

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1320

TITLE WILLIAM KOLENDER ET AL., Appellants
v.

EDWARD LAWSON
PLACE Washington, D. C.

DATE November 8, 1982

PAGES 1 thru 53

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM KOLENDER ET AL., :

4 Appellants :

5 v. : No. 81-1320

6 EDWARD LAWSON :

7 - - - - - -x

8 Washington, D.C.

9 Monday, November 8, 1982

10 The above-entitled matter came on for oral argument

11 before the Supreme Court of the United States at

12 1:00 p.m.

13 APPEARANCES:

14 A. WELLS PETERSEN, ESQ., San Diego, California;

15 on behalf of Appellants.

16 MARK D. ROSENBAUM, ESQ., Los Angeles, California;

17 by invitation of the Court, as amicus curiae,

18 in support of judgment below.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Petersen, you may proceed whenever you're ready.

ORAL ARGUMENT OF A. WELLS PETERSEN, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Appellants are asking this Court to find California's Penal Code Section 647(e), as interpreted by People v. Solomon, constitutional; furthermore, that when the statute is properly applied, it satisfies the Fourth Amendment criteria; and finally, that when the police acting properly under the statute request a person to identify themselves, that that does not violate their rights under the Fifth Amendment.

Now, the facts are normally in a case like a Terry stop case, the facts are normally quite important and very relevant. In this particular case, the facts surrounding the stop of Mr. Lawson are not relevant because the matter will go back down for a trial at the district court level, a jury trial on the facts. Therefore, I think it would be inappropriate and really they're not relevant to a decision today, not at all.

It is first critical to review Appellants' claim that the statute is constitutional as interpreted

1 by the Solomon court, and our first premise is that
2 because of Solomon, with Terry, we have clear standards
3 that proscribe the police in enforcing the statute.
4 Now, the court below recognized the statute engrafted
5 the guidelines from Terry through Solomon.

6 Therefore, before 647(e) ever comes into play
7 the police must have articulable facts demonstrating
8 their belief was reasonable that the person was acting
9 in a suspicious manner relating to criminal activity.
10 This standard and guideline ensures a tempered act of a
11 policeman.

12 As this Court held recently in Cortez, the
13 police action must be considered in light of the total
14 circumstances. The police then act on probabilities,
15 after considering the data at their disposal. And it
16 would be impossible to write either a statute or an
17 opinion that encompassed every conceivable situation
18 that could be considered suspicious, and that's a point
19 conceded by Appellee.

20 But it isn't even necessary, because we have
21 Terry that sets forth adequate standards against which
22 the police activity is measured. Now, Terry obviously
23 was both loitering and wandering for a criminal purpose,
24 which therefore required the police to respond because
25 the public safety demanded it. Now, Terry provides the

1 standards not only for stops, but also probable cause to
2 arrest, and while those standards may lack machine tool
3 precision --

4 QUESTION: In Terry there was a frisk before
5 there was an arrest.

6 MR. PETERSEN: There was also a request for an
7 --

8 QUESTION: And in the frisk they found a gun.

9 MR. PETERSEN: There was a request for
10 identification --

11 QUESTION: And then there was an arrest.

12 MR. PETERSEN: -- then a frisk, and then an
13 arrest.

14 QUESTION: But the arrest was after the
15 frisk.

16 MR. PETERSEN: That's true.

17 But while these standards may lack, as I say,
18 the precision that some may wish, they certainly have
19 provided constitutional guidelines since their inception
20 that have guided courts throughout the country. And
21 California has only memorialized the Terry stop by
22 statute and court opinion intertwined to give us a solid
23 basis upon which to judge these matters. Certainly, the
24 standard imposed upon the police to articulate what they
25 perceive as criminal activity is no more onerous than we

1 placed on the police in making a stop, a driving while
2 intoxicated stop.

3 Solomon also provides the second leg of the
4 standard, a standard for what satisfies the request for
5 identification. It must be to a reasonable policeman
6 reliable. Now, while this may present some problem to
7 some, we ask all sorts of people to make decisions on
8 reliability. We ask bartenders to --

9 QUESTION: Does that require someone to carry
10 and produce identification?

11 MR. PETERSEN: No, ma'am, it does not. It
12 does not do that at all. It only requires that the
13 officer be satisfied that the identification is
14 reliable. I'm sure that all of us recognize that there
15 are joggers who go about --

16 QUESTION: How does one do that without
17 carrying something?

18 MR. PETERSEN: It's quite easy. You query.
19 In other words, a jogger stopped -- and we all recognize
20 the fact that there are joggers now plying their trade
21 in sweatpants and sweatshirts because it makes them less
22 noticeable in the jogging atmosphere and they can run
23 away from their crime.

24 But if a person were jogging and wasn't
25 carrying their identification, the officer would merely

1 inquire where they lived and their name,
2 identification. The person provides it. The officer
3 then asks them what the major intersection is near the
4 home, what the route was that he ran to get from there,
5 or where it is in relation to where the person was
6 stopped.

7 All of these things that seem to be unable to
8 be answered by people such as Mr. Powell in Nevada, who
9 couldn't respond to where his friends lived or their
10 name or their address or which direction he was
11 rightfully headed at that time. Those things are ways
12 of getting to the reliability of the identification.

13 QUESTION: May I ask, following up on that,
14 supposing you stopped the jogger, you asked him his
15 name, he says, my name is John Smith, and then you ask
16 him these additional questions about how he ran to that
17 particular location. He says, I would prefer not to
18 tell you. Does he commit a crime?

19 MR. PETERSEN: He has not provided the officer
20 the level of identification that 647(e) requires under
21 Solomon.

22 QUESTION: And he has committed a crime?

23 MR. PETERSEN: Solomon says that he must --
24 that you must discern where the man can be contacted at
25 a later date if that's necessary.

1 QUESTION: So he has committed a crime if he
2 says, I would prefer not to tell. Say he gives his
3 address also.

4 MR. PETERSEN: Well, if he gives his name and
5 address --

6 QUESTION: He has nothing with him. You say,
7 would you tell me, what route did you jog over here
8 from. He says, I would prefer not to --

9 MR. PETERSEN: If the officer at that point
10 feels that that, knowing the neighborhood --

11 QUESTION: Say he thinks he's lying.

12 MR. PETERSEN: Sure, he thinks he's lying.
13 Then he --

14 QUESTION: Then he's committed a crime? But
15 say he's not lying. He tells him truthfully what his
16 name and address is, but he declines to tell him how he
17 got from point A to point B. Has he committed a
18 crime?

19 MR. PETERSEN: Yes. I find it difficult in
20 the scheme of a rational person --

21 QUESTION: Supposing he says --

22 MR. PETERSEN: -- in an interface with the
23 police not being willing to say, well, I ran down this
24 --

25 QUESTION: Well, maybe on the way over he

1 robbed someone. Maybe he snatched a purse on the way
2 over. And he figures if he tells him how he came he
3 would incriminate himself. That might be his real
4 motive for not wanting to tell the police officer.

