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WASHINGTON, D.C. 20543

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-1330

**TITLE** UNITED STATES, Petitioner v. THOMAS J. HENSLEY

**PLACE** Washington, D. C.

**DATE** November 5, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner : No. 83-1330  
v. :  
THOMAS J. HENSLEY :  
-----x

Washington, D.C.

Monday, November 5, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:39 o'clock a.m.

APPEARANCES:

KATHRYN A. OBERLY, ESQ., Washington, D.C.;

on behalf of Petitioner.

EDWARD G. DRENNEN II, ESQ., Florence, Ky.;

on behalf of Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Oberly, I think you may proceed when you're ready.

ORAL ARGUMENT OF KATHFYN A. OBERLY, ESQ.

ON BEHALF OF THE PETITIONER

MR. LANDRY: Thank you, Mr. Chief Justice, and may it please the Court:

Respondent in this case was convicted of being a convicted felon in possession of a firearm. The Court of Appeals reversed the conviction on the theory that the guns found in Respondent's car were the fruits of an illegal arrest. The court's ruling was based on two grounds:

First, the court held that investigatory stops, commonly known as Terry stops, may only be made when the police reasonably suspect that a crime is ongoing at the moment of the investigatory stop. Because that was not the case here -- Respondent was stopped in connection with a robbery that had been committed two weeks earlier -- the court concluded that this could not be a valid investigatory stop case.

The court then treated the case as an arrest case and concluded that the officers who made what we consider the stop, what the court considered an arrest, lacked probable cause for an arrest because the facts

1 they were relying on were a wanted flyer issued by a  
2 neighboring police department saying that Respondent was  
3 wanted in connection with an armed robbery that had been  
4 committed in the neighboring jurisdiction.

5 In our view, the Court of Appeals' analysis  
6 was fundamentally flawed by its initial ruling on the  
7 scope of investigatory stops. We actually find it  
8 somewhat hard to believe that the court meant what it  
9 said, because there is no decision of this Court that  
10 limits investigatory stops to ongoing crimes, and in  
11 fact the Court has repeatedly said, as have most of the  
12 other circuits, that a police officer having reasonable  
13 suspicion may stop when he suspects that a crime is  
14 being committed, is about to be committed, or has been  
15 committed in the past.

16 QUESTION: Ms. Oberly, do you take the  
17 position that a Terry stop could be made to investigate  
18 a past misdemeanor offense?

19 MS. OBERLY: I think that it probably could  
20 be, Your Honor, although this here is a past felony  
21 offense.

22 QUESTION: Yes, I know.

23 MS. OBERLY: But it would depend somewhat on  
24 the circumstances. I don't think, for example, that  
25 police departments routinely issue wanted flyers for

1 people who are suspected of having committed  
2 misdemeanors. So that I don't think it would arise in  
3 the case of a misdemeanor.

4 But I don't think that there's any -- in terms  
5 of law enforcement interests, the interest is clearly  
6 greater in apprehending suspected felons. But there is  
7 still an interest on the law enforcement side in  
8 apprehending anyone suspected of committing a crime,  
9 whether it's a misdemeanor or a felony.

10 And so on one side you have the law  
11 enforcement interest in apprehending people suspected of  
12 committing crimes, and on the other hand, on the other  
13 side of the Terry balance as developed in subsequent  
14 cases, you have the intrusion on the individual being  
15 stopped. And so long as the intrusion is sufficiently  
16 limited, as it was in this case -- this was the most  
17 limited intrusion imaginable, the stop in this case --  
18 then I think that the law enforcement interest in  
19 apprehending people suspected of crimes would not  
20 dissipate simply because it was a misdemeanor.

21 But that is, I would stress, not our case  
22 here. This is an armed robbery committed by someone who  
23 all police departments believed was armed and dangerous,  
24 who had a long criminal record, who was known to the  
25 police of both departments, and this was a very serious

1 offense.

2 QUESTION: May I ask if the law enforcement  
3 interest would have been served if the wanted flyer  
4 disclosed whether or not a warrant had been issued for  
5 the individual? Could the police departments have a  
6 practice of either having the flyers say there was or  
7 was not a warrant?

