouldn't do that. This case has been going for seven and a half years now.

QUESTION: In your view does the Terry case, the holding of the Terry case, require that there be an arrest before there can be a frisk, a patdown, looking for weapons?

MR. PETERSON: A full custodial arrest? No, not if there is a founded suspicion that the person is armed.

QUESTION: The search may be made without an arrest

under Terry?

MR. PETERSON: Or you could view Terry as a case allowing a limited kind of arrest. You can look at it either way. The brief detention is a limited arrest, but it's not unreasonable under the 4th amendment and it's not unreasonable to briefly detain and also pat down if there is a founded suspicion that the person might be armed, because the officer has a right to protect himself. That's the way I read Terry.

QUESTION: Isn't it clear under Terry that after the frisking process or patting down, conceivably that might tip the scales on the part of the officer not to pursue the matter any further, or to continue the interrogation which might as well lead to his release or his moving as to his being taken into custody? The search in Terry was for just one purpose, was it not? The protection of the officer.

MR. PETERSON: That's right, because there was a founded suspicion that he might be armed. I don't think you could pat down anyone that you had a right to ask a question of. I don't think that's what Terry holds.

Does that answer your question?

QUESTION: Well, I hear what you are saying.

QUESTION: Mr. Peterson, do you think the respondent in this case does have a cause of action under 1983 for unlawful arrest?

MR. PETERSON: I think he has a cause of action

against the officer for arresting him without probable cause. He has no remedy against the Henderson, Nevada, City Council for adopting an ordinance which in effect commands the police to make unreasonable arrests, and commands them to violate the 5th amendment rights of people who are walking around in Henderson.

QUESTION: You do think a person who is the victim of an unlawful arrest, the arrest being unlawful by virtue of an ordinance subsequently being held unconstitutional, does have a cause of action under 1983?

MR. PETERSON: No, not if the only reason that the arrest is unconstitutional is the unconstitutionality of the ordinance. Then he does not have a cause of action under 1983 against the officer.

QUESTION: If the ordinance had not been held unconstitutional at the time of the arrest, then there is no cause of action under 1983.

MR. PETERSON: That's right. There is no cause of action either against the police officer under Pierson v. Ray, I think that's the case, or against the legislature because the legislature enjoys legislative immunity.

But there's a more fundamental problem in this case, and that is the 4th amendment says that the people shall be secure from unreasonable searches and seizures. The Attorney General would have the Court adopt the view that that focuses

solely on the police and that a legislative body may command unreasonable searches and seizures, and so long as the police officer is relying on that legislative command, there is no violation of the 4th amendment. But the 4th amendment doesn't say that people shall be secure only from searches and seizures conceived by the police. I think this --

QUESTION: It certainly doesn't protect against searches and seizures by private people, does it? Burdeau v. McDowell.

MR. PETERSON: Oh, no, but there is no question of this being an arrest by a private person here. This is an arrest by a police officer based on legislation. That's State law.

QUESTION: But if the search and seizure was not by the legislature, the search and seizure was by the police officer, that's the way it has to be measured, doesn't it?

MR. PETERSON: Well, that's the way it has to be, because the legislature doesn't go out and make the searches itself.

QUESTION: Exactly.

MR. PETERSON: If I command someone to commit a crime on my behalf, then I can't say that, well, I didn't do it, and so I'm not responsible. And I think that's the position that the Attorney General was urging the Court to

adopt, and I think that has been rejected by this Court in Almeida-Sanchez and in Brignoni-Ponce, cases decided just last term, where the immigration officers were relying in complete good faith, and indeed there is unanimity among the lower courts as to the constitutionality of what they were doing in making fixed check point stops and roving stops. Nevertheless, the evidence in those cases was suppressed, and this Court --

QUESTION: This past year we came out differently.

MR. PETERSON: On the issue of retroactivity.

QUESTION: Well, on the issue of whether the exclusionary rule should be applied.

MR. PETERSON: To cases other than the first case that is brought to this Court.

QUESTION: Right.

MR. PETERSON: This is the first case with respect to this ordinance where there has been an arrest under it that has been brought to this Court. Whether or not to apply this case retroactively in other decisions, I think has to wait until those cases come along.

QUESTION: But in Peltier one of the grounds that was relied on was the fact that the border officers had relied on an act of Congress, and here you've got certainly some sort of an analogy that if the local policeman relies on an ordinance of his locality, maybe it isn't entitled to the same

weight, but it is certainly a factor, isn't it?

