ORIGINAL

In the

Supreme Court of the United States

THE STATE OF MICHIGAN,

PETITIONER

V.

GARY DeFILLIPPO.

RESPONDENT

No. 77-1680

Washington, D. C.
February 21, 1979

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Respondent

Washington, D. C.

Wednesday, February 21, 1979

The above-entitled matter came on for argument at 10:12 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine, Detroit, Michigan 48226
For Petitioner

JAMES C. HOWARTH, Chief Deputy Defender, Legal Aid and Defender Association of Detroit, 462 Gratiot Avenue, Detroit, Michigan 48226 (Court-appointed Counsel for Respondent)

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Michigan against DeFillippo.

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

ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN, ESQ.

ON BEHALF OF PETITIONER

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

Before I discuss the question of the constitutionality of the Detroit Stop and Identify Ordinance I would first like to discuss whether the constitutionality of that ordinance is necessarily relevant to the ultimate issue in this case and that is whether or not the phenyclidene seized from Respondent is admissible against him in a trial for possession of phenyclidene and the facts are these:

On September 14th, 1976 at approximately 10:00 p.m., two Detroit police officers answered a radio run to investigate a complaint regarding two persons drunk in an alley by a garage. As they pulled their scout car into the alley in question, they observed Respondent and a woman who was in the process of taking her pants down.

They drove on into the alley and while seated in the scout car, directed questions to these persons. The woman stated that she had to go to the bathroom

Respondent was asked for identification and stated that he was Sergeant Mash. He was asked for his badge number and he gave a number. He was again asked for identification and this time stated that he worked for Sergeant Mash.

At this point the female approached the scout car and she was asked for identification. Her response was to dump the contents of her wallet through the open police car window onto the lap of the officer who was seated inside. She was then arrested for disorderly conduct because of her intoxicated condition.

Respondent was arrested for a violation of a Detroit ordinance for refusing to identify himself. He was searched and on his person a quantity of marijuana was found. Also taken from him was a package of cigarettes and in that package the officer observed a tinfoil Packet.

That packet was ultimately determined to contain a quantity of phenyclidene and it was for possession of phenyclidene that Respondent was ultimately charged.

He was bound over for trial in Detroit Recorders Court and a motion to quash the information was brought before the trial judge and denied. The Michigan Court of Appeals granted an interlocutory appeal in order that the information be quashed and the case dismissed.

QUESTION: Is the Recorders Court in Detroit the court of general criminal jurisdiction?

MR. BAUGHMAN: It handles all criminal matters in the City of Detroit, both felony and misdemeanor.

QUESTION: Mr. Baughman --

MR. BAUGHMAN: Yes.

QUESTION: -- you stated that when the Respondent refused to identify himself he was arrested.

MR. BAUGHMAN: Yes, that is correct.

QUESTION: The ordinance does not provide for an arrest in that situation or is that considered to be an arrest?

MR. BAUGHMAN: It is our position that it is considered to be an arrest. The ordinance declares that it is unlawful to refuse to identify oneself and an unlawful act under a general penalty provision of the Detroit City Code calls for a 90-day penalty and a $500 fine.

QUESTION: It is under the general code rather than the sentence that says, "In the event the person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain --" That is not what you rely on.

MR. BAUGHMAN: That is correct. I believe that is a separate provision from the refusal to identify portion and I think that is made more clear by the ultimate revision of the ordinance by the Detroit City Council, a separate revision.

QUESTION: But the revision of the ordinance is

not before us.

MR. BAUGHMAN: No. I think the revision only makes clear what was intended all along.

QUESTION: I see.

QUESTION: The arresting officer had some other grounds on which to arrest this man, did he not?

MR. BAUGHMAN: He may have. That has not been --

QUESTION: He may hame? When he represented that he was a police officer? Is it not a crime of some kind in Detroit and in Michigan for a person to impersonate a police officer?

MR. BAUGHMAN: It is and --

QUESTION: Well, would that not --

MR. BAUGHMAN: -- he may well have had probable cause to arrest for false impersonation of a police officer at that time. You cannot be convicted of false impersonation of a police officer in Michigan unless you act as such but that of course does not mean that there was not probable cause to arrest but that could not have been convicted so that may well be true.

QUESTION: When did the Defendant refuse to identify himself?

MR. BAUGHMAN: Well, it is our position that by giving a false -- an admittedly false answer when he later changed the answer -- that that is tantamount to a refusal to

identify. In this record it appears that he never did state that he was Gary DeFillippo.

QUESTION: Oh, yes, looking backwards that is right, I guess. So what if a man -- if you accost a person and ask him his name. Has he violated the ordinance if it later turns out that it was false?

MR. BAUGHMAN: Well, I think if he gave a name then we would go on to the next portion of verifiable proof, written or oral.

QUESTION: So that is also a part of the ordinance, you think?

MR. BAUGHMAN: Yes. That point was not reached in this case because they never got beyond the identification question.

QUESTION: Because he gave two different answers.

MR. BAUGHMAN: That is correct.

QUESTION: Mr. Baughman, this case is not one of prosecution for violation of the ordinance, is it?

MR. BAUGHMAN: No, it is not. This is a derivative of its case.

QUESTION: Do you know of any instances in your city where one has been prosecuted for violating the ordinance?

MR. BAUGHMAN: I am not personally aware of those. Those would be tried --

QUESTION: You are a prosecuting attorney, are you

not?

MR. BAUGHMAN: Yes, I am.

QUESTION: Have you ever prosecuted one?

MR. BAUGHMAN: No, I have not. They are not prosecuted by the Wayne County Prosecutor's Office. They are prosecuted by the City of Detroit corporation counsel as they are ordinance violations and not state law violations. I am not familiar with whether or not they are --

QUESTION: How would the constitutionality of the ordinance ever be determined if no prosecutions are ever brought under it?

MR. BAUGHMAN: The only other method would be a possibility of a suit for declaratory judgment Michigan law which would be allowed. But I believe that if the issue of no prosecutions ever being brought under this ordinance would have to be raised in the trial court by a defendant claiming that this was his only method of attacking it and that was not done in this case and I don't think this record demonstrates whether or not there have been prosecutions --

QUESTION: Well, except the prosecution has the -- can determine what they want to prosecute for.

MR. BAUGHMAN: That is correct. I am just saying that I -- on this record and personally I do not know if persons have been prosecuted. They may well have been but that is within the knowledge of the Detroit Corporation

Counsel and I do not know.

Now, it is our position that the phenyclidene seized from Respondent is admissible against him and that his arrest was valid, regardless of the constitutionality of the ordinance.

This Court has stated that the question of the good faith of the police officers only arises after a constitutional violation has been found, in the question of whether or not a suppression remedy should be applied but whether or not a constitutional violation occurred at all turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time he acted.