5 But the mere fact he did not answer is a
6 crime?

7 MR. PETERSEN: If he did not give reliable
8 identification.

9 QUESTION: Well, I told you what he gave.

10 MR. PETERSEN: If he did not provide reliable
11 identification, because you said that the police officer
12 did not believe him --

13 QUESTION: Does the police officer have to
14 give him any kind of warning? Does the police officer
15 have to give him any kind of warning that the
16 information might help them catch the thief who stole,
17 in my hypothetical case, a purse three blocks away?

18 MR. PETERSEN: There is no requirement that I
19 know, statutory or otherwise, that requires a policeman
20 to inform a person why he is being stopped. Now, in the
21 world of common sense and the way that police operate,
22 normally that information does come out and people are
23 told that --

24 QUESTION: As I understand your explanation of
25 the statute, without any Miranda warning or its

1 equivalent, if a man who is in fact suspected of
2 committing a crime is stopped and asked if he was at the
3 location of the crime and he just says, I'd rather not
4 answer, he's now committed the offense.

5 MR. PETERSEN: No, not if he responded --

6 QUESTION: The question was, how did you get
7 from A to B. And you said if he doesn't tell me he's
8 committed the offense.

9 MR. PETERSEN: If he has not provided the
10 officer with reliable identification, he certainly has.

11 QUESTION: Well, he told him, my name is John
12 Smith --

13 MR. PETERSEN: Now, leapfrogging to the Fifth
14 Amendment issue --

15 QUESTION: Well, your opponents argue that.

16 MR. PETERSEN: I realize that, and if you'd
17 like to discuss that, I think it's important to --

18 QUESTION: Well, you were telling us how the
19 statute is properly construed at this point, as a
20 preliminary to your argument.

21 MR. PETERSEN: There might be other ways of
22 getting to the reliability of the data, of the
23 identification.

24 QUESTION: But there would be an approved
25 way.

1 MR. PETERSEN: All we're after with 647(a) is
2 the man's name and address, or the woman's or the
3 person's.

4 QUESTION: But you then said the customary
5 procedure correctly applied under the statute is to
6 follow up with a question of how did you get from A to
7 B, without any warning of the consequences of either
8 answering or not answering.

9 MR. PETERSEN: The warnings only are given to,
10 can you provide any other reason why I should believe
11 that you live at such and such an address.

12 QUESTION: Well, no. You've told me what you
13 said is the approved way.

14 MR. PETERSEN: That's right. Now, the --

15 QUESTION: In a Terry stop can the officer
16 reach into the pocket of the suspect and pull out his
17 wallet and check for ID?

18 MR. PETERSEN: Under Wisconsin law they
19 certainly can. The Wisconsin Supreme Court in Flynn
20 decided that and said they could, and also --

21 QUESTION: Was that part of a patdown process
22 in Wisconsin?

23 MR. PETERSEN: No, it was part of asking for
24 an identification. It wasn't -- to my understanding of
25 Flynn, it was not part of seeking weapons. It was, the

1 officer wanted to find out who the person was and he
2 reached into his pocket and took his wallet.

3 QUESTION: Has this Court ever said that
4 that's all right under a Terry stop?

5 MR. PETERSEN: No, not to my knowledge they
6 haven't. They denied cert in Flynn, but of course that
7 doesn't necessarily --

8 QUESTION: Would the California statute then
9 allow the same information to be obtained, but in a
10 different way?

11 MR. PETERSEN: We feel that there are
12 certainly ways to ask for a reliable identification
13 without interfering with the person's Fifth Amendment
14 rights, as Justice Stevens raised. We feel that there
15 are certainly ways and avenues of inquiry which can be
16 used that will bring about the information that is
17 non-incriminatory.

18 QUESTION: The California courts have
19 interpreted this statute to require the person stopped
20 to account for his presence or her presence. What does
21 that mean?

22 MR. PETERSEN: That means that you provide
23 reliable --

24 QUESTION: That's the sort of inquiry you're
25 talking about?

1 MR. PETERSEN: That's right. You must only
2 provide reliable identification. That's all that's
3 required.

4 QUESTION: You keep saying "identification."
5 I think you must mean information, don't you, because
6 the third question Justice Stevens has proposed, or that
7 you proposed, is not identification at all. How did you
8 get here?

9 MR. PETERSEN: Well, what you're getting to is
10 identification. The reliable information, the
11 information to verify that the identification is
12 reliable, is what he was getting to, I believe, if I
13 read his question correctly.

14 QUESTION: Well, he gave you the name and the
15 address, and you --

16 MR. PETERSEN: That's right. He said, my name
17 is John Jones and I live at 25 Main Street. And the
18 officer for some reason disbelieved him and then said,
19 well, can you tell me how you, the route that you
20 jogged, or can you -- and that would have incriminated
21 him. Perhaps he would have said, well, you know, I live
22 at that address and the next intersection is Main and L,
23 and that's nearby and the officer would recognize that
24 and recognize the information as reliable.

25 QUESTION: Or suppose the officer --

1 MR. PETERSEN: I think that's reasonable and I
2 think it's reasonable police action that we're looking
3 for here.

4 QUESTION: Suppose the officer is basically on
5 the lookout for the neighborhood rapist, who is believed
6 to drive a blue car. Then under this statute can he go
7 on and inquire about, how did you get here, did you
8 travel in a car, what color?

9 MR. PETERSEN: Well, if we're talking about a
10 jogger, no. No, once the person has given reliable
11 identification, he may not. Under Solomon the person
12 must be allowed to proceed. That doesn't mean that some
13 time in the future when the detective who is
14 investigating the neighborhood rapist comes upon various
15 names seen under suspicious circumstances, that he
16 cannot go to the person's home and make further
17 inquiries under other circumstances. That's just normal
18 investigation.

19 QUESTION: How about right there on the
20 street?

21 MR. PETERSEN: No, that isn't authorized. You
22 must allow him to go on his way once he provides
23 reliable information. If what he tells you triggers
24 additional suspicions, such as what occurred when Mr.
25 Powell was stopped in Las Vegas, then certainly further

1 inquiry -- a policeman would be remiss if he did not
2 inquire further.

3 QUESTION: May I ask one other question. What
4 about the "account for his presence" language in the
5 statute?

6 MR. PETERSEN: The "account for his presence
7 language" has been interpreted by Solomon to mean only
8 that you provide reliable identification, not that I'm
9 here because I want to stand and watch something, or I'm
10 not here because -- I'm here at the corner because I'm
11 supposed to meet someone. That's not part of the
12 procedure at all.

13 QUESTION: Just all it goes to is --

14 MR. PETERSEN: The Solomon court has said
15 that.

16 QUESTION: Well, I'm still -- if it weren't
17 for that language, I would have been puzzled by your
18 statement that the correct practice under the statute
19 would be to ask a question such as, what are some of the
20 neighboring streets or how did you get from there to
21 here. You think that goes to the reliability of the
22 identification?