8 MS. OBERLY: They certainly could, Your  
9 Honor. And flyers come, just like informant's tips,  
10 flyers come in all shapes and sizes.

11 QUESTION: Except that the police can control  
12 what they put in the flyers, but you can't control the  
13 informer's tips.

14 MS. OBERLY: Yes, Your Honor. The testimony  
15 in this case was that this type of flyer is as common as  
16 a flyer that actually expressly indicates an arrest  
17 warrant has been issued; and that the Kentucky officers  
18 who made the stop found in their experience that this  
19 type of flyer generally was followed by an arrest  
20 warrant; and that one of the officers recalled having  
21 been told that a warrant would be forthcoming in this  
22 case.

23 All that testimony is in the joint appendix  
24 from the suppression hearings.

25 QUESTION: But if the flyer had said there is

1 no warrant outstanding, then I take it they wouldn't  
2 have even stopped him?

3 MS. OBERLY: Not necessarily, Your Honor,  
4 because the flyer was issued six days before the  
5 Covington, Kentucky, police department came upon  
6 Respondent. And at that point I think it still would  
7 have been reasonable for the Kentucky police to assume --  
8 or to at least wonder whether in that intervening six  
9 days the Ohio investigation had further progressed, so  
10 that there might either have been a warrant or  
11 additional information to supply probable cause for  
12 arrest, or some changes --

13 QUESTION: Does the record tell us how long it  
14 normally takes to find out if a warrant is outstanding?

15 MS. OBERLY: No, but if it's been computerized  
16 it's a matter of minutes, and they --

17 QUESTION: And had they been able to get that  
18 information in that matter of minutes, they could have  
19 avoided the necessity for a stop, is that not right?

20 MS. OBERLY: No, Your Honor, not on the facts  
21 of this case. What happened here was the first officer  
22 -- there were many officers involved. The first  
23 Kentucky officer spotted the Respondent driving a car  
24 through Covington.

25 QUESTION: I understand.



1 MS. OBERLY: He radioed to his despatcher and  
2 said: I just spotted Tommy Hensley and he took off;  
3 could you check and see if there's a warrant on him? At  
4 that point another officer, who was in his cruiser,  
5 overheard this radio communication between the first  
6 officer and the despatcher, and the second officer  
7 injected himself into the radio communication and he  
8 said: I think there is a warrant on this fellow from  
9 Cincinnati.

10 Then we switched -- the radio communication  
11 switches to the despatcher trying to get information out  
12 of Cincinnati records about whether there is or is not  
13 an outstanding arrest warrant on this Respondent. At  
14 the same time that that radio communication is going on,  
15 the officers are following Respondent to where they  
16 think he's going to go.

17 So that at the time they,  
18 the officers, converge on where the Respondent is and  
19 stop him and pull his car over, the inquiry, which is  
20 quite brief and can always be quite brief, about whether  
21 there was an outstanding arrest warrant was practically  
22 completed.

23 QUESTION: And how much additional time would  
24 you judge was required to find out the answer?

25 MS. OBERLY: Well, in this case they never had

1 to find out the answer, because within minutes --

2 QUESTION: I understand that. I understand  
3 that.

4 MS. OBERLY: -- within minutes of stopping him  
5 --

6 QUESTION: They arrested him for something  
7 else. But the choice, I suppose, is between stopping  
8 him and detaining him for -- how long a period are they  
9 permitted to detain him in the Government's submission?

10 MS. OBERLY: I don't think that -- just as the  
11 Court has said in previous cases, in Florida versus  
12 Royer, there's no precise time limit.

13 QUESTION: Well, would they have kept him for  
14 an hour?

15 MS. OBERLY: I think that would be excessive  
16 here, Your Honor.

17 QUESTION: Could they have kept for 15  
18 minutes?

19 MS. OBERLY: Probably 15 minutes would have  
20 been justifiable.

21 QUESTION: Do you think they could have kept  
22 him under surveillance while he was in his car for 15  
23 minutes? He was not breaking any speed law, as I  
24 understand.