It is our position when an officer enforces a presumptively valid penal ordinance, the violation of which has occurred in his presence, as is his duty, an objective assessment of the facts and circumstances known to him at that time cannot include that which was not known to him at the time; that an appellate court would subsequently hold the penal ordinance to be unconstitutional.

When that legislature enacts the penal ordinance or statute and ultimately there is determined to be a due process defect in that ordinance, this means that a person cannot be incarcerated pursuant to a conviction for violation of that ordinance without his 14th Amendment rights being violated.

QUESTION: Due process defect or any defect --

MR. BAUGHMAN: Any defect.

QUESTION: -- makes it a violation.

MR. BAUGHMAN: Correct but it does not mean that when he is arrested for probable cause to believe that he violated that ordinance by a police officer when the ordinance is at that time presumed valid, that his Fourth Amendment rights have been violated.

The Fifth Circuit has held precisely in this manner in the cases cited in our brief. In those cases that court has refused to reach the question of the constitutionality of the underlying ordinance in derivative evidence cases, holding that that question is not relevant to the Fourth Amendment question and holding that when a person is arrested for probable cause --

QUESTION: On what ground did the Court of Appeals for the Fifth Circuit say there was no Fourth Amendment violation or that the evidence should not be excluded?

MR. BAUGHMAN: Well, Your Honor --

QUESTION: You believe if they said the First, why, they would say the Second, too.

MR. BAUGHMAN: They said the arrest was valid. And saying that the arrest was valid I would take to mean that they were saying that there was no Fourth Amendment violation.

They also went on to say that the application of the Exclusionary Rule in that context would not serve any

purpose and --

QUESTION: Even if there had been --

MR. BAUGHMAN: Even if there had been a Fourth Amendment violation and we take both those positions. We believe there was no Fourth Amendment violation in this case but that if there was the Fourth Amendment the Exclusionary Rule should not be applied.

Now, in Almeida-Sanchez this Court did hold that a Fourth Amendment violation did occur in a case where officers did act in reliance on a statute which had not been declared unconstitutional but we believe that the difference there is that that statute was not a penal statute. Its sole purpose was to authorize searches in certain circumstances, to authorzie what might be termed Fourth Amendment activity.

Now, this ordinance does have a portion that authorizes Fourth Amendment activity, the stop of the person. But we believe that that portion of the ordinance is not at issue here, either factually or legally. It is a codification of Terry v. Ohio and we believe that the facts in the instant case plainly show grounds for a stop and I do not believe that any lower court has held to the contrary.

The question is the penal portion of the ordinance, the substantive offense portion of the ordinance I think is what is at issue here.

QUESTION: No, but you certainly must not only

say there is grounds for a Terry stop but there must have been grounds for an arrest and a search.

MR. BAUGHMAN: Correct but the ordinance provides that when one is stopped pursuant to Terry v. Ohio, he must upon request state his identity. It is making the conduct of refusing to state identity a crime.

QUESTION: Do you think this -- was there ever any question in this case raised about the grounds for the so-called "stop"?

MR. BAUGHMAN: I do not believe so, no. I think what is before the Court is whether the legislature ultimately, as far as the constitutionality of the ordinance goes, is whether or not the legislature can make this conduct a crime but what they did here is create a substantive offense and we agree that the legislature cannot make valid conduct which is unconstitutional under the Fourth Amendment when they act procedurally, as in Almeida-Sanchez but where they create a substantive offense, where the legislature acts pursuant to its exclusive function of defining crime and ordaining punishment, whether or not it has drawn the statute constitutionally, whether or not it can prohibit the conduct it seeks to prohibit is a 14th Amendment question. Whether or not the person was arrested pursuant to probable cause for a violation of that ordinance is a Fourth Amendment question and we submit that plainly here there was more than probable cause to

believe that Mr. DeFillippo had violated the ordinance.

There being probable cause, his arrest did not violate his Fourth Amendment rights and the search of his person incident to that arrest was proper.

Now, if this Court is to hold that the seizure of Respondent's person was a violation of the Fourth Amendment, then the inquiry is not over for then consideration of official motives is appropriate in determining whether or not the Exclusionary Rule should be applied.

Now, Justices Powell and Rehnquist in concurring in Brown v. Illinois that there is no legitimate justification for depriving the prosecution of reliable and probitive evidence in cases of technical violations of the Fourth Amendment and they gave as an example when a person is arrested pursuant to a statute which has not yet been declared unconstitutional.

Now, we have stated our position that we believe that this conduct is not even a technical violation of the Fourth Amendment but if this Court so views it, then we fully agree that the application of the Exclusionary Rule in this situation would serve no valid purpose.

QUESTION: Now, in Stone against Powell, the reason that the Court of Appeals for the Ninth Circuit had held that search to be invalid was that it held the ordinance of, what was it, Henderson?

MR. BAUGHMAN: That is correct.

QUESTION: In Nevada, the vagrancy ordinance was an invalid ordinance, that it held it after the fact, after the search.

MR. BAUGHMAN: That is correct.

QUESTION: Did the Court either approve or disapprove that reasoning? Did this Court in Stone against Powell either approve or disapprove?

MR. BAUGHMAN: I think the majority did not reach that question, deciding the case on the habeas corpus issue instead. There were concurring opinions which disagreed with the application of the Exclusionary Rule under those circumstances.

QUESTION: But the Court rather assumed, did it not, that it was an illegal search because the vagrancy ordinance was an invalid ordinance, although the policeman at the time of the arrest had no reason to believe so.

MR. BAUGHMAN: I am not certain. That may well have been an underlying assumption of the Court. I believe that it stood for the proposition that those kinds of claims could not be brought from habeas corpus, valid or not. I don't think it really settles whether or not the claim was valid.

QUESTION: You do not think that throws any light on your question here?

MR. BAUGHMAN: I do not believe so.

QUESTION: Although that was the fact, was it not, in Stone against Powell?

MR. BAUGHMAN: That was the holding of the Ninth Circuit.

QUESTION: The reason the Ninth Circuit held that was an invalid arrest was, the Ninth Circuit, after the fact, decided it was an invalid ordinance.

MR. BAUGHMAN: Certainly and that demonstrates that there is a split among the circuits because the Tenth Circuit held to the contrary.

QUESTION: And in what case did you mention Mr. Justice Powell's concurring opinion?

MR. BAUGHMAN: That was in Brown v. Illinois.

QUESTION: And he was the author of Stone against Powell?

MR. BAUGHMAN: Yes, he was.

QUESTION: May I come back to what happened at the time of the arrest? Did the pat-down occur before or after the arrest?

MR. BAUGHMAN: It occurred after the arrest.

QUESTION: After the arrest.