23 MR. PETERSEN: That's right. If they were as
24 you stated, the officer disbelieved the person.

25 QUESTION: See, you have, I suppose by

1 hypothesis, at the time of the stop the officer suspects
2 him of being engaged in criminal activity.

3 MR. PETERSEN: Already has articulable facts
4 to justify the first intrusion.

5 QUESTION: Right. So he thinks he's involved
6 in criminal activity.

7 MR. PETERSEN: Right.

8 QUESTION: He says, I want to ask you your
9 name and so forth.

10 MR. PETERSEN: That's right.

11 QUESTION: But he doesn't tell him he thinks
12 he's involved in criminal activity.

13 MR. PETERSEN: No. Most of the time people
14 will -- the interchange will result in that. However,
15 there's no requirement, as I stated before, that I know
16 of where you have to notify someone why you are stopping
17 them. It just happens that most people are. You have
18 to notify them at the arrest --

19 QUESTION: And you don't have to notify them
20 if you say, how did you get here, even though the
21 purpose of the question is to find out if maybe he's the
22 pursesnatcher?

23 MR. PETERSEN: No, the purpose of the question
24 is to find, is to gain the reliability of the
25 information.

1 QUESTION: I see.

2 MR. PETERSEN: If you suspect him as a
3 pursesnatcher, you're focusing in and your Fifth
4 Amendment comes into play, of course, at that time. But
5 just asking a name and address has, as cited in my reply
6 brief, been designated as, for lack of a better word,
7 pedigree information that's required, that doesn't
8 require a Miranda warning before you require that.

9 QUESTION: This statute provides, would you
10 say, wider latitude to police than the Terry stop?

11 MR. PETERSEN: No. No wider latitude
12 whatsoever, because they're inextricably intertwined.
13 They form the basis. All we've done is memorialize
14 Terry with a statute and say that Terry applies and you
15 can stop a person and ask them for identification under
16 Terry circumstances. It's a Terry stop.

17 QUESTION: But if under Terry you can't compel
18 someone to produce their wallet and their ID, how is
19 this statute not broader than Terry?

20 MR. PETERSEN: Because Terry did not get to
21 the issue of requiring the person to provide his
22 identification. I think the only place that was
23 mentioned was in Justice White's concurring opinion,
24 when he said that when he asked them for identification
25 and he told them, Mr. Terry told the officer what his

1 identification was, in Justice White's opinion he said
2 that if he had chosen not to tell him he could have
3 walked away.

4 Under these facts and circumstances, we feel
5 that there's a reasonable governmental interest in
6 having the person provide his name, and the people of
7 California have so stated through their legislature.

8 QUESTION: So it may be broader than Terry if
9 Justice White's view is correct?

10 MR. PETERSEN: If Justice White's view is
11 taken as part of the opinion, it might be a tad
12 broader. But still in all, I think by the same token
13 it's more restrictive, too, because if you don't have
14 reliable information under which you think your safety
15 is at stake you can't pat them down. You can only ask
16 for their name. And it allows a lower level of
17 intrusion than a Terry patdown, and that's what makes
18 this very reasonable.

19 It's eminently reasonable that if a person is
20 suspected of criminal activity, say it's a prostitute on
21 the corner or say a bookmaker in a barbershop or
22 something like that, where you wouldn't normally feel
23 that your life was in danger, so it wouldn't justify a
24 patdown search, you could still, with articulable facts
25 justifying a detention, the initial detention, you could

1 still inquire as to their name and address and
2 identity.

3 QUESTION: What do you say are the articulable
4 facts that supported this stop here?

5 MR. PETERSEN: There were 15 of them.

6 QUESTION: Well, just take the last one.

7 MR. PETERSEN: I think basically, and as I
8 said before, I really didn't come prepared to discuss
9 the facts of the case because they're going to be
10 litigated again, because the Ninth Circuit sent it back
11 for a jury trial on whether or not the person was
12 stopped.

13 But let's take the time, the first time, which
14 is one that I am familiar with, when the person was
15 walking along a darkened road in the nighttime hours and
16 there had been a series of car clouts in the area, and
17 the person was not wearing a raincoat, although it was a
18 rainy night. It would appear that he wasn't from the
19 immediate neighborhood, that he was from outside the
20 area; that he was not walking along the edge of the
21 street, that he was walking out toward the middle,
22 according to the officer.

23 QUESTION: How much -- you haven't got to the
24 appearance yet. What about the appearance that
25 attracted the officer's notice, or did that -- is that

1 known?

2 MR. PETERSEN: As far as -- my recollection is
3 that the facts, those facts are what the officer related
4 as connecting the person to criminal activity. Middle
5 of the road walking; on a dark street without any
6 lights; might be hit; car clouts in the area, might be
7 car clouting; and the fact that he --

8 QUESTION: By that you mean vandalism?

9 MR. PETERSEN: That's it, yes. So those were
10 the facts.

11 As I said before, I think that to get into the
12 specific facts and argue the specific facts of these
13 things isn't proper, since it will go to trial again on
14 those facts.

15 QUESTION: But it won't go to trial on the
16 question of the Respondent's guilt or innocence. It
17 just goes to trial, doesn't it, on the issue of whether
18 or not there was good faith on the part of the
19 officers?

20 MR. PETERSEN: That's true, that's true. But
21 it will go to trial on that and the good faith on the
22 officers' part certainly depends to a large extent upon
23 the facts surrounding each of the stops.

24 QUESTION: Did the district court make any
25 finding as to the need for the injunction issue in this

1 case, whether there was a likelihood that the stops
2 would recur?

3 MR. PETERSEN: He did not, in my reading of
4 his ruling did not. We are in the process of seeking to
5 have the injunction lifted until this decision from this
6 Court comes down. But we have not proceeded on that
7 until following our appearance here.

8 I would like to hit on the -- or to just
9 mention the reasonableness of this type of a stop before
10 we conclude, because I think that the governmental
11 interest to deter and detect crime is a major societal
12 interest, a weighty social objective, I think it was
13 stated in Brown. And the intrusion of being asked for
14 identification this Court has characterized in
15 Bignoni-Ponce and Martinez-Fuerte and Mendenhall as
16 being limited intrusions or modest, whereas when you ask
17 somebody to assume the position and be frisked that is a
18 serious or severe intrusion that can result in great
19 indignity, and I think that's a fair statement.

20 So when you put that on the scales and you
21 weigh the great governmental interest against the
22 minimal intrusion of asking for identification, I feel
23 that it's fully justified under the circumstances. I
24 feel that anybody at the bench, the bar or in the
25 audience who was faced with a situation where they saw

1 someone walking around their house on public streets,
2 where people have a perfect right to, at odd hours, in
3 the early morning hours, because you were concerned or I
4 was concerned, we called the police, that we would think
5 it was not reasonable that they asked that person what
6 their name was. I think it's perfectly reasonable.

