ORIGINAL

In the

Supreme Court of the United States

ZACKARY C. BROWN,

APPELLANT,

V.

THE STATE OF TEXAS,

APPELLEE.

No. 77-6673

Washington, D. C.
February 21, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN, Appellant, v. THE STATE OF TEXAS, Appellee.	No. 77-6673

Washington, D. C.,

Wednesday, February 21, 1979.

The above-entitled matter came on for argument at 11:15 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

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APPEARANCES:

RAYMOND C. CABALLERO, ESQ., Pearson & Caballero, 1610 State National Plaza, El Paso, Texas 79901; on behalf of the Appellant.

RENEA HICKS, ESQ., Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of the Appellee.

C O N T E N T S

[Afternoon Session - pg. 41]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Brown against Texas.

Mr. Caballero, I think you may proceed whenever you are ready now.

ORAL ARGUMENT OF RAYMOND C. CABALLERO, ESQ.,

ON BEHALF OF THE APPELLANT

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

Brown vs. Texas is a direct appeal from the County Court at Law No. 2 for El Paso County, Texas, from a misdemeanor conviction for failure to identify himself, the appellant and give a report of his name and address.

The facts are that on December 9, 1977, at approximately noon, two uniformed El Paso police patrolmen, in a squad car, looked down an alley and noticed appellant and another individual who were apparently only a couple of feet apart, walking in opposite directions. The officers could not tell if the individuals had met or had spoken. Both men were black. No other activity was noticed.

There was no report of suspicious or criminal activity. The officer stated that he decided to stop appellant and ask him his name, and that that was the sole purpose for the stop.

The appellant was stopped, and the officers did ask

him for his name, and also for the reason for his presence in the alley.

Appellant protested the stop, stating that the officers had neither right nor reason to detain him. He did not resist the arrest or stop.

Brown was patted down then, and no weapons, drugs or any other contraband were found on his person. But he was placed under arrest for the failure to identify himself.

The other individual in the alley was never stopped or questioned.

On the way to jail appellant gave the officers his name, but he was still booked for the offense, the officer stating that in his viewpoint the offense was complete at that point.

He was later on found guilty in a non-jury trial, and was fined $45.

Now, the provision in question does not carry any jail term or imprisonment, it simply provides for maximum penalty of a $200 fine.

The provision is Section 38.02 of the Texas Penal Code, which makes it a misdemeanor to refuse to give a report of one's name and address to a peace officer who has lawfully stopped one and requested that information.

This case is significantly different from DeFillippo, which you have just heard, in the following respects:

The Detroit ordinance at least attempted to put in some sort of a Terry standard that there must be suspicious conduct or criminal conduct afoot, which would allow a police officer to investigate further and ask for one's name. The Texas statute does not have any such requirement.

QUESTION: Well, it has the word "lawful".

MR. CABALLERO: That's correct, Your Honor.

QUESTION: Well, if you assume that the Texas courts understood what a lawful stop was, and convicted this person, you would have thought that, as an initial matter, they thought the stop was lawful, and that, therefore, there was at least a valid Terry stop.

MR. CABALLERO: I think, Your Honor, that if you use the word "lawful" in a statute such as this you can, I suppose, read in all kinds of standards. However, to a person reading the statute, on its face, --

QUESTION: That's a vagueness argument.

MR. CABALLERO: That's correct, Your Honor.

QUESTION: Now you're making a vagueness argument, but you were just making a statement that the Texas statute didn't have any standard in it, different from the --

MR. CABALLERO: What I'm saying is that simply by reading "unlawful", there is nothing to tell you whether it must be criminal activity, for example. It may be that the Texas Legislature thought it was lawful for a police officer

to stop a person walking down the street and ask him for his name for no other reason.

QUESTION: Well, then you do -- you are suggesting that neither the Texas Legislature nor the Texas courts knew what "lawful" meant.

MR. CABALLERO: I'm suggesting they probably didn't consider it carefully enough, Your Honor. The statute is not drafted carefully enough to set forth what is lawful and what is not, and that is one of our principal arguments here.

Now, also in DeFillippo there was evidence of other criminal activity: drunkenness, perhaps some sort of indecency, sexual conduct, possession of drugs, possibly impersonation of a police sergeant.

In this case here we are solely dealing with an offense involving only one type of criminal conduct, and that was the offense of failing to identify himself.

Now, DeFillippo did not involve a prosecution for failure to identify; this case does involve that kind of prosecution. Also in DeFillippo, of course, there was a question of good-faith reliance of the police officer on the ordinance.

Before the trial court and before this Court, appellant has challenged the constitutionality of the Texas statute for facial vagueness and for overbreadth, because it punishes not innocent conduct, Your Honor, but protected

conduct. And there's a big difference. Conduct protected by the First, Fourth and Fifth Amendments to the United States Constitution, making the statute therefore invalid under the due process clause of the Fourteenth Amendment.

The first question that comes up is a vagueness argument: Can a police officer ask someone questions? This is apart from the ability to stop someone. Can he ask someone a question?

The point brought up by Mr. Justice White --

QUESTION: Well, the answer to that is clearly yes, he can ask, can't he?

MR. CABALLERO: I agree, Your Honor. He has the same rights -- I can ask people questions. I can stop --

QUESTION: Well, particularly a police officer can.

MR. CABALLERO: That is correct. He has the same rights as any other citizen to ask questions.

QUESTION: Well, at least those rights.

MR. CABALLERO: Up to a point, Your Honor, where it becomes harassment or where you're --

QUESTION: To inquire: What is your name?

MR. CABALLERO: Simply that point. For example, if I'm arguing a case up here and a police officer came up to me right now and asked me what is my name, I don't know if that would be a reasonable type of inquiry, Your Honor. I think there are conceivable instances --

QUESTION: Well, Mr. Brown wasn't arguing a case here, was he?

MR. CABALLERO: That's correct, Your Honor. I'm saying that conceivably there could be limitations on a person's right to ask questions. But I think, as a general proposition, under most fact situations, he does have a right to ask questions.

Now, what about the stop? The way I read Davis vs. Mississippi, the Fourth Amendment is applicable to any kind of stop. "Detention", "arrest", they are all the same, as I understand the reading of Davis vs. Mississippi.