MR. PETERSON: It's a factor in the next case, the next case that comes along where someone else is arrested under the same ordinance or an ordinance which is drafted in substantially the same terms, and this Court has said now you cannot make arrests under this ordinance.

QUESTION: The test is whether the seizure was reasonable. It isn't a flat rule. The Constitution says no unreasonable seizure. Are you saying that the fact that he in good faith relied on an ordinance he thought to be valid and hadn't been held to be otherwise simply is entitled to no weight in the determination of reasonableness?

MR. PETERSON: I think that since the Constitution says that you shall be secure from unreasonable searches and seizures, that you cannot look just at the agent who has been commanded to make the unreasonable search and seizure by the legislature.

QUESTION: My question isn't whether you look just at that, but I am asking whether you say is it to be entirely out of consideration the fact that there was in effect an ordinance that had not been held invalid in determining something like reasonableness.

MR. PETERSON: I think the only consideration the Court should give to the existence of that ordinance is the normal kind of presumption that the Court gives to the

constitutionality of a law until it is declared unconstitutional. If that is an unconstitutional ordinance, then I think in this case the evidence is going to have to be suppressed.

QUESTION: Mr. Peterson, assume these facts for a moment, that a man is arrested like this man was, but at the time of his arrest the Supreme Court of the State of Nevada had ruled that that ordinance was constitutional. Are you with me?

MR. PETERSON: I am with you.

QUESTION: So they arrest him, and they find this incriminating evidence, and subsequently this Court said that the Nevada court was wrong. Would that invalidate that arrest?

MR. PETERSON: Did it say that the Nevada court was wrong in the same case that the Nevada court has said that it was right?

QUESTION: Yes.

MR. PETERSON: Then it would invalidate the arrest. If it were a different case, it would not.

QUESTION: So that the only way it could be reasonable would be it would have to be a decision of this Court. Right? Or a higher court.

MR. PETERSON: I think the only way in the first case to get to this Court --

QUESTION: That's the only way it could be reasonable, would have to be this Court or a higher one.

MR. PETERSON: No, it's either reasonable or unreasonable, but I am not sure that you can rely on how this Court is going to rule until this Court has ruled. And if the Nevada Supreme Court --

QUESTION: It wouldn't be reasonable if every court in the land ruled on it one way and then we came along later and ruled the other way.

MR. PETERSON: Then it would not be reasonable.

QUESTION: Then it wouldn't be reasonable.

MR. PETERSON: That's right, it would not be reasonable.

QUESTION: In the interim, what happens --

QUESTION: You can't get declaratory judgments, you know. I don't know how you are going to do it.

MR. PETERSON: He can't get a declaratory judgment in a case like this because he doesn't have standing under Ellis v. Dyson.

QUESTION: How else can you make it reasonable?

MR. PETERSON: Well, I think you have to eventually, a case is probably going to have to end up in this Court if there is serious doubt about the reasonableness of it, as this case has.

QUESTION: So you tell the prisoner -- you tell the guy who is running down the parking lot, you say, "Now you wait here until I get a definitive decision on this as to whether I

can lock you up or not.

MR. PETERSON: No, you can't do it that way.

QUESTION: How would you do it?

MR. PETERSON: I think that this Court has struck that balance in its retroactivity decisions. In the Brignoni-Ponce and Almeida-Sanchez cases, many people had been arrested and searched pursuant to the Federal statutes in those cases, and this Court in Peltier decided not to reverse those, but this Court did in the case that came here reverse that decision. And I think that is the way the balance has been struck. It won't be applied retroactively most likely, but it has to be applied in this case since this is the first case to get here.

QUESTION: But to pursue Mr. Justice Marshall's hypothetical inquiry, in the interim, after the ordinance is on the books and before the highestcourt of the State has passed on it, isn't there an old-fashioned idea of the presumptio of the constitutionality and validity of that statute?

MR. PETERSON: That's right.

QUESTION: So that it is just as valid before the Supreme Court of Nevada passes on it as it is afterward for these purposes, is it not?

MR. PETERSON: Until it gets here and it's declared invalid. And once it gets here, it is like Almeida-Sanchez and Brignoni-Ponce.

QUESTION: Obviously, this officer passed on it in that

interim period, didn't he?

MR. PETERSON: Yes, he did. I suggest that at that time the ordinance was also invalid because -- or he had no reasonable grounds to believe that it was valid because there was a welter of cases on the books even then.