7 Now --

8 QUESTION: If you asked everybody's name in
9 New York, you'd surely need a whole lot of police.

10 MR. PETERSEN: I still think it's a valid
11 safeguarding tool, and I think it's important that they
12 be allowed to do that, and I think that the concern of
13 the freedom to move has got to be weighed against the
14 freedom of other people to move also. And each one
15 interfaces with the other one -- excuse me.

16 QUESTION: Go ahead.

17 MR. PETERSEN: If you had an absolute right to
18 wander, you wouldn't even be able to arrest somebody.
19 You'd have -- it'll lead to total anarchy if you leave
20 it to its logical conclusion.

21 QUESTION: Your latest hypothetical about a
22 person seemingly lurking around a house late at night
23 prompts this question. What if it's high noon in Time
24 Square or somewhere in Los Angeles?

25 MR. PETERSEN: I certainly think that the time

1 and the place and the total circumstances, just as in
2 Cortez, the total circumstances play a large role in
3 it. In Cortez it was the time of the night, the
4 position of the car --

5 QUESTION: Well then, is your answer that at
6 high noon in the downtown district of Los Angeles, with
7 no indication usually associated with drug transfers,
8 just simply a person walking along, that this statute
9 would not authorize a stop?

10 MR. PETERSEN: No, not unless there was -- you
11 know, it was in the daytime in an Ohio city where Mr.
12 Terry was stopped, and I think --

13 QUESTION: Cleveland. That was Cleveland, in
14 the middle of the business district, right in front of
15 the Statler Hotel.

16 MR. PETERSEN: That's right. I think it was
17 daytime, and --

18 QUESTION: Absolutely.

19 MR. PETERSEN: -- because, without any other
20 facts, you know, it's what prompts the stop.

21 QUESTION: Are you suggesting some peculiar
22 rule that applies to Cleveland, but not to the rest of
23 the country?

24 MR. PETERSEN: Oh, no, no, no. Not at all,
25 not at all.

1 (Laughter.)

2 MR. PETERSEN: I'm sorry if I left that
3 impression.

4 QUESTION: It's the Statler Hotel.

5 MR. PETERSEN: My intention was to state that
6 a man at high noon who isn't exhibiting any criminal
7 tendencies certainly wouldn't be stopped, or his walking
8 up and down looking like he's looking for a cab. That's
9 completely different. It's the totality of the
10 circumstances.

11 I'd like to reserve some time for rebuttal.

12 CHIEF JUSTICE BURGER: Mr. Rosenbaum.

13 ORAL ARGUMENT OF MARK D. ROSENBAUM, ESQ.,

14 AS AMICUS CURIAE, IN SUPPORT OF JUDGMENT BELOW

15 MR. ROSENBAUM: Mr. Chief Justice and may it
16 please the Court:

17 This case raises fundamental constitutional
18 questions regarding the broad exercise and extension of
19 police authority and the relationship between that
20 authority and an individual in a free society. Through
21 647(e), police make and enforce as elements of a
22 criminal law requiring innocent persons to disclose
23 proof of identification upon official demand,
24 deliberately imprecise and evolving standards designed
25 to govern investigatory activities.

1 Analysis of 647(e) therefore turns upon two
2 basic concerns which, with the Court's permission, I
3 will address this afternoon: first, whether the
4 incorporation of the so-called Terry standard as an
5 element of a 647(e) offense, based upon the moment to
6 moment decision making by a police officer, deprives
7 that statute of any objective core; and if so, whether
8 it thereby impermissibly offends due process vagueness
9 doctrine by encouraging arbitrary and discriminatory
10 enforcement, by denying fair notice, and by trenching
11 upon basic constitutional rights of privacy, security
12 and mobility.

13 And second, whether 647(e) works in two ways
14 to undermine the central importance of the probable case
15 requirement: whether it offends the Fourth Amendment by
16 sanctioning intrusions upon individual security and
17 privacy upon less than probable cause, and upon no other
18 interest than the general one in crime prevention and
19 detection, but not, as Mr. Petersen would have it, based
20 upon whatever incremental advantage exists through the
21 existence of a criminal sanction; and whether it also
22 subverts Fourth Amendment guarantees by converting the
23 power to make inquiry and to investigate upon less than
24 probable cause into the power to arrest and search
25 absent functionally at least the existence of probable

1 cause.

2 Let me start with the vagueness issue, and let
3 me pay particular attention to the issue which Justice
4 O'Connor has raised, the question of whether or not this
5 statute in fact requires persons within the state of
6 California to carry and to display at all times upon
7 official demand proof of identification.

8 For in practice 647(e) is functionally
9 indistinguishable from the very sort of stop and
10 identify statute in application which this Court
11 specifically disapproved of in Brown versus Texas. The
12 consequence of 647(e) is that in California there is an
13 internal passport requirement. This is true because the
14 basis for a Terry stop and demand, an officer's basis
15 which Mr. Petersen described, is both unknown and
16 unknowable to anyone but the detaining officer,
17 including of course the individual detained.

18 And this is true for two reasons that go to
19 the heart of the Terry decision: First, the decision to
20 stop an individual under Terry is one that is peculiarly
21 dependent upon the skill and the experience and the
22 training of the officer. As Justice Powell stated in
23 Mendenhall and as the Chief Justice has stated in Cortez
24 and in Brown versus Texas, this sort of skill and
25 experience and training simply is not available to the

1 average lay person.

2 QUESTION: Would you say, then, that a case in
3 which a Terry stop was made is not reviewable by the
4 courts because it's so esoteric they just wouldn't know
5 anything about it?

6 MR. ROSENBAUM: No, of course not. What Terry
7 established was an objective standard for courts to
8 review whether or not a stop which took place in the
9 past was constitutional or not. But the critical point
10 for our purposes with respect to notice is whether the
11 individual on the street, the person who is being
12 detained by the officer, can make a judgment at that
13 time as to whether he or she wishes to state his or her
14 rights under Brown versus Texas and say, I don't believe
15 you have reasonable suspicion here, I don't want to have
16 to disclose my identity to you, I want to rest upon my
17 rights, or whether the person has any opportunity to
18 make that sort of judgment.

19 QUESTION: What if the statute spoke in terms
20 of probable cause and not articulable suspicion? Would
21 that affect your argument on this point at all?

22 MR. ROSENBAUM: Well, that's an interesting
23 question. I would say first that if the statute had a
24 probable cause requirement it would, first of all,
25 probably be an unnecessary statute, because as Justice

1 O'Connor indicated earlier, at that point the officer
2 can conduct a search. The officer can actually reach
3 into the individual's pocket.