QUESTION: Well, Terry v. Ohio said the same thing, didn't it?

MR. CABALLERO: I believe it did, Your Honor. In that case -- I can't ex plain Terry vs. Ohio, Your Honor. The only way I can say it is that under Terry you are simply trying to protect the life of a police officer who, thinking there is criminal activity afoot, No. 1, and two, thinking that he might be in a dangerous position, he is simply able to pat someone down before he starts asking the questions.

In this --

QUESTION: Let's put this, for hypothetical purposes, out of the criminal area and say that a police car is called to an automobile collision, and there are a number of people around. Do you suggest that the State has no police power to

require the persons who observed that automobile collision to give their names to the police officer?

MR. CABALLERO: No, Your Honor, I'm not suggesting that. That's the problem with this case, that it's not limited to civil or criminal incidents. And what I suggested to the Court in my brief was that Texas used to have -- the predecessor statute, which was not a penal statute, a kind of material witness type statute, provided that the police officer could round up the witnesses to a civil or criminal incident, which --

QUESTION: Well, then, just to take one step at a time, the First Amendment is no barrier to a statute requiring a person to identify himself to a police officer at high noon, with no criminal activity going on?

MR. CABALLERO: Your Honor, the statute that I'm talking about does not make you identify yourself. YOu have a choice of doing two things: first, you can identify yourself or, if you stand mute and refuse to identify yourself, then the officer must take you before a neutral magistrate, at that time make provision for a material witness bond, or to identify yourself. But no statute -- I'm not suggesting to this Court that any statute, civil or criminal, can make you, under the pain of criminal violation, state what your name is or say anything. Anything that comes from your mouth, as far as I'm concerned, Your Honor, is a violation of both the

First and Fifth Amendments. It's orally compelled.

QUESTION: But then if you refuse to do that before the magistrate, in this hypothetical situation, then what?

MR. CABALLERO: Then he places you under a material witness bond; if you can't make bond, then you're in jail, Your Honor.

QUESTION: I suggest to you that that pretty well washes out the First Amendment argument you're making.

MR. CABALLERO: Well, let me talk about the First Amendment thing, Your Honor.

Let's assume that you have the fact situation of NAACP v. Alabama, that is, the situation where you have a group of persons who, for their own protection, are trying to unite and, let's say, get rid of racial segregation, which was the case there; and the State was violently opposed to -- at that point at least -- to the NAACP. And you want to find out, as a State officer, who the members are of the NAACP.

Now, this Court held, under NAACP v. Alabama, that a court could not compel NAACP to give up its membership lists. I'm suggesting to this Court that there is a First Amendment violation potentially here, if I could stop every single person who had attended an NAACP meeting on their way out of the meeting and asked them, "What is your name?"

If the person refuses to give his name, then I march him on down to jail and have him fingerprinted, and try to

ascertain their identification through some other means.

I am suggesting, Your Honor, that there is a First Amendment violation.

QUESTION: Wasn't that decided, at least in part, though, on the theory of the freedom to assemble and petition for redress of grievances?

MR. CABALLERO: In NAACP?

QUESTION: Yes.

MR. CABALLERO: They spoke more broadly than that, Your Honor. I believe they said that privacy in one's associations are involved in the freedom of the association that in some instances your freedom to associate is endangered if the privacy is not there. The Iranian student type thing, or the -- your ability to redress and to protest anonymously, Your Honor.

QUESTION: Here your client, I take it, wasn't engaged in any comparable activity to that in NAACP vs. Alabama?

MR. CABALLERO: No, Your Honor, I think my client's activity is closer -- and still First Amendment protected right, which this Court decided in Norwell vs. Cincinnati, where a police officer approached a gentleman walking under -- with a suspicious person report afoot; and he stopped Mr. Norwell and he asked him what he was doing there at that time of night, and Mr. Norwell simply said, "I don't tell you any-

thing" in those words; and this Court held that was protected activity. It's a non-provocative protest of an arrest. And I think my case is closer to that.

QUESTION: Did that case go off on freedom of speech?

MR. CABALLERO: I believe -- you just said it was protected activity, I can only assume --

QUESTION: Your man here is arrested for -- not for what he said but for what he didn't say.

MR. CABALLERO: Well, he did say something, Your Honor. And he did pretty much the same --

QUESTION: But he wasn't arrested for that.

MR. CABALLERO: Pardon me, Your Honor.

QUESTION: Was he arrested for what he did say?

MR. CABALLERO: They didn't -- he was arrested for what he did not say.

QUESTION: Yes, that's what Mr. Blackmun was bringing out.

MR. CABALLERO: But he did say something, and that was that he protested the right and reason of the officers to detain him under the circumstances in this case.

By implication, if you say -- to take the question earlier of what "lawfully" means; by implication, if I only have to give my name under the Texas statute when I am lawfully stopped, it would mean that if I am not lawfully stopped, then I don't have to give my name.

Now, when is one person supposed to know that he is not lawfully stopped? Under the [Cinesettles] case, under Terry, under Davis vs. Mississippi, a person -- let's assume you had a constitutional scholar walking down the street and he knew about those cases --

QUESTION: When is somebody supposed to know when there is probable cause to arrest?

MR. CABALLERO: You don't. You are simply arrested. That's a fact.

But in this case, apparently a person has an option, at least for a little while, to think: Is this a lawful arrest or is it not?

QUESTION: Well, let me ask you: what if there's probable cause, what if a policeman thinks there's probable cause to arrest and he arrests him, and he asks him his name. Do you think the State could then make the refusal to give the name a crime?

MR. CABALLERO: Right, Your Honor. Then you're getting into a different area, Your Honor.

QUESTION: Well, could you or not?

MR. CABALLERO: No, I don't think you can, Your Honor, because it's still protected activity.

QUESTION: Because it would be vague?

MR. CABALLERO: No, Your Honor. That's getting out of vagueness, and you're getting into the area of overbreadth,

because at that point what you're doing is you're making criminal conduct which is protected by the First, Fourth and Fifth Amendments. Not because of vagueness. You're setting aside the vagueness argument at that point.

Now, the California statute, the Detroit ordinance in this case, the Henderson City ordinance, all kind of incorporate a little bit better than this statute does the Terry type criteria. In this case there is nothing -- I don't think you could read anything near Terry into the word "lawfully" in this case.