QUESTION: Then your response I thought you gave to Mr. Justice Stewart a little while ago that you were not taking the position that this ordinance or this officer had any duty or any power to pass on the constitutionality.

MR. PETERSON: Well, to use a phrase that has been used before, that is a fallback position. I am not conceding that his good faith should be the test. But I am saying that that is the test. If this Court adopts the Attorney General's position, then this officer could not have had good faith because of the plethora of cases that were on the books at that time.

QUESTION: How can you say there wouldn't have been a 1983 cases against him? I assume you must have been assuming that there was good faith as the defense in a 1983 action.

MR. PETERSON: Well, that, of course, has not been completely resolved by this Court in Pierson v. Ray. I would think that for the purposes of damages against a police officer, the court might well take the position that he could hide behind the shield of the statute.

QUESTION: I would like to ask one question on the broader problem of collateral attack and this kind of issue

being raised in a Federal collateral attack. Do you understand that deterrence is the reason why there should be collateral attack on State convictions raising this kind of question?

Let me rephrase that. I am afraid I have confused you. As I understand your brief, the underlying reason for the exclusionary rule is to deter improper searches.

MR. PETERSON: That's one reason.

QUESTION: Well, what else?

MR. PETERSON: The imperative of judicial integrity is another reason. It's a vague concept, but I rather like the suggestion that the Shelly v. Kramer approach when a court accepts illegally seized evidence, it is effectuating an unconstitutional act in the same way that in Shelly v. Kramer the court was effectuating the racially discriminatory covenants by enforcing those covenants. I think that is one way to look at the imperative of judicial integrity.

QUESTION: And you say the same basis -- you assert the same basis for supporting the need for collateral attack in the Federal court on State convictions. The two reasons -- deterrence and the imperative of judicial integrity.

MR. PETERSON: Yes, those are two reasons.

QUESTION: With respect to the deterrence --

QUESTION: (Inaudible) that has been voiced and that is that the suppression is necessary to vindicate a

person's own rights.

MR. PETERSON: Yes. That also.

QUESTION: You have also argued that the exclusionary rule should apply to a legislature as well as to the police.

MR. PETERSON: I think that has to be the rule because the 4th amendment says that you shall be secure from unreasonable searches and seizures, and there is no way that you can be secure if the legislature can tell the police, "Do as you please."

QUESTION: You reject the suggestion that the real deterrence to members of the legislature is the power of the judiciary to hold unconstitutional any act that is indeed invalid.

MR. PETERSON: I certainly do in the context of this case because it is not going to be held invalid unless you have a suppression hearing and it's held invalid at the suppression hearing. If it can only be held invalid in a prosecution, then the district attorney is going to refrain from prosecuting because of the clear unconstitutionality of the ordinance. That way you attack searches and seizures that are made under it. There can't be a declaratory judgment action because that is trammeled up with Article III requirements and standing requirements that now allow only a very narrow group to anticipate by going into court and attacking the ordinance. Ellis v. Dyson, this Court's case from last term

is a very good example of that.

QUESTION: Mr. Peterson, to the extent that you rely on deterrence as the justification for collateral attack, you are necessarily, I assume, also making the assumption that there is a difference between these claims that will be processed in the State court and those that will be processed in the Federal courts. Because if there is no difference, you don't need the additional deterrence of collateral attack. Is that not correct?

MR. PETERSON: There may be a difference. There is not going to be a difference in every case.

QUESTION: There will be some cases where the Federal court would grant relief but not the State court.

MR. PETERSON: That's right, and this is a good example.

QUESTION: Is it not always true that the Federal court addresses the issue three or four years after the criminal proceeding began and therefore three or four years after the man started his sentence?

MR. PETERSON: Certainly true in this case.

QUESTION: To the extent that you are talking about police deterrence, you are talking really about whether a man may serve a three- or four-year sentence as opposed to a five- or six-year sentence. You are only talking about the latter portion of his sentence, and in this case indeed we

are talking about a man who is already on parole.

MR. PETERSON: That's right, he is on parole.

QUESTION: Isn't it normally the case that by the time you exhaust the lengthy proceedings, by the time you reach the end of the Federal review process, the question of deterrence has pretty well come to an end?

MR. PETERSON: No, not in the sense that we only deterring Officer Lattin. These laws are still on the books today, and as a matter of fact California has an identical disorderly conduct statute which is being enforced today in California. And if I understand the deterrence rationale for the suppression doctrine, it is to deter other law enforcement people, including other --

QUESTION: If you enforce an ordinance like this, a man will only stay in jail for five years, if you assume the State will sustain the ordinance and sustain the conviction. His only relief is in the Federal court. The deterrence is that you tell the police that you can only put the man away for five years.