4 But with respect to the vagueness question
5 that you're asking about, Justice Rehnquist, I would say
6 it would be a close question, but I would say that there
7 is a difference which this Court has recognized on
8 numerous occasions between probable cause and reasonable
9 suspicion. Probable cause comes with a lot more
10 freight, and in addition probable cause is a recognition
11 in this society that we will accept different sorts of
12 relationships between the individual and the law
13 enforcement apparatus.

14 QUESTION: But that's true of articulable
15 suspicion, too, isn't it, if you phrase it in those
16 terms? Articulate suspicion is some sort of halfway
17 house between probable cause and nothing. It's better
18 than nothing, but not as good as probable cause.

19 MR. ROSENBAUM: Yes, and because of that we
20 will permit the police to make certain intrusions upon
21 individual privacy that we won't permit in the nothing
22 situation. But the issue as far as notice is concerned
23 is whether the individual on the street is capable of
24 making the judgment as to whether the officer who's
25 doing the detention --

1 QUESTION: Do you think that individual has
2 any better basis for making the judgment if it's
3 probable cause? Do you think the typical lay person
4 really knows what the components of probable cause are
5 any more than they know what the components of
6 articulable suspicion are?

7 MR. ROSENBAUM: Well, let me answer that in
8 two ways. First, as I indicated to Your Honor, it is a
9 close question, but probable cause comes with a
10 different set of freight and it is more understandable.
11 Moreover, we are talking about a vagueness doctrine, and
12 as this Court has repeatedly recognized, last time in
13 the Hoffman Estates case, the drug paraphernalia case,
14 the Mesquite case, the case involving the licensing
15 ordinance, we will adjust our vagueness standards
16 depending upon the constitutional rights that are
17 involved.

18 In the probable cause situation which you
19 hypothesized, we are willing to draw perhaps a less
20 strong line in terms of what we would expect from the
21 individual himself. But the basic point, of course, is
22 that in the probable cause hypothesis that you state
23 there simply is no need for the sort of statute that
24 you're describing in the first place.

25 And returning again to the notice point that

1 we're talking about, the problem of the individual on
2 the street, not having the skill and the training and
3 the experience of the officer, is compounded because
4 quite fundamentally that individual simply doesn't have
5 the information available to the officer. What
6 precipitates the Terry stop may be an informant's tip,
7 as in Adams versus Williams, may be a DEA profile, as in
8 Reed versus Georgia, it may simply be a call from the
9 patrol car.

10 But whatever the basis of that information,
11 the individual on the street, who ought to be able to
12 decide comfortably with the knowledge that at the very
13 minimum that individual has the rights guaranteed by
14 this court in Brown versus Texas, simply has no way of
15 making an assessment as to whether or not a forfeiture
16 ought to exist here, whether or not it is proper to
17 disclose identification.

18 QUESTION: Is this your -- do you think this
19 is your strongest point here, counsel?

20 MR. ROSENBAUM: I have two strong points with
21 respect to vagueness, Your Honor. The first is the
22 notice --

23 QUESTION: Do you think the vagueness argument
24 is your strongest point?

25 MR. ROSENBAUM: I think both the vagueness

1 argument and the Fourth Amendment arguments are
2 compelling in this particular case. The other prong of
3 the vagueness argument that I want to focus upon that
4 complements this particular notice requirement is the
5 fact that, as an incorporation of the Terry standard
6 within 647(e), that incorporation means that the statute
7 has no objective core.

8 It is like the Massachusetts flag desecration
9 statute which this Court ruled unconstitutional in Smith
10 versus Goguen. Like the phrase there, "treats
11 contemptuously," there is no basis here for an objective
12 standard because what is taking place here is that an
13 element of the crime is being defined by the moment to
14 moment decisionmaking of the officer on the street.

15 What 647(e) does is to codify an officer's
16 suspicions regarding wrongdoing and then to criminalize
17 the failure of an individual to allay those particular
18 suspicions or to furnish information. And while we are
19 perfectly willing, as a matter of recognizing the
20 importance of investigations, to say that where that
21 standard appears as part of an investigatory statute or
22 part of an investigatory standard, to consciously relax
23 our standards of vagueness --

24 QUESTION: Is it your argument that the
25 statute is vague or that it's overbroad?

1 MR. ROSENBAUM: It is that the statute is
2 vague because it is not capable of any constitutional
3 application. There is no way that this statute can be
4 applied without causing a forfeiture of the rights which
5 this Court guaranteed in Brown versus Texas.

6 QUESTION: You say it's not capable of being
7 applied in any situation?

8 MR. ROSENBAUM: That's correct, because
9 whether you look at vagueness or whether you look at the
10 Fourth Amendment argument, what is inherent in this
11 statute is a forfeiture of the rights of privacy and
12 security and mobility that were guaranteed under Brown
13 versus Texas.

14 The arbitrary and discriminatory enforcement
15 therefore flows from the use of this investigatory
16 standard as one of the elements. And as I indicated,
17 while this Court has indicated, has stated that it will
18 relax standards of vagueness in circumstances short of a
19 criminal sanction, where the element becomes part of it
20 different constitutional considerations flowing from the
21 fact that a breach of a criminal statute results in
22 arrest and imprisonment means that we have to use a
23 tighter consideration.

24 And if there be any doubt that this statute in
25 fact works arbitrary and discriminatory enforcement,

1 this Court need only look at the facts of this case and
2 the studies perceiving urban realities that we cite in
3 our papers. For in this case Mr. Lawson, a black man of
4 unconventional appearance, was stopped not less than 15
5 times over a 22-month period on occasional visits to the
6 San Diego area, always in white neighborhoods, always by
7 white officers. And on not one of those occasions was
8 he ever charged, arrested or prosecuted for any other
9 offense.

10 QUESTION: Would you think if, added to
11 whatever the other facts were, the Respondent here, the
12 Appellee, was wearing a stocking cap over his head with
13 holes for the eyes?

14 MR. ROSENBAUM: That would also be an
15 unconventional appearance.

16 QUESTION: Well --

17 (Laughter.)

18 QUESTION: I was thinking of something a
19 little more than unconventional.

20 MR. ROSENBAUM: That of course would permit a
21 Terry stop. But it still wouldn't answer our basic
22 question with respect --

23 QUESTION: Well, would it fit under this
24 statute? Could he be properly stopped under this
25 statute? At night, after dark, stocking mask over his

1 face?

2 MR. ROSENBAUM: Yes, the individual --

3 QUESTION: He could be stopped?

4 MR. ROSENBAUM: Yes, could be stopped and
5 could be requested for identification. But the question
6 in this case is not whether or not those questions can
7 be asked. As Justice White indicated in Terry, those
8 questions may be asked of any individual detained.