Also, what is --

QUESTION: Mr. Caballero, could I just ask this? You didn't challenge the lawfulness of the stop in this case, did you?

MR. CABALLERO: By filing the motion to suppress, I did not, I challenged the statute on its face, Your Honor.

QUESTION: So that the lawfulness, then, we assume?

MR. CABALLERO: I think that -- my client's activity, let's say, in this case, if they did have probable cause to stop my client, I could still challenge the statute. I don't think you can assume lawfulness in this case. What I'm saying is that there may conceivably be cases where it would not be a lawful stop. This may or may not be a lawful stop. I am not conceding -- and did not at the trial court --

QUESTION: Well, you didn't challenge it.

MR. CABALLERO: I did, Your Honor. I said, at page 25 -- page 18 of the record: "If the purpose of the stop was I want to ask this fellow's name, then of course I would contend that that's not a lawful purpose."

That's in the middle of page 18 of the record. I have never conceded that this stop was lawful.

QUESTION: Well, you go on to say: I'm assuming the State here, through its police officers, had some reason to make an initial stop.

MR. CABALLERO: That's correct. At that point I didn't know, Your Honor, I hadn't heard the evidence and that was before the trial.

But I have never assumed or conceded that this was a lawful stop in this case.

QUESTION: To go a step further, what about after the trial? Did you argue that it was not a lawful stop?

MR. CABALLERO: Your Honor, I have all -- no, I did not. I have always argued that the statute on its face --

QUESTION: I understand, on its face is bad. But --

MR. CABALLERO: Now, I --

QUESTION: -- what do we do with your argument if we should view -- there's no element of dangerousness in the situation, as I remember the facts --

MR. CABALLERO: That's correct.

QUESTION: -- what if our view would be that this

did not come within Terry; what do we do with the case?

MR. CABALLERO: The reason I attacked it on its face, Your Honor, I can see -- my position before this Court, this is the same kind of case as See v. Seattle and Camara vs. Municipal Court of San Francisco, and that is: in those cases they are attempting to make criminal a person's invocation of his rights under the Fourth Amendment. No motion to suppress, no nothing; simply an attack on the invalidity of the statute on its face.

I don't believe you have to have a motion to suppress in order to raise facial invalidity on Fourth Amendment grounds. And you did not have to have it in See vs. Seattle or Camara vs. Municipal Court. What I'm saying is --

QUESTION: I'm not sure you answered my question, but maybe that's --

MR. CABALLERO: Well --.

QUESTION: Does it make any difference if we, in fact, view the stop as lawful or not?

MR. CABALLERO: No, Your Honor, not if you're looking at the State's statute --

QUESTION: For purposes of our decision, you concede it's a lawful stop is what you're saying?

MR. CABALLERO: This case here may have been a valid stop -- you can assume that it was, that's correct, Your Honor. For my purposes, I'm arguing that facially --

QUESTION: You would also assume, for purposes of decision, that every judge who has to read this statute would know what the Terry standard is, and would limit the application of the statute to those cases which fall within the Terry standard. We should assume that, I suppose?

MR. CABALLERO: You would have to assume that. But, for purposes of --

QUESTION: Then it doesn't seem very vague any more. That part of the vagueness was that we didn't really know whether they limited it to the Terry stops or not.

MR. CABALLERO: Well, my understanding of the term "vagueness", Mr. Justice Stevens, is that a person reading the statute would be able to tell whether his conduct was criminal or not. I thought that was the test of vagueness, not whether a court somewhere knew what Terry vs. Ohio held. But maybe I misunderstood it. But that's what I thought vagueness meant.

QUESTION: May I come back to the question you've just been discussing? One of the elements in this statute is that the stop must be lawful. That's what the statute says. I realize that you argue that "lawful" could mean a lot of things.

But it seems to me from the record that that element of the offense may be absent in this case. The prosecuting attorney, Mr. Patton, on page 15 of the Appendix, concedes

that the stop must be lawful. He said an officer cannot go up to anyone on the street and ask for his name unless the stop is lawful. And if you look at what the officer said, back on page 28 and later on 31, I think in response to your questions, at the bottom of page 28 you inquired: "Did you, was there any action by my client that he was armed or committed a crime at that time?"

The answer was "No."

"The only thing you wanted to do was stop him and ask him his name?"

And the answer was "Correct".

So doesn't that wash the element of a lawful stop out of this case altogether?

MR. CABALLERO: In this case, if I were to have said the conduct of my client in this case was protected, it was not criminal, that would be correct, Your Honor. But if you're raising facial invalidity and vagueness, I would say no, Your Honor.

QUESTION: Well, I understand that, perhaps; but why do you have to get to the constitutional issue? If an element of the statutory offense is,by concession, absent?

Maybe I'm wrong, but I --

MR. CABALLERO: You don't have to get to the constitutional issue, Your Honor, you can simply -- the court below could have entered a judgment of acquittal, and I suppose

this Court --

QUESTION: Well, you have to have some constitutional basis for setting aside a State conviction. I don't care what kind of -- I do care what the ground might be, but there has to be some constitutional ground. And are you suggesting that there wouldn't -- that it was without any evidence whatsoever, is that it? Would it be Fourth Amendment or what?

MR. CABALLERO: Your Honor, the constitutional grounds would be basically Fourteenth Amendment due process, which would also bring in the First, Fourth and Fifth Amendments.

I'm not suggesting that you not reach the constitutional issue in this case, I was simply --

QUESTION: But I take it that whatever -- whatever level of suspicion there might have been in this case, the State courts have apparently said that under the statute it's enough. And so that poses at least the constitutionality of the statute as applied.

MR. CABALLERO: Yes, Your Honor, as applied, and also on its face.

QUESTION: Well, on its face, Mr. Caballero, I notice in your index of authorities in the front of your brief the only Texas case you cite is one saying that the Texas Court of Criminal Appeals has jurisdiction only where the fine level is over a hundred dollars. And it's very likely not your fault that you can't get to a higher Texas appellate court,

but have there been any Texas appellate decisions construing the statute?

MR. CABALLERO: No, Your Honor.