MR. BAUGHMAN: Yes.

QUESTION: Now, will you state again exactly what the issue is before us? Is the validity of the ordinance before us in this case?

MR. BAUGHMAN: I believe it is. It is not necessary, ultimately, for this Court to decide that issue to decide that the phenyclidene is admissible against Respondent in this case because this Court could hold that even if the ordinance is unconstitutional, phenyclidene is admissible because either the arrest was valid or because the Exclusionary Rule should not apply to this conduct in any event and therefore, not reach the constitutionality of the ordinance, it then being irrelevant but --

QUESTION: We could hold that there was probable cause for this arrest and the search would have been incident to that arrest and would that end the case?

MR. BAUGHMAN: I believe it would.

QUESTION: And that is your primary --

MR. BAUGHMAN: That is my primary --

QUESTION: -- standard, that this is an ordinance duly enacted by the City of Detroit, that there was a reasonable cause to believe that the Respondent was violating that ordinance and that therefore, the policeman arrested the Respondent.

MR. BAUGHMAN: Yes and no Fourth Amendment violation occurred.

QUESTION: And that that, your submission is, is a valid arrest without reference to whether or not this Court or some other court might subsequently find that ordinance to

have been invalid.

MR. BAUGHMAN: That is correct. That is our first position.

QUESTION: That is what I thought.

QUESTION: In other words, you are standing on the presumptive validity of the ordinance.

MR. BAUGHMAN: We are standing on the proposition that even if a person cannot be convicted validly for violating a penal statute, when he is arrested, before that finding of unconstitutionality occurs, upon probable cause to believe he violated it, that no constitutional violation has been committed by the officer.

QUESTION: If that were not so, I suppose the officer would be subject later to a suit for unlawful arrest.

MR. BAUGHMAN: He may have a good faith defense on the civil suit but a suit may be brought against him. It is possible.

QUESTION: Mr. Baughman, if we were to reach the constitutional question, do you see any Fifth Amendment problem here? You have discussed the Fourth Amendment. Is there a Fifth Amendment problem with respect to an ordinance that allows an officer or makes it a crime to decline to identify oneself when an officer is arrested for any purpose?

MR. BAUGHMAN: I do not believe there is a Fifth Amendment problem here and we rely heavily on the cases from

the California courts which are cited in our brief.

QUESTION: Well, what about Miranda?

MR. BAUGHMAN: In asking someone to identify himself under these circumstances, the person is not being compelled to give incriminating information. I think California v. Byers is somewhat on point although I think the facts are stronger in this case. In California v. Byers not only did the person identify themself, but by so doing they indicated that they were a person involved in an accident and this Court indicated there that identification is essentially a neutral act.

This person is just being asked to identify himself and not indicate that he is in an accident or any other provision. He does not stand accused.

QUESTION: You would extend Byers to a criminal case situation, would you?

MR. BAUGHMAN: Pardon?

QUESTION: Byers involved automobile accidents.

MR. BAUGHMAN: Yes but it was a criminal violation to fail to stop at the scene and leave your name and address. That was a penal statute.

In this case, the person was just asked to give their name. The name is not incriminating. The government can obtain a person's name in many other contexts. They can send our jury questionnaires to prospective jurors, tax forms,

census forms. There are a multitude of ways in which the government can compel a person to give up their name -- testimony in a courtroom. A person may be called --

QUESTION: Well, what has been the -- what have the cases held -- or do you know of any cases where there has been a Terry stop? Has anyone ever held that as soon as you make a Terry stop you must give Miranda warnings?

MR. BAUGHMAN: I am not aware of any such cases.

It is our position that there is not a Fifth Amendment problem because no testimonial information is compelled from a person in this situation.

Now, it may be possible to conceive of circumstances where other statutes requiring identification in different contexts may raise self-incrimination problems, although I am hard-put to think of any but I do not think that this statute raises such problems. I think the California cases are correct on this point.

QUESTION: Mr. Baughman, at the time the officer first approached the Respondent, was there reasonable cause to believe he was engaged in criminal activity?

MR. BAUGHMAN: I believe there was reasonable cause to believe criminal activity was afoot.

QUESTION: What criminal activity by the Respondent?

MR. BAUGHMAN: There are several possibilities but I think the officer had at least a reasonable suspicion that

either consentual or forcible criminal sexual conduct may have been afoot. I think once he observed the Respondent there in the alley --

QUESTION: Is there anything in the testimony there about that?

MR. BAUGHMAN: No, there is not.

QUESTION: That is just your supposition that because they were there in the alley together he might have assumed that. You think that is enough?

MR. BAUGHMAN: Well, my supposition from the woman being in the alley taking her pants down in a flagrant manner.

QUESTION: But her purpose was explained as something quite different.

MR. BAUGHMAN: Well, of course, that occurred after the officers made a stop there.

QUESTION: Well, as soon as they asked her.

MR. BAUGHMAN: I think the stop had already occurred at that point in time and under the ordinance then the officers were entitled to ask for identification.

QUESTION: Terry authorizes the stop.

MR. BAUGHMAN: Yes.

QUESTION: On the basis of facts observed by the officer, does it not?

MR. BAUGHMAN: That is correct.

QUESTION: And you are saying that what the

officer observed gave him all the right to make a Terry approach.

MR. BAUGHMAN: That is correct and that the ordinance, then, gave him the right to arrest for the violation of the law that the Respondent would not identify himself.

QUESTION: Which came later.

Well, the purpose of the stop under Terry must be to search the stopee for weapons.

MR. BAUGHMAN: That assumes also that there is a further reasonable suspicion that he is armed and dangerous. I don't believe --

QUESTION: That is what Terry is about, is it not?

MR. BAUGHMAN: That is correct.

QUESTION: Based on suspicion that he is armed and dangerous and the stop is for the purpose of searching him for weapons and if necessary, disarming him. Is that not correct?

MR. BAUGHMAN: It is also for investigation, I believe, the stop itself. The frisk is for protection. The stop is for investigation. This Court has said several times in Terry and Adams v. Williams that a stop in order to determine identity may be the wisest course. That is the exact claim --

QUESTION: Martinez-Fuerte, which was, I think, the last round of the alien search cases --

QUESTION: Yes, border searches.

QUESTION: -- says that you can detain under particular circumstances without regard to reason to believe that a person is dangerous if you suspect an offense.

MR. BAUGHMAN: Yes, the detention portion of Terry, I believe, is for investigation. The frisk only occurs -- and can only occur if there is a further reasonable suspicion that the person is armed and dangerous and then you can frisk but the stop is an investigatory stop, I believe.

QUESTION: And you say -- what would the investigatory stop?

MR. BAUGHMAN: Well, in this case --

QUESTION: Was there any further justification for it?

MR. BAUGHMAN: In the general context?