25 MS. OBERLY: No, and I think that that fact is

1 totally irrelevant. The officer said no --

2 QUESTION: Well, if they can tail the man  
3 who's abiding by the law while he's driving through the  
4 street for the same period of time it takes to get the  
5 information, why isn't that preferable?

6 MS. OBERLY: If they had enough officers to  
7 make sure that they weren't going to lose track of him,  
8 that might be one way to proceed. But that doesn't make  
9 the way that they did proceed unreasonable by any  
10 stretch of the imagination.

11 I mean, this is -- again I stress, this was  
12 the most limited intrusion possible.

13 QUESTION: Well, they made him put his hands  
14 up on the car and they pulled a gun on him.

15 MS. OBERLY: Which is clearly permissible  
16 under Pennsylvania versus Mimms. The first officer who  
17 arrived --

18 QUESTION: Well, it's not the same as  
19 Pennsylvania against Mimms, because that man had  
20 violated the law in the Pennsylvania case.

21 MS. OBERLY: That man had made a traffic  
22 violation. This man was suspected of being an armed and  
23 dangerous felon, who was wanted for an armed robbery  
24 that had been committed in the very recent past. And  
25 the officers had good -- far more reason than the

1 officers in Pennsylvania versus Mimms to fear for their  
2 own safety.

3 And ordering these -- Respondent --

4 QUESTION: There's a different legal  
5 justification? They did not have a violation of law to  
6 go on.

7 MS. OBERLY: The officers here, Your Honor,  
8 were not relying on having seen him commit a traffic  
9 offense, having seen him do anything else wrong in their  
10 presence. They were relying on the flyer that was  
11 issued by the St. Bernard police department.

12 QUESTION: And on their own inability to keep  
13 him under surveillance for the time to determine whether  
14 the warrant was outstanding.

15 MS. OBERLY: Because he was in a moving  
16 automobile.

17 QUESTION: Right.

18 MS. OBERLY: That's correct. And I don't --

19 QUESTION: Well, wasn't there testimony that  
20 "he took off"?

21 MS. OBERLY: Yes, there was, Your Honor. As  
22 soon as he saw --

23 QUESTION: You just said a minute ago that he  
24 wasn't violating the speed limit. Can you "take off"  
25 without violating the speed limit?

1 MS. OBERLY: There's no testimony as to how  
2 fast he took off. He took off fast enough to arouse  
3 their suspicions, but it doesn't say that he necessarily  
4 accelerated so rapidly that he was violating the  
5 speeding laws, and we're not contending that.

6 QUESTION: Well, it's clear he did not violate  
7 the law --

8 MS. OBERLY: That's correct.

9 QUESTION: -- or that surely would be in the  
10 record.

11 MS. OBERLY: That's correct. We're not  
12 contending that at all. We think that whether or not he  
13 was violating a traffic law is totally irrelevant to the  
14 basis for the stop here.

15 QUESTION: Well, when you take off, how fast  
16 are you going?

17 MS. OBERLY: Well, my car doesn't take off too  
18 fast. When you take off, you wouldn't necessarily  
19 immediately be violating the speeding laws.

20 QUESTION: Then you wouldn't say he was taking  
21 off, would you?

22 MS. OBERLY: Pardon?

23 QUESTION: Isn't "take off" over 55 miles an  
24 hour?

25 MS. OBERLY: You have to start at zero, Your

1 Honor, and then it depends on how rapidly you can  
2 accelerate.

3 QUESTION: Ms. Oberly, would it make any  
4 difference in this case if the St. Bernard police in  
5 fact didn't have enough information to justify a  
6 reasonable Terry stop?

7 MS. OBERLY: Yes, Your Honor, that would be  
8 critical. In our view where the Court of Appeals went  
9 wrong here was in focusing on the information that the  
10 Covington officers knew. What's relevant is what the  
11 St. Bernard officers knew.

12 The district court here found that the St.  
13 Bernard officers had enough information -- had enough  
14 probable cause to arrest the Respondent. This Court  
15 doesn't have to reach that issue. All the Court has to  
16 conclude is that the St. Bernard officers had reasonable  
17 suspicion to justify a Terry stop of Respondent if they  
18 had encountered him first.