This question came up earlier, and I can answer your question, I believe, in this manner: If the statute provides a pretext for an arrest, such as, for example, in DeFillippo, you find drugs or other violations, you never see this kind of prosecution arise. This is a very rare instance. I don't even know how it got this far.

But usually, at that point, prosecutors are --

QUESTION: It is because, Mr. Caballero, you brought it here.

MR. CABALLERO: Well, Your Honor, I am only defending my client.

QUESTION: Exactly.

MR. CABALLERO: The only thing I can say is that at that point prosecutors are simply not interested in prosecuting someone for the mere refusal to give his name. And you don't see this kind of prosecution. No Texas appellate court to my knowledge, and I've checked, has ever considered the issue. In [Cinesettles]? vs. Texas, that I've cited in my reply brief, they didn't cite the statute but the Texas Court of Criminal Appeals did give you its viewpoint concerning the lawfulness of stopping someone on the street and asking their name. And so --

QUESTION: And unless you get a fine of over a hundred dollars, you will never get a case to the Texas Court of Criminal Appeals on this.

MR. CABALLERO: That's correct, Your Honor.

QUESTION: Now, somewhere in your observations you said that the police officer gave no ex planation, except that he wanted his name. I suggest that isn't quite accurate. The police officer said, at page 29, just above the middle -- he referred to this being a high drug area. And this is certainly related to the reason he made the stop. That's a part of the officer's explanation.

MR. CABALLERO: He gave that explanation, Your Honor. I don't see that anyone's Fourth Amendment rights are diminished in any respect because he happens to be walking through a so-called high drug area. I don't think you will lose any of your Fourth Amendment rights because you happen to be walking through such an area.

QUESTION: You're going to the legal argument, which is your privilege. I am simply suggesting that the officer did give a reason. The reason was that he was being more observant in a high drug area when two people come together in an alley. Obviously, because they might be engaged in a drug transaction. They might not be, but that's his -- there is a reason given by the officer.

MR. CABALLERO: That was just suspicion.

QUESTION: It was just a frivolous or whimsical idea.

MR. CABALLERO: If that were the case, though, Your Honor, I would imagine that he would want to stop the other party to the drug transaction, and also ask him a question or two; which they never did.

I guess they assumed that the drugs were flowing from my client to the other, which, in the case they really did believe that and they wanted to make a drug arrest, they would certainly have stopped both parties. If they thought my client sold, then the other party would have it.

QUESTION: Is there any evidence what happened to the other man?

MR. CABALLERO: The only thing in the record was he was never stopped or questioned, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Caballero.

MR. CABALLERO: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hicks.

ORAL ARGUMENT OF RENEA HICKS, ESQ.,

ON BEHALF OF THE APPELLEE

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

My name is Renea Hicks, and I represent the State of Texas on this appeal.

The statute challenged here is Section 38.02(a) of

the Texas Penal Code. And, just generally, it imposes a very limited duty on citizens of the State of Texas in very narrowly circumscribed situations to aid police in their investigatory functions, and, indirectly, to aid their fellow citizens by helping to possibly preempt crime or help catch those who have just committed a crime.

I do not see that it is unconstitutional under any of the four grounds that were raised on this appeal. The First Amendment issue, I think, clearly must be discarded as a valid grounds for invalidating the statute, because to invalidate the statute, saying that someone has a First Amendment right to silence in all situations just would lead to totally unacceptable results throughout our society. Much of our government functions on requirements that people respond to requests from people. In Securities & Exchange matters, in Food and Drug Administration matters, and situations like that.

QUESTION: Well, what if the State of Texas passed a statute saying that every citizen, when he left home during the day, he had to call the local police station and tell them he was leaving and where he was going and when he'd be back? And made a violation of that command a criminal offense, punishable by a fine.

MR. HICKS: I don't see that that would be a First Amendment problem. It seems to me -- well, it could be a

First Amendment problem in the sense of impinging somewhat on associational rights by constantly keeping track of someone.

I don't think this statute does anything like that.

QUESTION: No. I agree.

MR. HICKS: But, if anything, I would think that that would be/a general due process problem with the statute, of going back to the situation in DeFillippo where the Michigan Court of Appeals said: making criminal that conduct which is --

QUESTION: Well, what is "general due process"?

MR. HICKS: By that I meant the Fourteenth Amendment due process question. This Court has held, in numerous kinds of cases, that the only things in the due process clause are not rights incorporated from the first Ten Amendments -- first Eight Amendments.

QUESTION: To pursue Mr. Justice Rehnquist's hypothetical, under this kind of an ordinance, the really only safe way that a citizen can avoid embarrassment at least is to carry some form of identification on him at all times, isn't that true?

MR. HICKS: I don't think that's so.

QUESTION: You don't think so?

MR. HICKS: This statute is different than many of the other statutes that are similar to this, in that there's nothing on the face of the statute that says someone has to carry identification to support what they speak to the officer.

In other words, there's no requiring of showing of a validated driver's license or a general ID card. It just says the person must report his name and residence address to a police officer. And I don't think the word "report" in this instance means that they have to report it by showing proof of the identification.

In other words, if someone says, "My name is John Smith" to an officer who has lawfully requested it, the officer has no right to say, "Well, prove that you're John Smith." And he has no right to arrest the person unless he has independent grounds to think that this is a false identification.

QUESTION: Well, counsel, I take it then that you're suggesting we should judge this case on the grounds that the -- the validity of the statute on the grounds that the statute permits an officer to stop any person at any time, regardless of the circumstances, and ask his name; and,if the person refuses, to arrest him?

MR. HICKS: No, Your Honor, I'm not saying that.

The statute requires that there be a lawful stop.

QUESTION: Well, I'm just asking -- I will ask you then: Is it a lawful stop to just stop any person indiscriminately and ask their name?

MR. HICKS: Well, it may not be an unlawful stop, but I do think that the words "lawful stop" in this instance

carries with it a certain technical meaning. The Terry vs. Ohio type of stop.

QUESTION: But the court in this case held that this was a lawful stop; it had to hold so in order to convict this person.

MR. HICKS: That was implicit in the judgment of conviction, yes, Your Honor.

QUESTION: And therefore that's the way we have to read the statute, isn't it?

MR. HICKS: I don't believe so, Your Honor. Under --

QUESTION: Well, why not?