MR. PETERSON: The deterrence is that you tell the legislature today, right now, that these laws are only good --

QUESTION: That such an ordinance will only put a man away for five years.

MR. PETERSON: Well, once this Court has declared the ordinance to be unconstitutional, then I would hope and

trust that the State courts would not continue to keep the person incarcerated and a motion to suppress would be sustained.

QUESTION: By a State court.

MR. PETERSON: By a State court, after this Court has given its guidance as to the unconstitutionality of the ordinance and the appropriate application of the suppression doctrine when arrest is made in reliance on an unconstitutional law.

QUESTION: The point you are making almost seems to suggest that all these ordinances are fungible, that they are just exactly alike. The Chief Justice Warren in the Terry opinion took about a half a page to point out the myriad variety, the infinite variety of ordinances. Now, a great many people are going to have different views about whether a particular holding of this Court fits one way or the other on a particular ordinance. Isn't that so?

MR. PETERSON: Well, I think that that's true, but the Court does proceed on principle and it announces principles which can be applied with a fair degree of certainty to fairly similar situations, although it's easy to posit redrafting these ordinances in any number of ways to make them arguably constitutional in spite of what this Court has said. The next ordinance might say "tramp about" or it might say "saunter," or it might use some other equally vague word so

that they could argue that the Powell case doesn't quite fit this case. I can only hope that this Court's decisions will be applied in good faith by the State court.

QUESTION: You think acting suspiciously would be equally infirm.

MR. PETERSON: Certainly, as a grounds to make someone a criminal.

QUESTION: Yet that's almost precisely the language this Court used in the Terry case.

MR. PETERSON: But they didn't make someone criminal for that, and they did not authorize a full custodial arrest for simply being suspicious.

QUESTION: They authorized a full search, which in this case and in many other cases would produce a gun or heroin or some other evidence of criminality.

MR. PETERSON: It authorized a patdown where there is a founded suspicion that the person might be armed, for the protection of the police officer.

QUESTION: Mr. Peterson, is it not correct that in most of this Court's decisions passing on the constitutionality of these vagrancy ordinances, the issue has been presented on direct appeal. Isn't this the only time this kind of issue has been presented under collateral attack?

MR. PETERSON: To this Court?

QUESTION: Yes.

MR. PETERSON: No. It was presented last year in Lefkowitz v. Newsome, but this Court didn't take it.

QUESTION: I mean in the decisions by this Court invalidating such ordinances. It goes to the question whether you need collateral review as a method of getting this kind of issue to this Court.

MR. PETERSON: Well, I think it's interesting that this ordinance has been presented to this Court in a number of other direct appeal cases, in People v. Solomon and I think People v. Weger coming from California, and this Court did not take the case. And yet here it is now in a suppression --

QUESTION: (Inaudible) differently, this time we wouldn't have taken it.

QUESTION: But the point is the issue gets here by direct review, whether we take it or not.

MR. PETERSON: Possibly.

MR. CHIEF JUSTICE BURGER: Very well.

You have about four minutes, if you think you need it now, Mr. Granucci.

REBUTTAL ARGUMENT OF ROBERT R. GRANUCCI

ON BEHALF OF PETITIONER

MR. GRANUCCI: Thank you, Mr. Chief Justice.

Some random thoughts. First, there was probable cause. The district court after an independent examination of the State trial record found probable cause.

Second, counsel's argument appears to impute bad faith to the Town Council of Henderson. I would simply point out that the Henderson vagrancy ordinance was based on a Nevada statute. The Nevada statute was in turn based upon the California disorderly conduct statute. And the California disorderly conduct statute was enacted in 1961 based on a model suggested by a respected scholar, Professor Arthur Sherry, of the University of California Law School, who had served as the head of Governor Earl Warren's Crime Commission.

Counsel also cited Almeida-Sanchez. However, in Almeida-Sanchez, as this Court noted in Peltier, there were no independent considerations of exclusionary rule policy considered by the Court apart from the validity of the statute which was challenged.

I respectfully urge the Court again to reverse the decision of the Ninth Circuit and to reinstate this conviction. After all, this is not a vagrancy case; this is a murder case.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:11 p.m., oral argument in the above-entitled matter was concluded.)