9 QUESTION: They could also -- they could
10 detain him until they asked the questions.

11 MR. ROSENBAUM: That's correct.

12 QUESTION: You agree with that.

13 MR. ROSENBAUM: That's correct.

14 QUESTION: But your point is he should not be
15 forced to answer the question at the pain of criminal
16 penalty.

17 MR. ROSENBAUM: That's correct. And turning
18 to the Fourth Amendment analysis, it was -- your
19 statement in Terry itself in the concurring opinion has
20 since been restated, both in Davis, where it was
21 regarded as "settled principle," and in Dunaway versus
22 New York -- that really indicates the underpinnings of
23 the Fourth Amendment argument here, because this statute
24 undermines the Fourth Amendment in two particular ways.

25 First, as Justice O'Connor was indicating,

1 what it does is to in every application dissolve the
2 probable cause requirement unless an individual is
3 prepared to waive his or her constitutional rights with
4 respect to interference with police officers. This
5 statute, if you think about it, is really nothing more
6 than a newfangled variation of the same sort of vagrancy
7 law that this Court struck down in Papachristou versus
8 Jacksonville, because there it manufactured probable
9 cause to arrest persons appearing suspicious. This
10 statute manufactures probable cause to arrest persons
11 appearing suspicious who refuse to allay those
12 suspicions.

13 Let's look at how this statute actually
14 works.

15 QUESTION: May I interrupt with one question?

16 MR. ROSENBAUM: Certainly.

17 QUESTION: Following up on the Chief Justice's
18 hypothetical question, supposing an officer does
19 encounter, 3:00 o'clock in the morning in a residential
20 neighborhood, a person wearing a stocking cap with eyes
21 in it. Is there anything he can do to that person? He
22 can stop him and ask him questions, and say the man
23 says, I won't answer. Is there any remedy that's
24 available to the police?

25 MR. ROSENBAUM: The officer can ask the

1 questions. If there is no response, as Justice White
2 pointed out in Terry, that can alert the officer's need
3 for continuing observation. But it is the Fourth
4 Amendment that answers the question that you pose,
5 Justice Stevens, because if the failure to answer and to
6 do nothing more than place the individual under close
7 surveillance --

8 QUESTION: But can the officer attach
9 evidentiary significance to the failure to answer, if
10 you assume there's a constitutional right not to?

11 MR. ROSENBAUM: If the officer could do that,
12 then what would happen is there would be probable cause
13 to arrest and this statute would not exist.

14 QUESTION: You mean it would be all right to
15 stop him and if he doesn't answer say, well, now I've
16 got probable cause?

17 MR. ROSENBAUM: No, to the contrary. That's
18 the nub in this particular statute. If a refusal to
19 answer, and it's just a simple question, what's your
20 name, and the person just stands silent, if in fact that
21 would not cause enough information to be added to the
22 initial suspicion to cause probable cause, then the
23 Fourth Amendment demands that the person be let go.

24 More questions could be asked. The officer
25 could say, why won't you give us any answer, what are

1 you doing in this neighborhood, whatever questions a
2 trained officer believes appropriate. But if at the
3 conclusion of those questions the officer doesn't have
4 enough information to form probable cause, then the
5 Fourth Amendment mandates that the individual be
6 released and whatever appropriate surveillance continue,
7 whatever appropriate observation continue.

8 But that's a balance that I'm not making; that
9 is a balance that is inherent in the probable cause
10 requirement.

11 QUESTION: But you're saying that there's no
12 way a state can pass a statute to deal with the
13 hypothetical case I give you, that would enable the
14 officer to elicit the name and address of the person
15 from an unwilling -- if he didn't want to give it?

16 MR. ROSENBAUM: That's correct. And that
17 really comes close to what the case, of course, is all
18 about. That is, the relationship between law
19 enforcement and the individual and what may be our
20 repugnance, on civic basis or moral basis, to
21 individuals not furnishing answers.

22 But to go so far as to arrest because of
23 failure to provide information, without anything more --
24 this isn't a Michigan versus DeFillippo case, where the
25 person first says, I'm Sergeant Mash, and then I'm

1 someone else, and that may accrete enough information to
2 cause probable cause. Short of that, the officer cannot
3 arrest the individual for failure to give a name and
4 identification.

5 QUESTION: Would you suggest that if there is
6 probable cause to arrest and everybody concedes it, the
7 state could then say that once there's probable cause to
8 arrest it is also a crime to refuse to give the name?

9 MR. ROSENBAUM: No, because when --

10 QUESTION: No, what?

11 MR. ROSENBAUM: No, I think that would be
12 improper. I think first it would most likely be
13 unnecessary because of --

14 QUESTION: Well, you're making a -- it
15 wouldn't be a Fourth Amendment argument?

16 MR. ROSENBAUM: No. There's a Fifth Amendment
17 problem that would --

18 QUESTION: That's where you would --

19 MR. ROSENBAUM: Right. Once the probable
20 cause to arrest takes place, then we have either a
21 custodial interrogation setting or something remarkably
22 close, and it would be Fifth Amendment considerations
23 that would govern our judgment.

24 But I want to return to how this statute works
25 with respect to probable cause in its actual operation.

1 What is the day to day application, not a fanciful
2 hypothetical, but how does it really work? An officer
3 approaches an individual and detains that individual.
4 The individual is frozen.

5 The officer says to the individual, what is
6 your name and address? And the individual doesn't
7 answer, perhaps is silent, perhaps refuses to answer
8 whatsoever. What is the state of affairs in terms of
9 Fourth Amendment constitutional doctrine at that time?

10 Well, we certainly, assuming the officer has
11 in good faith made a Terry stop, we have reasonable
12 suspicion. But we don't have probable cause to make
13 that arrest. And what that also means under Terry and
14 this Court's decisions in Robinson versus United States,
15 in Gustavson versus Florida, is that the officer at that
16 point cannot make a search.

17 Then what happens with 647(e)? The statute is
18 activated, an arrest is made, and the officer at that
19 point can make an arrest and a search and obtain the
20 very information which moments ago the Fourth Amendment
21 precluded. It is a probable cause manufacturing
22 machine.

23 Let's look at it in another way. An officer
24 goes up to a person and wants to reach into the person's
25 pocket to get the ID, but is precluded by the Fourth

1 Amendment because they only have Terry. The officer
2 says to the individual, you reach in your pocket and get
3 identification, and the individual refuses or is
4 silent.

5 647(e) is activated and it is the law -- it is
6 the law -- that then permits the officer to reach into
7 the individual's pocket and extract the very
8 identification which just moments ago the probable cause
9 requirement absolutely forbade. There is no way --

10 QUESTION: It would also authorize a complete
11 search incident to arrest.

12 MR. ROSENBAUM: That's correct. It is more --
13 it is more than just a reaching in for identification.
14 It is that plus, because then the individual is
15 subjected to all the constitutional deprivations that
16 attach to the arrest and to the full search that Justice
17 White just mentioned.