MR. HICKS: Well, there's --

QUESTION: I'm just trying to help you out.

[Laughter.]

MR. HICKS: I understand that. But I do believe that the lawful stop requires a Terry vs. Ohio stop. It may be that the court in this situation did not read it that way. But it is not an appellate court in the State of Texas.

QUESTION: It is the highest court in which we have any construction of this Texas statute.

MR. HICKS: That's correct.

QUESTION: And, as my brother Rehnquist suggests, we are not likely to get it from any higher court.

MR. HICKS: Well, it is possible to get it from a higher court.

QUESTION: Possible; but we haven't yet.

MR. HICKS: Correct.

QUESTION: And this is the sole construction of this statute we have, that the stop by this policeman of this petitioner was a lawful stop, or else there couldn't have been a conviction.

MR. HICKS: I think that's correct.

QUESTION: And if you assume they knew what the law was, you would think it was at least a Terry stop; is that it?

MR. HICKS: That is my argument before this Court.

QUESTION: Well, what --

MR. HICKS: It is possible that there was not -- that this Court would find, if it was independently reviewing the evidence, that there was a lawful Terry vs. Ohio stop.

QUESTION: What if the El Paso County Court says: "lawfully stopped" under this statute means "lawful" for purposes of Federal Constitutional law, as well as Texas law, and I conclude this was a valid Terry stop. And this Court, which is hearing the case now, says: No, we do not think it was a valid Terry stop.

We would simply reverse on an as-applied basis, wouldn't we?

QUESTION: Unh-hunh.

MR. HICKS: Well, I don't think that it's -- the issue of a lawful stop has constantly been pushed to the back-

ground by Mr. Brown or his counsel. And it is not really before this Court, whether there was a lawful stop.

I realize, under Thompson vs. City of Louisville, this Court has said that there can be a denial of due process if there is no evidence to support a conviction.

QUESTION: Well, it doesn't even -- that doesn't -- that wouldn't be necessarily the ground, it would just be that the evidence isn't enough to justify a Terry stop.

MR. HICKS: I understand --

QUESTION: But you don't think -- you say that issue wasn't presented in the --

MR. HICKS: It was not -- it was covered by the fact that Mr. Brown's attorney said that he assumed that there was a lawful -- that there was a reason to stop.

QUESTION: Well, if he assumed it, if he assumed the reason, then wanted the constitutionality passed on, he didn't present the lawfulness of the stop.

MR. HICKS: That's my argument.

QUESTION: May I just ask a question on that?

He did ask the question, as Mr. Justice Powell pointed out; the only thing he wanted to do was stop him and ask him his name. And the officer said, "Correct". That's on page 28. And he says the same thing again a couple of pages later.

QUESTION: Right.

QUESTION: I really have two problems with that. Can you -- does not the record show the absence of a lawful Terry stop, if that's the fact?

MR. HICKS: I think that's very possible.

I do think that there were two other --

QUESTION: No. Then, if that is true, and if there is -- as we can read the record -- if there just isn't any indication of violence and no motive to do anything but ask this fellow's name, and he happened to be in a drug area and he happened to be black -- and I don't know which is more significant as the reason for the stop; but do we just ignore that, then? Or do we -- and what can be done if it is not actually a violation of the statute? There's no appeal in Texas, is there, from this court?

MR. HICKS: Well, there is, but there wasn't in this case.

QUESTION: Oh, I thought because the amount involved, that there was no --

MR. HICKS: There can be an appeal because, in a Class C misdemeanor there can be a fine over a hundred dollars.

QUESTION: Oh, I see. If there had been over --

QUESTION: Up to a hundred, there is none.

QUESTION: But the judgment here is not reviewable by any court?

MR. HICKS: That's correct.

Well, I do think that it's very well that there may not have been a lawful stop in this case. I can only go back to the position that Mr. Brown --

QUESTION: Well, then isn't it -- don't we then have to assume, as a matter of Texas law, that the Texas court, which is the final court construing this statute, has held it applies more broadly than Terry does?

QUESTION: Yes.

MR. HICKS: There are two conclusions, two possible conclusions that could be drawn, I think. One could be that conclusion -- and I don't think that that's the proper one. The other one would be, I think, that the court misunderstood or misapplied the Terry doctrine.

The trial court did not apply the Terry doctrine properly. That might be the proper one, and I believe that that is what's supported by the record.

The reason I say that under the Texas statute, under this statute --

QUESTION: Are you conceding that, do you say?

MR. HICKS: I'm saying that this Court very well might find that there was not a lawful stop under Terry vs. Ohio, if it was independently reviewing the evidence, and if the issue was clearly presented to it.

I do think that the Texas statute requires a Terry vs. Ohio stop.

QUESTION: There's no indication in this case that it does. None. Ine fact, all the indications are the other way. The very fact that this person was convicted on the facts of this case.

MR. HICKS: Well, again, I think that the other -- there's another conclusion that can be drawn, and that is that it was misapplied; the Terry doctrine was misapplied.

QUESTION: But you have no basis for submitting that this law requires, at least in the justification equivalent to the Terry v. Ohio.

MR. HICKS: I think that --

QUESTION: There's no basis in this case for saying so.

MR. HICKS: In this case, but in Texas statutes -- for instance, in the Texas Code Construction Act, which governs the Texas Penal Code, there is provision in the Texas Code Construction Act which says that if terms of the statute have a technical or special meaning, through some means, such as a court decision, such as Terry vs. Ohio -- but it doesn't specifically mention Terry vs. Ohio -- then those words in a statute are to be given that construction.

QUESTION: Well, Terry vs. Ohio, in that case the Court upheld what the police officer did. There was no statute or ordinance covering what he did. It didn't say that he couldn't have done "more or less", it simply upheld what he

did. Why are you suggesting that that's a limit of what a police officer can ever do?

MR. HICKS: I'm not saying that that's the limit of what a police officer can do.

QUESTION: Well, you just did.

MR. HICKS: No, I believe I said that under this statute the term "lawful stop" is limited by other statutes in Texas that control the construction that the State courts would be able to give this statute, to the situation of there being a Terry vs. Ohio stop. Since Terry --

QUESTION: Well, that's telling us that Terry v. Ohio represents the limit of what a lawful stop would be; isn't it?