QUESTION: In this case?

MR. BAUGHMAN: In this case, the officers, when they had the complaint of two drunks in an alley and pulled into the alley and saw Respondent and a woman taking her pants down, then I think that two possibilities were consentual or forcible criminal sexual conduct. I think they at least had a duty to proceed into the alley to investigate what was occurring.

QUESTION: Well, that is -- you said two possibilities.

MR. BAUGHMAN: That is two.

QUESTION: Well, forcible or consentual.

MR. BAUGHMAN: Forcible or consentual. There are a variety of statutes on either point.

QUESTION: I see.

QUESTION: He was just standing there and he was fully clothed.

MR. BAUGHMAN: That is correct.

QUESTION: Is public drunkeness an offense in Detroit?

MR. BAUGHMAN: It is no longer a criminal offense. It was at the time. There is now a new set of statutes that deal with that situation. I would point out that ultimately it did not appear that Respondent was drunk, just the woman.

QUESTION: Just the woman?

MR. BAUGHMAN: Just the woman appeared to be drunk after the investigation occurred.

I would like to return just for a moment to the application of the Exclusionary Rule in this case and turn to the question of what would not applying the Exclusionary Rule to these facts mean if this Court were to hold that the arrest under the ordinance was a violation under the Fourth Amendment.

We submit that it would not result in lawless police conduct but in police continuing to do their duty, to enforce the violations of ordinances when they occur.

If anything, it would deter police officers to not act as courts, reviewing legislation before they decide whether or not to enforce it.

Now, if the rule were to be applied to these facts, what would it mean? I believe that hopefully, its application should not and would not alter future police behavior, for the police did that which we would expect them to do and which we would want them to do in the future.

As Mr. Justice White stated in his dissent in Stone v. Powell, that excluding the evidence in these sorts of circumstances can in no way affect future police conduct unless it is to make the officer less willing to do his duty.

Now, this Court, and I think wisely so -- and legislatures also, have wanted to maximize control over police officers to reduce as low as possible their area of discretion without keeping them from operating at all.

We want societal control of their actions.

If the Exclusionary Rule was applied in this case, exactly the opposite effect would occur than the Exclusionary rule seeks to achieve for the officers would then have unbridled discretion to decide what laws they are going to enforce before they enforce them and I don't think that is the result which the Exclusionary Rule was intended to accomplish.

If, then, there is no effect on future police behavior, if there is no removal of any inducement to violate

the Fourth Amendment and I submit plainly there would be no removal of any inducement in this case, then suppressin the truth in a criminal proceeding will occur and nothing will have been gained.

I would also like to briefly point to the argument from judicial integrity on which I believe Respondent heavily relies. This Court has already held that judicial integrity is not offended if law enforcement officials reasonably believe in good faith that their conduct is in accordance with the law at the time they act, even if subsequent decisions hold that their conduct was not permitted under the Constitution and here the police acted as we would want them to act when a violation of the law occurs in their presence.

Since the trial, then, is the search for truth, to exclude the truth in the absence of an insolent use of police authority, in the absence of the achievement of any effect on future police behavior, I submit is itself an affront to judicial integrity.

Now, we have, for the purposes of argument here, assumed that the ordinance is unconstitutional but as I have indicated on the merits, we do not concede that the ordinance is unconstitutional and I would point out that I believe, looking at the revision only for clarification purposes, that it does -- the ordinance has three parts.

There is the stop portion which I have discussed.

There is a substantive offense portion which makes it a crime to refuse to identify oneself and also makes it a crime to refuse to provide verifiable proof, written or oral, of that identification.

The inability portion of the statute which Justice Stevens referred to, I believe, is separate from the criminal portion. If a person, rather than refusing to identify himself, is unable somehow to provide verifiable proof, he may be detained until his identification is verified and then he is to be released.

This portion of the ordinance is very similar to the Uniform Arrest Act which is cited in our brief which allows a two-hour detention under similar circumstances and I believe that portion is not at issue in this case. This is not inability to identify. This is a refusal to identify case.

Now, the key question, it seems to me, is whether or not the government can make this conduct criminal, the refusal to identify. I have already stated that I do not believe that it is a Fifth Amendment problem. I think the key question is whether or not any right of the Respondent is violated by the government making this conduct criminal.

The only one that comes to mind is possibly a claim of an interference with the right to privacy.

It is our position that there is a governmental interest served in allowing -- in making this conduct

criminal and I think this is a 14th Amendment Due Process question.

QUESTION: Well, you would not suggest that you could make it criminal to refuse to give your name to any officer who just happens to stop you on the street, would you?

MR. BAUGHMAN: No, I would not. I would point out that this is a carefully-circumscribed ordinance which limits that authority to when there has been a valid Terry stop. Only in that circumstance can an officer demand identification and only in that circumstance is it a crime to refuse. Not anyone on the street can be stopped.

QUESTION: You say the protection against compulsory self-incrimination is not involved why?

MR. BAUGHMAN: Because the giving of one's name is a neutral act.

QUESTION: Well, it may not be. I mean, what if his name is John Dillinger?

MR. BAUGHMAN: Well, the fact he was John Dillinger --

QUESTION: Would be unlikely now because John Dillinger has been dead for --

MR. BAUGHMAN: Well, that may lead to his apprehension but the fact that he is identified as the person who he is is no more incriminating than taking his fingerprints, his blood, his hair and other -- his handwriting sample or other activities this Court has held are not testimonial.

A link in a chain to conviction, as this Court held in Byers, leading to his apprehension does not mean that the information he imparts is testimonial and that it can be used against him. I do not believe he is compelled to incriminate himself, although he is compelled to give information. Persons are compelled to give information by the government all the time.

QUESTION: Well, are there not cases arising under the constitutional guarantee against compulsory self-incrimination which protect a witness from even giving his name?

MR. BAUGHMAN: I am not aware of it.

QUESTION: On a witness stand?

MR. BAUGHMAN: If it is conceivable under the circumstances that his name alone would incriminate him, I would suspect that is true.

QUESTION: And can you not conceive of such a situation existing?

MR. BAUGHMAN: Not under these -- not under this sort of --

QUESTION: If his name was John Dillinger or Al Capone or --

MR. BAUGHMAN: That he is who he is may subject him to prosecution but his name itself is not an incriminating piece of evidence.

QUESTION: In other words, that may furnish

probable cause for his arrest but it does not necessarily incriminate him. Is that your position?

MR. BAUGHMAN: That is my position. I believe that is what the California courts have held and I think that California v. Byers would support that proposition.

QUESTION: Mr. Baughman, you seem to assume that if there were no criminal connection it would be unconstitutional for the ordinance to require that you authorize a policeman just to go up to a citizen on the corner out in front of the courthouse, say, and say, what is your name?