18 QUESTION: Where do you get that from, where
19 they can make a full search?

20 MR. ROSENBAUM: They can make a full search
21 incident to arrest.

22 QUESTION: Custodial arrest.

23 MR. ROSENBAUM: Yes, sir.

24 QUESTION: On the street?

25 MR. ROSENBAUM: That's what this Court --

1 QUESTION: I thought you could make a
2 patdown.

3 MR. ROSENBAUM: Perhaps I'm not being clear.
4 I'm discussing the situation where under this statute
5 the officer obtains probable cause.

6 QUESTION: I'm just wondering whether you're
7 getting too far away from this case.

8 MR. ROSENBAUM: Well, what I'm saying is that
9 actually your point indicates how the Fourth Amendment
10 can be subverted, because they start with Terry and very
11 limited powers of the frisk, and all of a sudden with
12 647(e) entering the case it is a full search incident to
13 arrest that is permitted. And that's one of the Fourth
14 Amendment problems with the statute.

15 QUESTION: Terry gives you that same sort of
16 acceleration on the facts of Terry, doesn't it? If you
17 reach in and find someone is carrying a concealed weapon
18 and carrying a concealed weapon is a crime, all of a
19 sudden you do have probable cause.

20 MR. ROSENBAUM: Yes, and that's because
21 society has recognized that the possession of a
22 concealed weapon is a substantive offense that we will
23 punish and permit to have a search incident to
24 afterwards. But what's the substantive offense in our
25 case? In our case it is a crime out of what is not a

1 crime. All the person has done is refuse to allay
2 suspicions, either silently, noisily or whatever. And
3 all of a sudden that becomes, not like a concealed
4 weapon, but that becomes the basis for the full arrest
5 and search incident to arrest.

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1 QUESTION: Well, that's what the court
2 approved in Michigan against DeFillippo, though.

3 MR. ROSENBAUM: Yes, but in Michigan versus
4 DeFillippo, the court declared that statute there
5 unconstitutional. And that issue --

6 QUESTION: Surely, if the statute had been
7 constitutional it all would have fallen.

8 MR. ROSENBAUM: If the statute is
9 constitutional, my argument obviously falls, but what
10 I'm indicating --

11 QUESTION: No. Your demonstration of what
12 flows fro the statute is exactly what happened in De
13 Fillippo.

14 MR. ROSENBAUM: Yes, and -- but the question
15 is what happens to the probable cause requirement in
16 those circumstances. And that's just one of the ways
17 that the probable cause requirement is undermined in
18 this particular case.

19 Let's look at what this does with respect to
20 permitting intrusions upon constitutional rights of
21 security and privacy and mobility upon less than
22 probable cause for the governmental interest here that
23 is accrued through the existence of a statute; that
24 penalizing the disclosure of identification.

25 And in this respect, I would direct the

1 Court's attention to its decisions in Terry and Brignoni
2 Ponce and Summers. In Terry, this Court stated that it
3 would permit a frisk of an individual, beyond a stop,
4 upon less than probable cause but not upon a general
5 interest in crime prevention or detection. Rather, the
6 Terry frisk was specifically predicated upon preserving
7 an officer's safety in circumstances that would warrant
8 concern. It was not prevention or detection, though
9 obviously, that option was available to it.

10 QUESTION: But the initial detention is, of
11 course.

12 MR. ROSENBAUM: Yes. And what we're looking
13 at in this case is what will we permit short of probably
14 cause in addition to estop. And it is our position
15 that this Court has never permitted an intrusion of this
16 sort of character beyond the stop itself for an interest
17 just from the generalized one, in crime prevention or
18 detection. That's what Terry indicated with respect to
19 the justification of the frisk.

20 Let's look at Brignoni Ponce which I would
21 contend in many ways controls this case. Indeed, I
22 would suggest that Mr. Petersen's argument simply cannot
23 be squared with the holding of that case. In Brignoni
24 Ponce, this Court examined a roving patrol that was
25 interested in determining whether or not aliens, in

1 violation of immigration laws, were being transported.
2 And this Court stated that upon less than probable
3 cause, upon reasonable suspicion, stop estop would be
4 permitted.

5 Now, what is significant about this case for
6 our purposes here is that that particular stop, that
7 particular intrusion to ask questions regarding
8 immigration status, was purely an investigatory act. It
9 was no less investigatory than the sort of stops of Mr.
10 Lawson that took place in the San Diego area.

11 But what is critical here is that that
12 investigatory stop was sanctioned not upon the general
13 interest of crime prevention or detection which Mr.
14 Petersen would like to sustain this statute on, but
15 rather, was predicated very specifically on this
16 nation's peculiar problems in the area of immigration.

17 And the Court will recall Justice Powell, at
18 pages 881 and 82, specifically stating that any further
19 intrusion beyond asking about immigration status or
20 asking about the suspicious circumstances regarding
21 immigration would not be permitted under the Fourth
22 Amendment; that there had to, at that point, be consent
23 or probable cause.

24 So in circumstances remarkably identical to
25 the circumstances here, the general interest in crime

1 prevention or detection was not enough to sustain the
2 intrusion.

3 And I would submit to this Court that that is
4 predicated upon an understanding as to really the degree
5 of advantage that law enforcement gains through the
6 actual operation of a statute like this. Not, as Mr.
7 Petersen would have it, some sort of global discussion
8 of crime prevention or detection. But rather, what is
9 involved simply by having this particular statute
10 available. Let's look at that.

11 By Mr. Petersen's own tally, there are only
12 some eight states in the Union, only some eight states,
13 that even have statutes like this. And neither Mr.
14 Petersen nor any of the amici filing papers on his
15 behalf, has cited to this Court a single study or a
16 single fact that would indicate that it is the existence
17 of this statute that is responsible for the advantages
18 gained.

19 Nor would the statute itself preclude
20 investigations from going forward, for as Justice White
21 has indicated in his statements, the individual is still
22 under police surveillance, the officers are still free
23 to continue whatever surveillance.

24 And perhaps the most interesting point of all
25 flows from the record in this case, because when you

1 examine the 15-odd stops that happened, in the majority
2 of stops when the officer sought to attain information
3 from Mr. Lawson regarding identification, they didn't
4 use the statute as the basis. That statute's advantage,
5 as an increment to crime prevention or detection, while
6 I'm not suggesting is insubstantial, while I'm not
7 suggesting is non-existent, certainly is not of the sort
8 or magnitude that would in any way cause the gross
9 departure from the probable cause requirement that is
10 stated here, that is suggested here by the government's
11 argument.

12 And it is really here in appreciation of that
13 fact and in appreciation of the discussion that we had
14 with respect to vagueness, that it becomes clear as to
15 what this case is all about. For it is here that the
16 fundamental policies of vagueness and the Fourth
17 Amendment. coalesce.

18 For while in circumstances short of probable
19 cause, it may be our moral and civic judgment that
20 individuals questioned by the police should respond,
21 including even disclosure of identity, what finally
22 defines the character of a free society and separates it
23 from a totalitarian one is ultimately the relationship
24 between the individual and the law enforcement apparatus
25 -- how much space exists, whether one is free, or

1 whether one is subservient.