MR. HICKS: I don't think that that's a necessary conclusion from what I just said about the construction that would be given to this statute.

There are stops that might not amount to Fourth Amendment detention, that would be termed lawful, I suppose. I mean, policemen constantly are patrolling their areas, checking with the merchants, and so on.

QUESTION: Is it your view that the Texas court concluded that there was a lawful stop here?

MR. HICKS: Yes. I think that that is implicit in in the judgment of conviction.

QUESTION: Otherwise he couldn't have convicted, could he?

MR. HICKS: That's correct.

QUESTION: Now, in reaching that conclusion, it's certainly Hornbook, that the whole record is viewed by that judge -- not necessarily by us, but by that judge, the judge reaching that conclusion -- part of that record is that this somewhat inarticulate policeman, and a brand-new policeman as well, said that part of his motivation -- he implied that part of his motivation was that it was in a high drug area.

Is it reasonable to conclude, do you think we could conclude, that the judge made the decision, that the lawfulness was demonstrated in relation to the high drug area that the policeman said was part of his reason?

MR. HICKS: I believe that that is one of the factors on which the judge based his conclusion, implicit in the judgment at least if not substantive.

QUESTION: Then is that decision reviewable here?

MR. HICKS: I don't believe it is, Your Honor. That is my point, that there is some evidence on the point of whether there is a lawful stop. As I say, this Court, reviewing the record, or the initial trial court might decide that there was not proof beyond a reasonable doubt, that there was a lawful stop.

But there were two factors, I think, here: one was that it was a high drug area; the other factor -- there were three factors -- the other factor was that these people were

in an unpaved alley; and the other factor is that there were two people in this unpaved alley in a high drug problem area, near one another.

Now, those three factors, in isolation, very well, in fact probably, are not a lawful stop under Terry vs. Ohio. But there are some evidence on that point.

And that is the reason I suggest that under Thompson vs. Louisville the conviction could not be reversed, because there is no evidence on the point.

And I do not believe that because a judge in Texas may have applied Terry vs. Ohio in a way differently than this Court might have, that that means that that court was saying that "lawful stop" means something different in texas than it means under the Fourth Amendment litigation after Terry vs. Ohio.

QUESTION: But you're not contending here, then, that you can make it a crime -- the State could make it a crime to refuse to give your name whenever you're stopped, for whatever reason or no reason?

MR. HICKS: I'm not contending that it can make it a crime, that is correct. I'm not contending that Texas has done that.

I think it may be possible --

QUESTION: Well, I know -- I understand.

MR. HICKS: -- to do that.

QUESTION: Suppose there were no reference by the policeman in this record to the fact that he was observing two men in an alley, in a high drug area, and that there was nothing in the record except that he just wanted to find out the man's name; would you think that would be a lawful stop, a permissible stop under this statute?

Permissible first.

MR. HICKS: No. I would not say that that would have been a lawful stop under this statute, and I would say that there would have been no evidence to support a conviction in that situation.

QUESTION: Well, there would have been plenty of evidence to support a conviction for refusing to give your name, if he refused to give his name.

MR. HICKS: But that is only one of several elements in the statute. Again I go back to arguing that. It's the Terry vs. Ohio stop that is --

QUESTION: There wouldn't be any evidence of a lawful stop?

MR. HICKS: That is correct; there would have been no evidence on that point --

QUESTION: Well, the difficulty with the case is that we don't have an opinion from the Texas court, and so we don't know whether it's a question of interpretation of the State statute that may be troublesome constitutionally, or whether

it's an evaluation of the evidence under a perfectly permissible interpretation of the State statute.

MR. HICKS: I think that that is one of the main problems in this case.

I do think that there is support in Texas law, statutory law, for the argument that this is a Terry vs. Ohio stop, and again I cite the Texas Code Construction Act which governs the Texas Penal Code; which says that technical terms, or terms that have acquired special meaning, retain that special meaning in the Codes of Texas.

And there is also a provision that Texas courts are to construe statutes so as to avoid findings of unconstitutionality. A kind of black-letter law.

I did want to address the problem of Norwell vs. Connecticut which Mr. Caballero cited as supporting his First Amendment argument, and I do believe that reading that case will reflect that the gentleman that was convicted of disorderly conduct in that case had his conviction reversed by this Court because of something he had said. It was his -- his conviction was not because of something he had said --

QUESTION: It's Cincinnati, not Connecticut.

MR. HICKS: Cincinnati; I'm sorry, yes.

It was a First Amendment question because the great effort reflected in that case was that he had been convicted for what he had said, not for violation of the statute.

He had non-provocatively responded to the officers accosting him.

In this case, the record reflects that he was arrested simply for refusing to give his name after a lawful stop by the police officer.

I did want to also distinguish this case from cases such as Papachristou and the other cases that have held vagrancy statutes unconstitutional, because this statute punishes conduct not status. I think that is an important difference.

In Papachristou, the statute was held unconstitutionally vague because, underlying that decision I think, there was the feeling that people were convicted for what they were, not for what they had done. I don't believe that is the situation in this case.

I also wanted to point out that there is a mens rea requirement in this statute, it requires an intentional refusal. I think this distinguishes this somewhat from the DeFillippo case, which did not clearly contain a mens rea requirement. And I think the intentional element, the mens rea requirement does, under various decisions of this Court, save this statute from any vagueness that this Court might find otherwise.

QUESTION: But that presupposes that there is a valid obligation to answer the question: "What is your name, and identify yourself".

MR. HICKS: Well, I do believe that is a valid

obligation, and I don't --

QUESTION: Well, this statute makes it an obligation.

MR. HICKS: Yes. And, as I say, I believe it is a valid statute, and the obligation is fair. It's not asking -- I don't believe it's too much to ask citizens in these narrowly circumscribed situations to aid the law enforcement community, in investigating possible crimes.

QUESTION: If there's reasonable suspicion to stop them.

MR. HICKS: That's correct.

QUESTION: But if there's not?

MR. HICKS: If there's not reasonable suspicion, I believe it is a different case than this one.

And I believe, as the discussion in the DeFillippo argument preceding this one indicated, that it's quite possible for a State to enact a statute making it a crime, whether there's a lawful stop or not, to refuse to give your name.