19 If they had, then what the Covington officers  
20 are doing is basically acting as the agents of the St.  
21 Bernard officers.

22 QUESTION: And if the St. Bernard officers did  
23 not have sufficient information in their possession to  
24 justify issuance of the flyer, you would suggest the  
25 evidence should be suppressed, is that right?

1 MS. OBERLY: Under this Court's ruling in  
2 Whiteley versus Warden, that would be the result, unless  
3 -- and we don't contend it's present in this case, but  
4 the exception would be if the Covington officers had  
5 somehow prior to the stop developed their own  
6 information to justify a stop.

7 But since they were making the stop here  
8 solely in reliance on the St. Bernard flyer, the  
9 validity of that stop turns back to the validity of the  
10 issuance of the flyer.

11 QUESTION: Do you take the position that the  
12 St. Bernard police could properly ask another police  
13 department to detain the Respondent until they got there  
14 for something like that, or are you just asking this  
15 Court to determine that a Terry stop can be made long  
16 enough to determine whether there is a warrant  
17 outstanding?

18 MS. OBERLY: For this case, we only ask that  
19 you determine the latter, that the Terry stop may be  
20 made long enough to determine if there's a warrant  
21 outstanding.

22 QUESTION: Well, are you suggesting, then,  
23 that we're to decide this case on the premise that the  
24 stop by the Kentucky officers was only until they had  
25 time enough to find out whether an arrest warrant had

1 issued?

2 MS. OBERLY: That's correct, and that's the  
3 uncontroverted arrest.

4 QUESTION: In other words -- I see. This  
5 wasn't a stop, then, for purposes of interrogating him?

6 MS. OBERLY: There was no interrogation, Your  
7 Honor, by the Kentucky officers, except to --

8 QUESTION: No, I'm trying to get at what your  
9 position is as to why they stopped him.

10 MS. OBERLY: They stopped him -- the  
11 uncontroverted testimony is they stopped him solely to  
12 find out whether there was an arrest warrant.

13 QUESTION: And that's what you want us to  
14 decide --

15 MS. OBERLY: That's correct.

16 QUESTION: -- if it was an admissible stop?

17 MS. OBERLY: That's correct.

18 QUESTION: But they didn't stop him as a  
19 source of information as to whether there was an arrest  
20 warrant.

21 MS. OBERLY: No. They stopped him because  
22 they needed time to -- he was going to take off, as  
23 Justice Marshall has pointed out. He'd already started  
24 to take off. So they stopped him. They did exactly  
25 what this Court said was permissible in Adams versus



1 Williams, which is to maintain the status quo  
2 momentarily while they obtained more information.

3 The more information they needed was a  
4 computer check on whether there was an arrest warrant on  
5 Respondent.

6 QUESTION: Well, Ms. Oberly, the flyer asked  
7 the police to stop this man, didn't it?

8 MS. OBERLY: Yes, it did.

9 QUESTION: And based on just reasonable  
10 suspicion, I suppose.

11 MS. OBERLY: Correct. Well, the district  
12 court found based on probable cause, but --

13 QUESTION: Well, I know, but --

14 MS. OBERLY: -- we're willing to submit it --

15 QUESTION: -- the officer who issued it didn't  
16 even think he had probable cause.

17 MS. OBERLY: His testimony is conflicting.

18 QUESTION: Yes. Well, anyway, let's assume  
19 there was only reasonable suspicion.

20 MS. OBERLY: Correct.

21 QUESTION: So they asked another police  
22 department to stop him. What do you think they wanted  
23 them to stop -- the other police department to do when  
24 they stopped him?

25 MS. OBERLY: For questioning.

1 QUESTION: Right.

2 MS. OBERLY: But the Covington officers who  
3 made the stop had no intention of detaining this fellow  
4 for questioning.

5 QUESTION: All right. Let's suppose that in  
6 the radio communication they were told: No, no warrant  
7 has issued yet, but our flyer is still good; please stop  
8 this man.

9 MS. OBERLY: They could not and would not,  
10 according to the testimony, have done that.

11 QUESTION: Why would you say they could not  
12 stop him?

13 MS. OBERLY: Because they would have known,  
14 upon finding out that there was no warrant, that the St.  
15 Bernard -- that the initiating department, the St.  
16 Bernard police, did not have probable cause.