2 And in the end, this case is much more than a
3 case about the amenities of life. What this case is
4 about in a free society is nothing less than the
5 integrity and the autonomy of the individual, and what
6 our collective repugnance will be to an attempt to
7 destroy those particular values.

8 If the Court has no further questions, I have
9 completed my argument.

10 CHIEF JUSTICE BURGER: Mr. Petersen, do you
11 have anything further? You have five minutes remaining.

12 ORAL ARGUMENT OF A. WELLS PETERSEN, ESQ.

13 ON BEHALF OF THE APPELLANTS, -- Rebuttal

14 MR. PETERSEN: Mr. Chief Justice, may it
15 please the Court:

16 Appellant seems to merge his lack of notice
17 and Fourth Amendment rights together in arguing that a
18 person really doesn't know what might constitute
19 suspicious behavior. This is true of any arrest.

20 Now, if I or anyone else happens to be dressed
21 like a criminal, physical appearances of a criminal --

22 QUESTION: What's dressed like a criminal?

23 MR. PETERSEN: Well, the police report comes
24 in that a crime has been committed and the criminal was
25 dressed in a certain way, had a certain physical

1 appearance --

2 QUESTION: Oh, if he corresponds, if he meets
3 a description that's been sent out.

4 MR. PETERSEN: Meets the description, and is
5 driving a car that was used in a crime. To be perfectly
6 innocent -- happened to me once. You're stopped.
7 There's nothing wrong, absolutely nothing wrong there,
8 and I was not put on notice that dressing that way,
9 appearing that way or driving in that car was anything
10 other than completely innocent. However, I was
11 stopped. And it can happen to anyone. And you cannot
12 put the onus --

13 QUESTION: Mr. Petersen, that seems to
14 demonstrate the validity of your opponent's argument.

15 MR. PETERSEN: No. Not so.

16 QUESTION: The person stopped doesn't know the
17 basis for the stop.

18 MR. PETERSEN: That's right. And that's --
19 necessary. I identified myself and was allowed to go on.

20 QUESTION: I know you did. But how does the
21 person stopped know whether the statute requires him to
22 answer the questions.

23 MR. PETERSEN: It's not necessary. There's no
24 way you can possibly let everybody know what, in any
25 particular set of circumstances, is going to be

1 suspicious to a policeman.

2 QUESTION: And so your answer is that the
3 person stopped can never know whether he has an
4 obligation under the law to answer the question.

5 MR. PETERSEN: Once the policeman asks him, he
6 has the obligation to answer him.

7 QUESTION: Even if the policeman doesn't have
8 reasonable suspicion?

9 MR. PETERSEN: Probable cause, reasonable
10 suspicion.

11 QUESTION: But does he have an obligation to
12 answer if the policeman does not have reasonable
13 suspicion?

14 MR. PETERSEN: He's got a good lawsuit
15 afterwards.

16 QUESTION: But you didn't answer my question.

17 MR. PETERSEN: For the civil suit. Yes, he
18 has an obligation to answer because you have an
19 obligation under any arrest --

20 QUESTION: But then the statute is not
21 confined -- then the statute is not confined in its
22 application to cases in which the officer has reasonable
23 suspicion.

24 MR. PETERSEN: Neither are cases of arrest
25 always confined within probable cause to arrest.

1 QUESTION: Well, but that's the way you
2 speaking for the state of -- or city of San Diego --
3 interpret this statute.

4 MR. PETERSEN: For the state of California.
5 Yes, sir. Because otherwise, all your obstruction of
6 justice --

7 QUESTION: Well, maybe that's the way -- what
8 you mean. I just want to be sure that's your position.

9 QUESTION: Well, that's contrary to the
10 California Court of Appeals' decision in Solomon, isn't
11 it? That you can be required to answer under this
12 statute if there isn't reasonable or articulable
13 suspicion under Terry?

14 MR. PETERSEN: The thing is -- you're getting
15 down to the practicality. In a legal sense, no. But
16 you're relying on your police to be imposing this code
17 section constitutionally, and anybody can do anything
18 improperly is all I'm saying.

19 QUESTION: Of course. But --

20 MR. PETERSON: But certainly, you expect him
21 to have the articulable facts.

22 QUESTION: We don't need counsel to inform us
23 of that, I don't think. But supposing in the Superior
24 Court of San Diego County, a prosecution is brought
25 under this ordinance, and all the prosecution proved was

1 that the defendant had been stopped and asked for
2 information, and it was clear there was not Terry
3 grounds for stopping the individual. Wouldn't the
4 defendant be entitled to a directed verdict at the close
5 of the prosecution --

6 MR. PETERSEN: Certainly. And he probably
7 would bring a lawsuit for false arrest, a civil suit.

8 I'd also like to mention the fact that what
9 he's after is a right to anonymity; not a right to
10 freedom of movement. And nothing -- there's no
11 constitutional right to anonymity. And I think it is
12 very imminently more reasonable to require
13 identification of a person than it is to, in every
14 instance -- you can't stop unless you've got a right to
15 patdown.

16 QUESTION: If you really mean what you say,
17 you could make it a crime to refuse to identify yourself
18 whether there's reasonable suspicion or not. There's no
19 constitutional right to anonymity; and therefore, if a
20 policeman walks up to you without any reasonable
21 suspicion and just happens to ask you, what's your name,
22 and you say sorry, it's none of your business, you could
23 be committing a crime.

24 MR. PETERSEN: No, not without the articulable
25 fact.

1 QUESTION: Oh, there is a constitutional
2 right, then, to anonymity.

3 MR. PETERSEN: Well, yes. Under most
4 circumstances, I'd have to agree with you, yes. But not
5 when you're found under suspicious circumstances of
6 Terry.

7 Most statutes, by the way, of this type are
8 city and county ordinances and are not state statutes,
9 and empirical data would be impossible to develop
10 because you would have to have identical law enforcement
11 agencies, identical societies, identical laws, and
12 that's impossible.

13 There is a duty not to arrest -- not to resist
14 arrest, even if the rest is improper. And there are
15 obstruction of justice statutes throughout this country
16 that would all be held unconstitutional if we didn't
17 have the standards. But I submit that under the
18 standards of Solomon in 647(e), -- thank you.

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

21 (Whereupon, at 2:00 p.m., the above-entitled
22 case was submitted.)

23

24

25

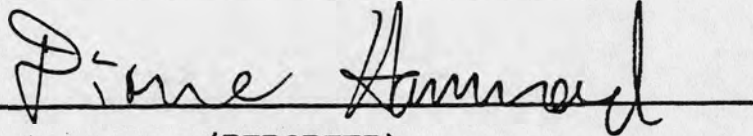
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

WILLIAM KOLENDER ET AL. v. EDWARD LAWSON #81-1320

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pione Hammond", written over a horizontal line.

(REPORTER)

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