Again, I don't believe --

QUESTION: Well, that's contrary, I think, to what I understood you to answer a few minutes ago. That you didn't think a State could validate that.

MR. HICKS: I don't believe I said that. I may have, but I didn't --

QUESTION: Well, I misunderstood you, then.

MR. HICKS: I believe it may be possible. Again, I'm not trying to argue that --

QUESTION: But you're telling us that this statute doesn't go that far?

MR. HICKS: That's correct.

QUESTION: Well, if we happen to think the issue of the lawfulness of the stop was properly here, in the sense of was there Terry grounds for stopping, if that issue is here and we decided there were not sufficient grounds to make a Terry stop, then before we could reverse we would have to say that a State may not --

QUESTION: That's right.

QUESTION: -- make a person identify himself on less than Terry grounds.

QUESTION: That's right.

MR. HICKS: That's correct.

QUESTION: And Byers v. California, of course, did require a man to identify himself; but that was in relation to the driving of an automobile, wasn't it?

MR. HICKS: That's correct. And it involved a penal statute, but it did involve a situation where there had been an accident of some sort.

And I believe that, although the issue wasn't presented in Byers, there could have been grounds for --

QUESTION: I take it that it's probably unlawful in

Texas for an eye-witness to a murder to refuse to identify himself, I suppose?

MR. HICKS: That's correct. I believe that's so.

If at the scene or within the general surroundings of the murder.

QUESTION: An eye-witness.

MR. HICKS: Several months later it may be different.

MR. CHIEF JUSTICE BURGER: We'll resume at one o'clock.

MR. HICKS: Thank you.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:03 p.m.]

MR. CHIEF JUSTICE BURGER: Have you completed your argument?

MR. HICKS: Your Honor, I just have one more thing to touch upon.

MR. CHIEF JUSTICE BURGER: All right, you may resume, then.

ORAL ARGUMENT OF RENEA HICKS, ESQ.,

ON BEHALF OF THE APPELLEE -- Resumed.

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

The last argument that I would like to address, or the last issue that I'd like to address, just briefly, is the Fifth amendment issue that was raised in the brief on appeal by Mr. Brown's attorney.

I just wanted to point out that this is an attack on the statute on its face on all issues and not in particular, at this point, on the Fifth Amendment question. And the Fifth Amendment self privilege against self-incrimination is not a right that can be asserted vicariously on behalf of large groups of people. This Court has many times held that it's a personal privilege that must be asserted.

Which brings me to my second point on this, and that is that Mr. Brown, nowhere in the proceedings until the motion

to set aside the information was filed invoked the Fifth Amendment. In fact, on the way down to the booking station, he told them his name.

Another point I would like to make is, under California vs. Byers, at least in a plurality opinion, this Court has written that a person's name and his address is just a neutral item of information which is not incriminating in any way, and it can be analogized to the taking of blood samples, the exhibition of the person at a line-up, and such situations.

One question that has not come up here so far, and was brought up in the DeFillippo case, I think Mr. Justice White asked it, was what about the Miranda situation? Is it required that Miranda warnings be given?

And I did want to point out that Miranda spoke briefly to this issue, when it said that it did not apply to general on-the-scene questioning in circumstances where a crime might have been committed, or something like that.

QUESTION: Of course, a crime wasn't committed until after the question was asked.

MR. HICKS: Well, that's true. This particular crime was not. And what I was saying is, going back to my argument that a lawful stop means a Terry v. Ohio stop, Miranda seemed to say that in a situation like that you don't need to give Miranda warnings, because general on-the-scene questioning is

not covered.

I think Oregon vs. Mathiason kind of expanded this idea.

QUESTION: But, Mr. Hicks, wasn't that because the person just generally on the scene wasn't necessarily in custody? Miranda starts when the person is being questioned after he's taken in.

MR. HICKS: Well, that's true, but what I'm saying is, a person that's reasonably stopped --

QUESTION: That's what I was next going to ask you: When -- if you do stop a person and pat him down, is he in custody for purposes of a Miranda case?

MR. HICKS: I do not think so.

QUESTION: But he is --

MR. HICKS: He has been detained under the Fourth Amendment, I agree, and --

QUESTION: If you arrest him, you say, "I place you under arrest", it would be?

MR. HICKS: He is in custody when he's placed under arrest, there's no doubt about that.

QUESTION: But you say there's a distinction between a stop on reasonable suspicion for necessity warning, and a formal arrest?

MR. HICKS: Yes. Correct. It seems to me that it would not be even workable --

QUESTION: Well, a man that's stopped, is he free to move about at will when he's been stopped?

MR. HICKS: I'm sorry, I didn't hear the first part.

QUESTION: Is he free to move about when he's been stopped by the police?

MR. HICKS: No, he's not. He has been detained, but whether that is a person that's --

QUESTION: Well, what's the reason for a distinction in terms of Miranda, the reasons behind the Miranda rule? Why would you draw that line, I wonder?

MR. HICKS: Well, again, I'm relying on cases like Arosco, Amarand, and the situation in Oregon vs. Mathiason, where the Court -- in Oregon vs. Mathiason, that involved a situation where a person was under suspicion and had been asked to voluntarily come in to the police station.

QUESTION: He voluntarily came. But you don't voluntarily agree to be stopped.

MR. HICKS: Correct. But he was in a policeman's office for two hours or so.

QUESTION: Voluntarily.

MR. HICKS: But this Court held that no Miranda warnings were required.

QUESTION: Well, isn't it -- by hypothesis, isn't a Terry stop involuntarily? Isn't that sort of a --

MR. HICKS: I think there's no doubt that there's some

element of involuntariness in it, that the person is detained. And that the whole thrust of Terry was that the Fourth Amendment is involved in those situations.

QUESTION: Well, you're certainly restrained if someone is searching you for weapons.

MR. HICKS: That's true.

QUESTION: But isn't the genesis of the whole Terry concept that it's part of an investigation for possible criminal activity?

MR. HICKS: That's the point I was making. The person --

QUESTION: It isn't just to see whether the man's got a gun. The primary thrust is to investigate possible criminal activity, but in that process this Court has said they may search the person to see whether he's got a gun, and that's a prophylactic thing, so that the officer doesn't get killed.