17 QUESTION: Well, I know, but I thought your  
18 point was they had reasonable suspicion to justify a  
19 stop.

20 MS. OBERLY: To find out whether --

21 QUESTION: I would think you -- I thought your  
22 position was that the people who issued the flyer had  
23 reasonable suspicion to justify a Terry stop.

24 MS. OBERLY: That's correct.

25 QUESTION: And if they had encountered the man

1 first, they would have stopped him.

2 MS. OBERLY: That's correct, and they could  
3 have.

4 QUESTION: Why couldn't the people who  
5 received the flyer do the same thing?

6 MS. OBERLY: They could have -- well --

7 QUESTION: Legally, under your position.

8 MS. OBERLY: They could have stopped him long  
9 enough to call the St. Bernard police or called the  
10 computer people and say, is there a warrant. Let's say  
11 the answer comes back --

12 QUESTION: Well, I know that. But suppose  
13 there's no warrant.

14 MS. OBERLY: The answer comes back no -- and  
15 I'm trying to follow up on the question. The answer  
16 comes back no, but the St. Bernard police say, we would  
17 still like to question him.

18 At that point the Covington police would have  
19 to decide how long would they have to detain Respondent  
20 before the St. Bernard police could arrive to ask their  
21 questions. And at some point the Government would  
22 concede that detention might be too long to exceed the  
23 permissible bounds of the Terry stop.

24 QUESTION: You say the St. Bernard police also  
25 could have made a Terry stop.

1 MS. OBERLY: Absolutely, Your Honor.

2 QUESTION: But now, they knew that there was  
3 no warrant, because the warrant would have been obtained  
4 by them. What would they have been making the Terry  
5 stop for?

6 MS. OBERLY: To ask -- what they wanted to  
7 stop Respondent for was for questioning. He would not  
8 have had to submit to the questioning. They could have  
9 stopped him and said, we'd like you to come talk to us  
10 about this robbery. And, absent probable cause, he  
11 could have said, I don't care to talk to you, and he  
12 would have been free to go on his way.

13 But they certainly had the authority, the St.  
14 Bernard district court, certainly had the authority to  
15 make the initial stop to see whether the Respondent was  
16 willing to cooperate in questioning.

17 QUESTION: The Covington police could have  
18 done the same thing in your view?

19 MS. OBERLY: Yes, except the problem here is  
20 that the Covington police wouldn't have known what to  
21 question him about. So that all the Covington police  
22 would do --

23 QUESTION: Yes, but that isn't a legal  
24 argument. That's just a practical argument.

25 MS. OBERLY: That's correct. But I mean

1 if --

2 QUESTION: Suppose the St. Bernard police had  
3 said: Please ask him the following two questions.  
4 Wouldn't you say that they could have stopped him and  
5 asked him those two questions?

6 MS. OBERLY: Yes, if they'd been given  
7 specific -- that's an entirely different situation. If  
8 they'd been given specific information by the initiating  
9 department, they're entitled to rely on that, just as  
10 they're entitled to rely on the flyer.

11 QUESTION: How long after the stop did they  
12 observe the gun?

13 MS. OBERLY: From the record, it appears that  
14 it was within three minutes.

15 QUESTION: How long?

16 MS. OBERLY: Three minutes. The first officer  
17 stopped and waited for backup units to arrive and did  
18 nothing except keep the suspects under control until the  
19 backup units arrived. That took three minutes or less.

20 QUESTION: Now, was he out of the car?

21 MS. OBERLY: Yes. The first officer ordered  
22 them out of the car and asked them to put their hands on  
23 the roof of the car, for his own, the officer's own,  
24 protection and then waited for his backup units to  
25 arrive.

1           When the first backup unit arrived, the  
2 officer in that car immediately spotted part of the gun  
3 in plain view in the car, and at that point the warrant  
4 flyer completely drops out of the case and the basis for  
5 everything that happened after that point is the  
6 Covington officer's own independent observation of the  
7 gun in plain view in the car.