MR. BAUGHMAN: No, I think any officer can ask that of any citizen but he cannot arrest --

QUESTION: Can he make it a crime for the citizen to refuse to tell him? You say it could not.

MR. BAUGHMAN: I do not believe that the legislature could make it a crime to refuse to answer that question.

QUESTION: Why not?

MR. BAUGHMAN: Upon no other facts.

QUESTION: What is the constitutional objection to that statute?

MR. BAUGHMAN: Well, I think that it is just a 14th Amendment Due Process question is whether governmental interest is served and whether the means employed are reasonably related to the end. If the end, as I see it in this case, is the same end that Terry talks about, effective crime

prevention and detection, I do not believe that the means employed in that case would be reasonably related to achieving that end and also I think that the 14th Amendment Due Process cases state that the means cannot be unduly oppressive on individuals and I believe that probably would be unduly oppressive, if you do not limit it at least to the Terry situation.

QUESTION: You would say it is a Due Process question.

MR. BAUGHMAN: I believe the constitutionality of the ordinance is, yes.

QUESTION: Would not there ba a Fourth Amendment issue, though, if without any reason whatsoever the officer went up to a person and detained him while he asked him?

MR. BAUGHMAN: That would be a Fourth Amendment question but I do not believe that is what is before us here.

QUESTION: But if he walked up and walked up alongside of him and just followed him along and asked him what his name was.

MR. BAUGHMAN: That he could do. I think any citizen --

QUESTION: And you can certainly do that. There is no problem there but then if he, the person said, "No, I will not give it to you" and then if he arrested him you think then there is a problem.

MR. BAUGHMAN: Then there would be a problem, even if there was a statute, I think. Certainly without a statute there would be a problem.

QUESTION: But you say a statute or ordinance --

MR. BAUGHMAN: Yes.

QUESTION: -- making it a criminal offense for a person to refuse an inquiry by a police officer, knowing him to be a police officer, "what is your name?" that that would be an invalid statute or ordinance?

MR. BAUGHMAN: Assuming it without any Terry basis?

QUESTION: Exactly.

MR. BUAGHMAN: Just anybody on the street. It may -- I am not saying it would for certain. I think there would be much more problems with that ordinance than there would be with this one.

QUESTION: But why? Why?

MR. BAUGHMAN: Because I do not -- because the end of effective crime prevention and detection I do not think would be reasonably related to the means, stopping anyone on the street to ask them their name, as it is in this case and I think that might be unduly oppressive on individuals , which is also a Due Process test.

QUESTION: Do you think while the draft was in force that it was a violation --

MR. BAUGHMAN: No.

QUESTION: -- if an officer walked up to somebody and said, "Let me see your draft card" and the person said, "Awfully sorry but it is none of your business"? Do you think that there was a statute that made that a crime? Would that be it?

MR. BAUGHMAN: No, there may be -- there is a different government interest served there when you have a request for a certain document. It is not effective crime prevention and detection that is being served in that case. It is the enforcement of the draft laws and that might be a different circumstance.

QUESTION: Well, the Court of Appeals of Michigan in this case said what was wrong with it, sort of, was that it seeks to make criminal conduct which is innocent. But that is true of every criminal statute.

MR. BAUGHMAN: Yes.

QUESTION: It is innocent to drive over 55 miles an hour on a highway until a statute tells you it is criminal, is it not?

MR. BAUGHMAN: That is correct. Any lawmaking conduct which is not mal a mense criminal, makes criminal conduct which is innocent so I do not see the point of the Michigan decision in that regard.

QUESTION: Well, that is really --

MR. BAUGHMAN: I think that is one reason why we

are here.

QUESTION: -- your answer as to the doubtful validity of a statute such as you have hypothecated, that it makes criminal conduct which, before this ordinance was passed, was innocent conduct.

MR. BAUGHMAN: Yes, that is so.

QUESTION: Why is that? I mean, is that not true of every criminal statute?

MR. BAUGHMAN: Yes, it is. It is true of every criminal statute.

QUESTION: Unless one believes in natural law of some kind.

MR. BAUGHMAN: That is correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Howarth.

ORAL ARGUMENT OF JAMES C. HOWARTH, ESQ.

ON BEHALF OF RESPONDENT

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

The position of the Respondent in this case which was also the position of the Michigan Court of Appeals and a position not reached by the Michigan Supreme Court, is that the particular case before the bar involved the warrantless search of an individual American citizen by the name of Gary DeFillippo who in September of 1976 was standing harmlessly on

a back street of Detroit. In making that statement --

QUESTION: By doing that they were rejecting the Terry type of situation, were they not?

You are saying this was not a Terry stop.

MR. HOWARTH: Certainly it was not a Terry stop. It was --

QUESTION: What time of the day or night was this?

MR. HOWARTH: Ten p.m. It was at ten o'clock at night but it was made very clear in the cross-examination of the police officer, Officer Bednark, at the preliminary examination that there was no fear of weapons, that the arrest was being made for no other reason, other than the fact that Mr. DeFillipo did not satisfy the particular standards of that police officer regarding his identification.

We would submit that the statement of facts which Mr. Baughman has presented to the Court, while those statements can be interpreted from the fact, it can also be interpreted from the somewhat sketchy record before us that Mr. DeFillippo did indeed attempt to identify himself.

I would like to clarify that. Certainly, Mr. DeFillippo, in a city the size of the City of Detroit would not know the police officer personally. By stating to Officer Bednark, "I am Gary DeFillippo," if he certainly did not have with him a driver's license, that statement would certainly not satisfy this ordinance if Officer Bednark said,

"Well, I don't know that you are Gary DeFillippo. You don't have some piece of identification, a draft card. You don't have a birth certificate. You don't have a credit card."

Now, Gary DeFillippo allegedly talked about the subject of a Sergeant Mash. The question, I think, that remains unresolved is what did Gary DeFillippo actually say?

I do not think that that has ever been clarified because the police officer perceived at first, Mr. DeFillippo to say, "I am Sergeant Mash." The police officer admitted subsequently that Mr. DeFillippo may well have said to him, "I work for Sergeant Mash" or "I know Sergeant Mash."

There are actually three explanations for these two questions.

QUESTION: Were any of these accurate?

MR. HOWARTH: Yes, Your Honor. As a matter of fact, although the question was not explored fully at the preliminary exam stage, Officer Bednark was asked whether in fact there was an Officer Mash. There is an officer by that approximate name working for the Detroit Police Department and if I could be allowed an informal offer of proof before this Court --

QUESTION: No, you cannot offer proof before this Court, Counsel.

MR. HOWARTH: All right but the question having been, was that in fact accurate? I want to answer by responding although it is not in the record that there was

certain proof that Mr. DeFillippo did in fact work for Sergeant Mash.