MR. HICKS: That's correct. They can pat him down, frisk him, to see if he has a gun. If circumstances are present which indicate that there may be --

QUESTION: Well, there is an element of detention very clearly, isn't there?

MR. HICKS: I'm not arguing that there isn't, under Terry, in a situation like this. But it is not --

QUESTION: And it has never been thought -- it has

never been suggested in any opinion that that detention or custody, whatever it may be, triggers a Miranda warning?

MR. HICKS: I'm not familiar with any suggestion that it would be applicable. I just don't see how it would be.

That's all I have. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Caballero, you have a few minutes left.

REBUTTAL ARGUMENT OF RAYMOND C. CABALLERO, ESQ.,
ON BEHALF OF THE APPELLANT

MR. CABALLERO: Thanks, Your Honor.

Reading Terry into the words "lawfully stopped" in looking through the record here, I don't know that the court below ever considered Terry. And I can't see simply by saying a State Legislature put in the words "lawful" or "unlawful" reads in or reads out Supreme Court decisions.

And under the decision in this Court, Connally vs. General Construction Company, "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it". That's the test of vagueness, not that some court some place may be able to read in Terry or read it out in a particular situation.

Otherwise, all you have to do to make a statute pass the vageness test here would be to put in the words "lawfully stopped" or "unlawful detention" or whatever you may want to read into the statute by those words.

QUESTION: But don't many statutes in fact do that? For instance, the Criminal Justice statute says "unlawfully on the premises". And it may be a question of considerable doubt in the particular case whether a person is or is not lawfully on the premises.

MR. CABALLERO: I agree with you, sir.

In the situation where you read in the word "lawful" that are other standards. For example, "unlawfully on the premises" normally takes the meaning that you're on the premises and you don't have permission to be there. But the words "lawfully stopped" are so vague, it's a question of degree, I agree with you; if they are so vague, "lawfully stopped", that in this case, for example, this Court, under facts that I would consider that it was not a lawful stop, simply stopping a person in an alley who had not been doing anything wrong, no suspicion or report that he had been doing anything wrong, the court held below that it was a lawful stop.

Now, what the court did below, the court had serious reservations about the constitutionality of the statute, but simply presumed that the statute was valid and read into the statute, apparently, that this was also a valid stop as applied in this particular case.

Now, if the stop had been unlawful, necessarily my client would have been acquitted, and you would not be reviewing the statute. If the stop is lawful -- excuse me, if

the stop was unlawful under the facts of the case, then it would be like Norwell, where you simply find that there was protected activity, and there reach the constitutional issue by that means.

And, incidentally, in Norwell vs. Cincinnati, I went back and looked at it, this Court did say: We are persuaded that the ordinance as applied to this petitioner on the facts of this case operated to punish his constitutionally protected speech.

So that was decided on First Amendment grounds.

The Fifth Amendment question in this case, it's very difficult sometimes to see how the invocation of the right under the Fifth Amendment can be valid when it applies to name only; however, in a situation where, for example, I saw a case out of Texas, the Miller case cited in the brief, where a person had made a false claim for insurance, claiming he was dead, the claim was made through his wife; later on he was arrested. Had he given his name as Joe Doakes or anything else, that person -- they never would have put the crime together.

QUESTION: Well, aren't you confusing probable cause with incriminating? The disclosure of the name may lead to the arrest, but the disclosure of the name, per se, doesn't incriminate him. It merely sets in motion a chain of events that will bring him into court.

MR. CABALLERO: Isn't that also incrimination? Incrimination goes beyond mere evidence presented in court. Incrimination means something that may subject me to prosecution, and I can't see how you can totally separate the concept of evidence in court and probable cause, also evidence to give someone a reasonable cause to arrest a person.

In separating the two, I have a difficult time with that. To me they are both incrimination: one allows evidence to be presented in court; the other one allows my arrest.

Now, in either case it's incrimination.

But reaching the constitutionality -- how would you ever, under the facts of this case how would you ever test the constitutionality of this statute, if you didn't get beyond the facts of this particular case and find out whether there was constitutionally protected conduct which was being punished by the statute here, which is exactly what appellant is trying to do.

And is there constitutionally protected conduct, which this statute in this case makes criminal? The fact is you do have the right to walk down the street and stand mute. Under the case, Norwell vs. Cincinnati, you do have the right to walk down the street and tell a policeman, "I don't want to tell you anything."

QUESTION: Well, we get more than that. He verbally

and negatively protested. Now, in your case you don't have anything said at all.

MR. CABALLERO: Yes, we do, Your Honor.

My client said, he protested the reason and the right of the officers to stop him.

QUESTION: Yes, but he's being arrested for not speaking; to wit, identifying himself. I think it's a very different case from Norwell.

I think your First Amendment argument is frivolous.

MR. CABALLERO: Right.

Under Norwell, whether Norwell was being prosecuted for saying something or not doing something, the point is that in that case this Court held that it was constitutionally protected speech. In other words, telling the police office, "I don't want to tell you anything", this Court held was constitutionally protected speech.

If someone is asking my name and I tell him, "I don't want to tell you anything" --

QUESTION: Of course it protects speech, that's the First Amendment. The question here is there's a lack of speech.

MR. CABALLERO: All right, then you get closer --

QUESTION: What I'm saying is I think you have much stronger arguments on other Amendments than you do on the First Amendment, and I think you're spinning your wheels here.

MR. CABALLERO: Well, the First Amendment claim I see as a very real problem,not -- aside from the Norwell case and the case of a person who wishes anonymously to protest, goes to a meeting but doesn't want anyone to know that he is there. I think it's a very real problem.

QUESTION: Do you want to pin your case on the First Amendment?

MR. CABALLERO: I think it ought to be pinned on the First, Fourth and Fifth.

Your Honor, they all are bundled so close together that I don't think any one Amendment ought to decide this case. I think this is a group of rights that are so close in this case --

QUESTION: That may be one of the troubles of the case, you have a shotgun approach here on everything possible.

MR. CABALLERO: Well, it may be a shotgun approach, but I legitimately believe that the First, Fourth and Fifth Amendments all protect the conduct in this case.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:15 p.m., the case in the above-entitled matter was submitted.]

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