8           To sum up, it's our position on the two points  
9 in the Court's analysis that: Terry stops simply can't  
10 rationally be limited to ongoing crimes; and second,  
11 that this Court's holding in Whiteley versus Warden  
12 makes it quite clear that officers of one department are  
13 entitled to rely on information supplied by officers of  
14 a second department, so long as the first department has  
15 the requisite reasonable suspicion or probable cause, as  
16 the case may be, to justify the action that's taken.

17           QUESTION: Ms. Oberly, if you're summing up,  
18 does the record tell us -- because these words "tuck  
19 off" create an impression that may be inaccurate, does  
20 the record tell us the length of time between when the  
21 vehicle started to move and when it was stopped?

22           MS. OBERLY: It does not tell us precisely,  
23 Your Honor. But based on the radio transmission which  
24 was going on at the same time, it had to have been a  
25 period of two minutes or less. All of this was

1 happening simultaneously.

2 QUESTION: And as I remember it, the  
3 magistrate indicated that one of the officers said there  
4 had been no violation, no speeding in violation of law  
5 that he observed before stopping him; is that right?

6 MS. OBERLY: That's correct. And they never  
7 testified or attempted to justify the stop based on  
8 their own observation of a violation of law.

9 QUESTION: So should we judge the case as  
10 though the words "took off" merely meant they have  
11 started the vehicle in motion?

12 MS. OBERLY: That is not the way I would judge  
13 -- it's not a common sense reading of the words "took  
14 off."

15 QUESTION: Well, what do you interpret them to  
16 mean?

17 MS. OBERLY: I interpret it, in the context of  
18 a police radio transmission, that one officer says he  
19 sees the suspect, the suspect saw him and immediately  
20 took off, as an indication of flight. But again, we're  
21 not --

22 QUESTION: If it were an indication of flight,  
23 isn't it almost a certainty that they would have  
24 violated the speed limit within two minutes?

25 MS. OBERLY: I'd like to be able to say yes,

1 Your Honor. But since we have nothing in the record to  
2 support it, I don't feel that I could definitively say  
3 yes.

4 QUESTION: The thing that puzzles me about the  
5 Government case is that it sounds as though the stop was  
6 necessary to prevent the man from getting away from the  
7 officers.

8 MS. OBERLY: Correct.

9 QUESTION: And I don't know if you're really  
10 arguing that or not. Is there anything in the record to  
11 support that, other than the words "took off"? Because  
12 normally, if a vehicle is not violating the speed limit,  
13 normally it can be kept in -- you know, it can be  
14 followed for a considerable period of time without  
15 losing it.

16 MS. OBERLY: If you have sufficient  
17 officers --

18 QUESTION: And if you're only trying to find  
19 out if there was a warrant outstanding, I don't  
20 understand why a competent officer couldn't just keep  
21 the car in surveillance while he radios the station and  
22 says, tell us whether there's a warrant out for him.

23 MS. OBERLY: Your Honor, if you have  
24 sufficient officers that may all be possible.

25 QUESTION: Even one.



1 MS. OBERLY: With one car at this point, who  
2 seeks the vehicle take off -- I can't tell you how fast  
3 that was because the record doesn't say. It seems to me  
4 what you're proposing may have been one reasonable way  
5 to proceed. But also, stopping the car for this very  
6 limited intrusion is equally reasonable and doesn't  
7 violate the Constitution any more than your proposal  
8 would.

9 QUESTION: Why would it be necessary to order  
10 him out of the car while they check with the -- asked  
11 about the --

12 MS. OBERLY: For the officer's own safety,  
13 because they wanted bulletin that they were relying on  
14 said consider these men armed and dangerous, and the  
15 Covington officers knew from -- they knew this  
16 Respondent. He was a local boy.

17 QUESTION: I understand that, but couldn't  
18 they park their car --

19 MS. OBERLY: They knew he was armed and  
20 dangerous.

21 QUESTION: Where were the two cars parked when  
22 they stopped him?

23 MS. OBERLY: Two cars?

24 QUESTION: The police officer's car --

25 MS. OBERLY: The police officer wasn't parked,

1 so far as I know. He was cruising.