QUESTION: Mr. Howarth, on page 12 of the Petition for certiorari, the first page of the opinion of Michigan Court of Appeals which is the court that laid down the rule that we are reviewing here, I take it, the court says, "When asked for his -- Defendant did not appear intoxicated but when he was asked for his identification he replied that he was Sergeant Mash, a Detroit police officer.

"When asked for his badge number, Defendant replied that he was working for Sergeant Mash."

Now, that is the hypothesis we have to work from here, is it not?

MR. HOWARTH: Yes.

QUESTION: Even though the Court of Appeals might have found it differently had the case been argued differently to it.

MR. HOWARTH: I would agree with that. The only point that we make on that is that it is not 100 per cent certain that Mr. DeFillippo did in fact continue to represent to the officer that he was, in fact, a fellow Detroit police officer.

QUESTION: Are you telling us we should not accept what Mr. Justice Rehnquist just read to you out of the opinion?

MR. HOWARTH: No, I am not. What I am --

QUESTION: We either accept it or we do not and if we accept it, we cannot accept any of your hypotheses.

MR. HOWARTH: What I would say merely is that the Joint Appendix filed with the Court makes three references to the answer given by Mr. DeFillippo.

One, "I am Sergeant Mash."

Two, "I work for Sergeant Mash."

Three, "I know Sergeant Mash."

And the only point that we make is that it is not crystal clear exactly what response Mr. DeFillippo was making to the police officer and --

QUESTION: Well, would you say that at the time and in those circumstances, in an alley, after 10:00 o'clock at night -- presumably after dark -- that the police officer's suspicions would be aroused by at least the ambiguity that you are suggesting?

MR. HOWARTH: The police officer could have been suspicious. I have no problem with the fact that the police officer may have been suspicious and may have had his suspicions aroused as to who in fact is this man.

However, we do point out that we do not believe that the record would indicate the criminal activity portion of the argument which Mr. Baughman makes. Mr. DeFillippo was not shown to even be in close proximity to the young lady. Mr. DeFillippo was not shown to be doing anything which had

a sexual overtone about it.

QUESTION: Counsel, do you not agree that the Michigan Court of Appeals proceeded on the basis -- at least on the assumption that there was reasonable suspicion for a stop and also proceeded on the assumption that there was probable cause to arrest under the ordinance and then struck down the ordinance.

MR. HOWARTH: They may have, although they --

QUESTION: Just why should we independently make some factual determination that has never been made in the state courts? Never been passed on?

MR. HOWARTH: The difficulty that I have had with this particular proposition -- and as has been pointed out in the brief, in the State of Michigan, probable cause is not sufficient to arrest for an ordinance violation. An officer must have actual proof of the existence of an ordinance violation. This was not a felony.

QUESTION: That may be so but the -- I suppose the Michigan Appellate Court would just unnecessarily abreach the constitutional question. They went right on by these preliminary questions, did they not?

MR. HOWARTH: Certainly the Michigan Court of Appeals went directly to the constitutionality of the ordinance and it has not yet this morning been discussed, the problem of the particular vagueness of the ordinance in question,

which is what I would like to turn to.

The Michigan Court of Appeals, while they did find that the statute was perhaps overbroad and then used the terminology that the statute, ordinance made criminal what was otherwise innocent conduct I do not believe -- and I would agree with Mr. Baughman that that in and of itself would not be a sufficient reason to strike down the ordinance.

However, we would submit that when a statute takes very presumptively innocent conduct such as a person walking from his own home to go up to the corner to buy a newspaper, that when a statute can make that conduct potentially illegal, it must do so in terms which are clear, in terms in which the ordinary man of average intelligence will have no difficulty understanding and we submit that the Detroit Common Council in August, 1976, in passing this particular ordinance, did not set any such standards.

A standard in the ordinance itself uses the term "identification" without any explanation of what will be sufficient or what will be reasonable identification.

I would submit that there are many citizens in the City of Detroit who by their age or by their lack of a particular occupation are going to be unable to have, really, much of any identification at all.

This ordinance, as a matter of fact, was passed simultaneously with a curfew ordinance in the City of Detroit

and when one reads the Preamble to the ordinance, one sees that this ordinance was aimed at the curbing of juvenile gangs in Detroit.

There are going to be certainly many people who are 12 or 13 years old who could be on the streets of Detroit and be unable to provide any identification whatsoever. There are going to be many people who will be substantially older than that who will happen not to have their driver's license with them, who will happen not to carry a birth certificate with them.

Those people, should they be unfortunate enough to be standing innocently in the area of suspicious activity, stand to be arrested by Detroit police officers. The ordinance also talks in terms of "unable to provide" and "refuse to provide." You may be detained in either instance under the Detroit ordinance. Certainly you may be arrested if the officer feels that you have refused to provide identification. You may be detained for merely being unable to.

Therefore, a person who himself is the victim of a crime, who had his wallet taken, a person who is on a public beach in a bathing area, these people will probably not refuse to provide identification to police officers but clearly they will be unable to provide identification to police officers.

QUESTION: You do not need a document to identify yourself, do you?

MR. HOWARTH: That is unclear under the Detroit ordinance. The ordinance, when originally written and the ordinance that we deal with today did not discuss whether the identification need be written or oral.

However, there was evidence before the Detroit Common Council on the day that the ordinance was passed, showing that some of the proponents of that ordinance felt that written identification would be required.

QUESTION: It is true that the ordinance makes criminal only a refusal, not an inability.

MR. HOWARTH: That is correct but it would allow detention.

QUESTION: There is a difference.

MR. HOWARTH: That is correct.

QUESTION: If you come up to a person in a bathing suit and ask him his name, he gives you his name and you ask him for his driver's license and he says, "I am sorry, I do not have my driver's license in my bathing suit." That is not a refusal.

MR. HOWARTH: No, but it would be an inability and it could cause his detention.

QUESTION: But an inability is not criminal, under the ordinance.

MR. HOWARTH: No, it would not be.

QUESTION: But in the predicate for all of this is

reasonable cause to believe that behavior of an individual warrants further investigation and if you define that as a ground for a Terry-type stop, you have certainly eliminated a lot of people from the purview of the ordinance, have you not?

MR. HOWARTH: You have, Mr. Justice Rehnquist, eliminated many people but certainly not all people because anybody who is in the vicinity of criminal activity might be considered to be in a suspicious circumstance, such as Mr. DeFillippo.

We would concede that the young lady in question was almost undoubtedly engaged in some type of illegal activity. I think the actual arrest was disorderly conduct due to consumption of alcohol.

However, Mr. DeFillippo could not have been an aider and abettor in a situation of public intoxication.

QUESTION: How many other people were nearby in this dark alley?

MR. HOWARTH: The record is unclear. The record merely states that the officers observed two people.

QUESTION: Well, then, that means up here there were only two people on this record and the court has so indicated, the Michigan courts have taken that for granted.

MR. HOWARTH: The answer which I gave earlier stating that many people could have been involved would not necessarily apply to the particular situation in DeFillippo

but in many situations which could occur.

QUESTION: Well, we are only treating one situation here now.

MR. HOWARTH: I understand. I merely am addressing that to the difficulties with the application of this ordinance generally, that it could be used in many ways to cause wholesale arrests of people who were in the vicinity of what was suspicious criminal activity, which is one of the potential First Amendment problems with the ordinance.

QUESTION: Well, of course, let me put it this way, is the question in Detroit or Michigan, can people be detained as material witnesses?

MR. HOWARTH: I am not familiar with any material witness statute in the State of Michigan which would allow detention of people on the street.

However, applying your question --

QUESTION: Well, if police officers do not get the witnesses then and there, very often the odds are they will not get them at all.

MR. HOWARTH: That is correct. And certainly, if this had been a felony arrest as opposed to a misdemeanor arrest, the officer would have the obligation to produce res juste witnesses and Mr. DeFillippo could have been considered a res juste witness to whatever crime the young lady was being arrested for. But the young lady was arrested for a

misdemeanor and there is no res juste rule in the State of Michigan which requires a police officer to ascertain the names of all parties in the presence of a misdemeanor arrest.

QUESTION: Mr. Howarth, part three of your brief, you state and argue that the Detroit Common Council lacked good faith in enacting this ordinance.

MR. HOWARTH: Yes.

QUESTION: Is there any evidence in this record to support that rather serious charge?

MR. HOWARTH: The evidence in the record comes from two sources. It comes generally from the way in which this particular ordinance was passed, the particular emergency in response to --

QUESTION: Is this in the record?

MR. HOWARTH: That is not in the record and we had hoped to include it in the brief before the Court under the principle of a Brandeis brief in that it is documented material that we have put into the statement of facts and we had asked the Court to consider that.

However, what could be considered part of the record is that we know what the ordinance stated and there are decisions, there are two decisions of the Michigan Supreme Court that would indicate that the Detroit Common Council was acting in an area which was prempted by state law to begin with and we have presumed that the MIchigan Common Council

was aware of the state of law in the State of Michigan, that they could not use ignorance of Michigan Supreme Court decisions principally the decision in Walsh versus the City of River Rouge.

QUESTION: Can you point to anything in any of the opinions in the Michigan courts that indicate they thought what you are presenting to us now in this Brandeis concept was relevant to this case?

MR. HOWARTH: No and the reason for that, Mr. Justice --

QUESTION: Then why should we spend any time considering it here?

MR. HOWARTH: Well, the issue was raised before the Michigan Court of Appeals but not reached and we thought that under the position of this Court in Smith versus Stingman the fact that if facts as we allege them are true, that perhaps the matter should be remanded to the Michigan Court of Appeals to reach that question.

It has been raised before the Michigan Court of Appeals that there was a state preemption problem involved in this case, that ordinance violations dealing with emergency situations, on other words, riots or states of emergency, in the cities in the State of Michigan is a matter which is particularly reserved to the state government and had been so held since the early 1960's and it was raised for that reason.

QUESTION: Was it argued to the Michigan court that the police officer also acted in bad faith -- another charge you make in your brief.

MR. HOWARTH: Yes, Mr. Justice Powell, we did state --

QUESTION: Did the court -- excuse me, go right ahead.

MR. HOWARTH: We did state that if one reads the ordinance section which follows the particular ordinance here, that section states that if an arrest is made under Section 52.3, that all the police officer can do is make a pat-down for dangerous weapons. So the officer was specifically excluded under the same law that he sought to enforce to make a full-blown search for any fruits of any crime and yet the officer admitted that he was not making a pat-down merely for weapons but that he was going beyond that and we would maintain that the officer then was in a very similar position to the officer in Sibron versus New York in that he was not looking for weapons as he was allowed to do under a stop and frisk statute but was in fact looking for drugs and did in fact find drugs and that is where we allege that if the good faith issue is to be considered, that there is a high potential of a lack of good faith on the officials who put this particular situation into existence.

That would be both the Council and the officer involved.

This Court has been asked to consider the case of Almeida-Sanchez and how it applies to the instant situation and we maintain before this Court that the Almeida-Sanchez decision is actually dispositive of the case at bar, that there is not an actual difference that can be found.

The Petitioner has alleged that the difference is that Almeida-Sanchez was a statute which authorized searches and that was as opposed to the ordinance in Detroit which does not specifically authorize searches but actually defines criminal conduct.

QUESTION: Can I ask you a moment how you interpret this statement of the Appellate Court? You can probably expoain it. It says that the Detroit ordinance sanctions full searches on suspicion without regard for dangerousness of those persons whose activities fall within the vague parameters of the ordinance.

Now, does it read the ordinance the way you do or not?

MR. HOWARTH: I think they did not. The ordinance might appear to allow full searches on suspicion. The difficulty is --

QUESTION: But are we not rather -- should we not take for granted what the statute means if the state court has construed it?

MR. HOWARTH: I do not know that we would

necessarily be compelled to accept the ruling of the state court on that.

QUESTION: Well, if you have a lawful arrest for the violation of a valid criminal statute at the time of arrest you can search that person lawfully.

MR. HOWARTH: That would be correct, under --

QUESTION: Fully search him.

MR. HOWARTH: -- under the Robinson decision.

QUESTION: Under established Fourth Amendment law.

MR. HOWARTH: I would agree with that.

QUESTION: But apparently, that may be true under the Fourth Amendment but I thought you were suggesting that the state had -- in this very ordinance has restricted the officer's freedom to make a full search, even if he makes a valid arrest under this ordinance.

MR. HOWARTH: The following section to the ordinance, the ordinance in question is Ordinance Number 52.3. The following section is Section 52.4. Section 52.4 is the section which states that if an arrest is made under Section 52.3 --

QUESTION: That would be if you arrest a person for refusing to identify himself?

MR. HOWARTH: That is correct -- as the law now stands. Section 52.4 in time preceded Section 52.3. Therefore, when Section --

QUESTION: Was 52.4 in force at the time that this

arrest was made?

MR. HOWARTH: It was in force. It is still in force today. It has never been taken off of the ordinance books, even when Section 52.3 was amended.

QUESTION: So you are suggesting that under state law -- under state law that this search was invalid?

MR. HOWARTH: Under --

QUESTION: Even if the ordinance was valid, even if the arrest was valid, the search was invalid because of 52.4.

MR. HOWARTH: That is correct.

QUESTION: But that is not what the Court of Appeals held, is it?