2 QUESTION: But I mean, when he stopped the  
3 other vehicle, his vehicle also came to a stop, I  
4 assume.

5 MS. OBERLY: Right, correct.

6 QUESTION: And where were the two cars, next  
7 to one another? Couldn't they both have sat in their  
8 cars and he radiced and asked, is there a warrant  
9 outstanding?

10 MS. OBERLY: I don't think that having the  
11 officer sit in his car ensures that the suspect's car is  
12 also going to remain immobile and stay where it is.

13 QUESTION: You don't think so, with the lights  
14 flashing and the police car --

15 MS. OBERLY: Not given what they knew about  
16 these suspects, not at all.

17 I just again would like to say that your  
18 proposed course of action is reasonable, but that does  
19 not make what the Covington officers did here  
20 unreasonable or unconstitutional in the Fourth Amendment  
21 sense. What they did seemed to be the most prudent  
22 course of action to take at the time they were  
23 confronted with the situation where they had to make a  
24 swift decision.

25 That entire set of circumstances forms the

1 basis for this Court's Terry cases and post-Terry cases,  
2 that we're not going to second guess officers on the  
3 beat who make a reasonable decision and say, well, you  
4 could have done it in another manner and therefore what  
5 you did was wrong. I don't find anything wrong  
6 whatsoever with the way the officers proceeded in this  
7 case, even if there are multiple alternative methods  
8 that they could have employed.

9 And finally, I would just like to emphasize  
10 that this rule of the Court of Appeals that would  
11 prohibit one department from relying on a flyer issued  
12 by another department basically is a windfall for  
13 criminals who are able to get out of the first  
14 jurisdiction.

15 Once they've escaped the first jurisdiction,  
16 no other department can stop them. And there's nothing  
17 in this Court's jurisprudence and nothing cited by the  
18 Court of Appeals that would suggest that criminals who  
19 are that fortunate to rapidly escape the jurisdiction in  
20 which they committed their crime should never thereafter  
21 be able to be apprehended again simply because they've  
22 moved into someone else's area.

23 QUESTION: Well, that's really not quite  
24 right, because if they would advise whether there's a  
25 warrant outstanding that would decide whether or not

1 they could stop them. As I understand your position, if  
2 they had been told there was no warrant they could not  
3 have stopped. If they'd been told there was a warrant,  
4 then there's no question about the legality. A very  
5 simple rule.

6 MS. OBERLY: And we're in the middle ground,  
7 where they needed a very brief period of time to find  
8 out whether there was a warrant. Again, that's a  
9 classic Adams versus Williams situation, the language in  
10 Adams, maintaining the status quo to find out more  
11 information, something that would have immediately  
12 resolved the matter one way or another with minimal  
13 intrusion on the defendant's privacy interest.

14 QUESTION: Why in your view can't the second  
15 police department do anything the first police  
16 department could do if they were there on the ground?

17 MS. OBERLY: I hope that I haven't said they  
18 couldn't. I think that they can, if the first  
19 police --

20 QUESTION: I got an implication that you  
21 negated that.

22 MS. OBERLY: My position is that, if the first  
23 police department has the requisite reasonable suspicion  
24 or probable cause, as the case may be, for the action  
25 that it would take if it had been the acting department,

1 the second department can take the same action.

2 QUESTION: Haven't we in one case said that  
3 the knowledge of the one policeman -- it was a case cut  
4 in Wyoming.

5 MS. OBERLY: Whiteley versus Warden, Your  
6 Honor.

7 QUESTION: The knowledge of one policeman is  
8 the knowledge of all, and the second one may act on what  
9 the first man tells him just as though he knew all of  
10 the things the first man did.

11 MS. OBERLY: That's correct, and the only  
12 caveat to is that the information known to the first  
13 department has to be adequate, has to be either  
14 reasonable suspicion or probable cause.

15 QUESTION: If you take that position, then the  
16 second officer must have known there was no warrant  
17 outstanding. You don't want him to know that.