MR. HOWARTH: No and the reason, I believe for that is that the Court of Appeals was correctly holding that under United States versus Robinson, once an arrest is made, even for a traffic stop, even for an ordinance violation, this Court has held that a full search may be made --

QUESTION: Oh, yes, but as far as the Fourth Amendment was concerned but certainly it does not say that a state may not restrict the power of its officers.

MR. HOWARTH: That is correct. And we believe that under Section 52.4, the city officers actually were restricted from doing anything other than making a Terry-type pat-down.

QUESTION: Well, this -- the substance for the

possession of which he was prosecuted was found in a package of cigarettes after he was taken to the station house, was it not?

MR. HOWARTH: The tinfoil packet was found in the scene. The tinfoil packet was not searched to determine the presence of phenyclidene until he got to the station house.

QUESTION: But you think the -- you think the search that found the tinfoil went beyond the search that the ordinance authorized?

MR. HOWARTH: Yes.

QUESTION: For a valid arrest.

MR. HOWARTH: That is correct. Although it does not go beyond what has been allowed under traditional Fourth Amendment principles announced in the Robinson case.

This Court has, on many occasions, faced the situation of a claim or a presumed claim that an officer has acted in good faith under an executive -- under a legislative or under a judicial ruling of the state from which the officer comes. To rule that good faith reliance upon executive action, upon legislative action or upon judicial action within the state renders that conduct higher than the Fourth Amendment would require in our position the overruling of the Almeida-Sanchez case, would require the overruling of this Court's decision in Berger versus New York on which the wiretapping warrant was specifically allowed under state statute, even

though the standards set down by that statute were too vague to be allowed under Fourth Amendment principles, would require the overruling of the case of Coolidge versus New Hampshire, the Attorney General warrants which were specifically allowed by state statute, would require an overruling of at least the reasoning which was presented in the case of Mincey versus Arizona, the reliance -- and I am certain it had to be good faith reliance on a decision of the highest court in the state, allowing an exception to the Fourth Amendment murder scene.

QUESTION: But there is a difference. Let us -- you are citing a good many cases, a good many familiar names because I wrote some of those.

And would there not be a difference -- let us say a state legislature should say, no warrant will ever be required in this state for the arrest or search of anybody. Well, that would clearly be contrary to the Fourth Amendment and be an invalid statute.

MR. HOWARTH: That is correct.

QUESTION: But here -- and therefore, an arrest without a warrant would still be -- regardless of that statute would still be unconstitutional unless it was under one of the exceptions of the Fourth Amendment but here the question is, if you have a criminal ordinance on the books that has never been held by anybody to be an invalid ordinance and a policeman arrests somebody for violation of that ordinance, is

that a wrongful arrest? That is quite a different question, is it not?

MR. HOWARTH: I perceive them as being more similar. The question is certainly one of degree as opposed to one of time. This Court has stated that if a state legislature or a town council were to pass an ordinance saying that police officers could arrest all suspicious persons, that that would not pass constitutional muster.

Certainly there will be different gradations of that problem, certain degrees but I think that the case at bar is merely a case of degree.

You have a statute or an ordinance very much like the loitering statutes and you have one that has no standards that a police officer can even rely on in good faith. If the police officer cannot point to some standard on which he relied, the question of his good faith becomes very difficult to ascertain.

If you cannot ascertain whether he truly had good faith or not, you might be in a position of saying that since all state statutes and all ordinances are presumptively valid, police officers can make arrests and make full-blown searches on any ordinance that is passed until such time as that ordinance can be declared unconstitutional.

QUESTION: Well, let us take one that is very specific, a speed limit of 55 miles adopted by a state not a

state, not a federal and a car is arrested going 75 miles an hour. Is there a question of good faith there?

MR. HOWARTH: There should not be.

QUESTION: The police officer is under a mandate to arrest people going over 55 miles an hour, is he not?

MR. HOWARTH: I agree.

QUESTION: Now, suppose that a search of the car disclosed that the car was loaded with heroin. Later, if that is determined by this Court, the 55 mile an hour statute is unconstitutional as an undue burden on interstate commerce, let us assume, does that mean they suppress the heroin in that case?

MR. HOWARTH: I would think not and the difference being that we would be talking about a statute which I perceive to have been something this Court has discussed as a technical violation of the Constitution as opposed to what this Court talked about in Sibron versus New York, being those statutes which themselves trench on Fourth Amendment rights.

The hypothetical case which you have presented would certainly not trench on any Fourth Amendment right directly in the statute. We submit that the Detroit ordinance did so by setting up a vague, setting up an ambiguous statute, setting up one that did not have standards and which allowed police officers at mere whim and caprice to make arrests.

Under a speeding statute, of course a police officer

would have to be able to point to the fact of why, specifically, the person was going over the speed limit, how he determined that and I think that he would have excellent standards on which he could base that determination.

QUESTION: Well, vagueness and overbreadth do not have anything to do with the Fourth Amendment.

MR. HOWARTH: Vagueness and overbreadth can.

QUESTION: They have to do with Due Process.

MR. HOWARTH: They are Due Process arguments. The standard, however, is since a warrantless arrest depends on the validity of the arrest to determine probable cause, when the arrest cannot ever be found to be valid because there are no standards, then you have a warrantless arrest which is in itself unreasonable.

QUESTION: Well, all you are suggesting is that any statute that happened to pick up the standard that Terry announced would be vague, unconstitutionally vague.

MR. HOWARTH: The standard would not deal with the Terry standard as much as it would deal with the identification standard which is the real problem.

QUESTION: You are not defending the other part, then, of the Michigan Court of Appeals' opinion on vagueness?

MR. HOWARTH: The vagueness dealing with the fact that the --

QUESTION: Standard. No standard.

MR. HOWARTH: The standard dealing with whether the citizen will know when he must provide identification? No, I do agree with the Michigan Court of Appeals on that. It must be --

QUESTION: Well, that just means that the Terry standard is unconstitutional, then.

MR. HOWARTH: I do not know that the Terry standard gave no recognition to the fact that a citizen must answer questions and I -- we have no objection with the right of the police officer to ask questions of the citizen. It is the question of whether the citizen must be compelled to answer those questions.

QUESTION: I might also say that your 52.4 just says, it seems to me, that if you make the kind of a stop the 52.3 contemplates, you may pat him down if you have reasonable cause to believe that he is dangerous. It does not say that if he refuses to identify and then you arrest him that you cannot make a full search.

MR. HOWARTH: Well, we had interpreted it as being the, really, the arrest provision.

QUESTION: Well, apparently you do interpret it that way but that certainly is not the way the Court of Appeals interpreted it.

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

[Whereupon, at 11:12 o'clock a.m. the case was submitted.]