18 QUESTION: Why not?

19 MS. OBERLY: No, if he doesn't know --

20 QUESTION: If he knows there's no warrant, you  
21 would agree he could not stop him?

22 MS. OBERLY: No. No, because he has -- the  
23 first department, Your Honor, could also make a Terry  
24 stop. The first department, which clearly knows there's  
25 no warrant because it would have issued the warrant or

1 obtained the warrant if there was one, could still make  
2 an investigatory stop and when they come across the  
3 Respondent say, we'd like you to come talk to us, we'd  
4 like to question you. The Respondent doesn't  
5 necessarily have to submit, but that doesn't negate the  
6 authority of the first department to make the stop.

7 The second department in turn can likewise  
8 make a stop based on --

9 QUESTION: To find out what they're presumed  
10 already to know?

11 MS. OBERLY: No. No, Your Honor, they can't  
12 be presumed to know it. To find out what they need to  
13 know to assess what their future course of action will  
14 be, which is either immediately release him or find out  
15 that there's an arrest warrant and therefore they arrest  
16 him.

17 QUESTION: Are they or are they not presumed  
18 to know there was no warrant outstanding?

19 MS. OBERLY: I don't see how they can be  
20 presumed to know that.

21 QUESTION: Then they are not presumed to know  
22 everything that the other office knows.

23 MS. OBERLY: They're presumed to take any  
24 action that the first department could take. And it's  
25 clear here that the first department could have made a

1 stop based upon reasonable suspicion, which is all that  
2 the second department did.

3 QUESTION: So you're saying the presence or  
4 absence of a warrant really isn't material to your  
5 position?

6 MS. OBERLY: That's correct, because what  
7 we're relying on here is an investigatory stop, which  
8 obviously does not require a warrant.

9 QUESTION: And if all that the first  
10 jurisdiction had was reason to make an investigatory  
11 stop, would that be sufficient for the second  
12 jurisdiction to rely on?

13 MS. OBERLY: Yes, that translates.

14 QUESTION: Because there's no way you can tell  
15 from the flyer exactly the basis for the issuance of the  
16 flyer itself.

17 MS. OBERLY: That's correct.

18 QUESTION: I just don't see any relevance to  
19 the warrant argument.

20 MS. OBERLY: The warrant argument addresses a  
21 wholly different set of facts which we don't have in  
22 this case. I mean, it could arise frequently in the  
23 context of these interdepartmental cooperation cases.  
24 But in our particular case all that's needed is that  
25 department A have reasonable suspicion, that reasonable

1 suspicion is imputed to department B and department E  
2 can likewise make an investigatory stop.

3 And here they took the most reasonable action  
4 possible, which was immediately find out whether there  
5 was a basis for escalating their action.

6 I'll save the remainder of my time. Thank  
7 you.

8 CHIEF JUSTICE BURGER: Mr. Drennen.

9 ORAL ARGUMENT OF EDWARD G. DRENNEN, ESQ.,

10 ON BEHALF OF RESPONDENT

11 MR. DRENNEN: Mr. Chief Justice, members of  
12 the Court:

13 This case, as it gets further along, tends to  
14 get more and more blown out of proportion. The case  
15 that we originally dealt with at the district court  
16 level and the reason that the state court transcript is  
17 before you and was before the district judge was to  
18 demonstrate, in response to one of your questions, what  
19 did the officer mean by "take off."

20 If you read Officer Eger's testimony on page  
21 40 of the joint appendix, his testimony was at that  
22 point in time he said hello to Mr. Hensley, told him he  
23 was obstructing traffic, and told him to move along.  
24 And he then got on the radio and made an inquiry as to a  
25 flyer.



1           Now, it should be noted that then other  
2 officers began their conversations concerning this, and  
3 the despatcher said there is no flyer. So you have to  
4 again look back at their testimony, and their testimony  
5 was that they didn't recall whether it had been two  
6 months that they had heard it, two weeks that they had  
7 heard it, or the day before.

8           It becomes even more prevalent when you notice  
9 that the despatcher hooked into the watch commander and  
10 the watch commander said: There's no warrant, there's  
11 no flyer. They checked into Cincinnati: no flyer, no  
12 warrant.

13           The situation becomes even more blown out of  
14 proportion. They talk as if only Officer Ccke stopped  
15 the individual. There were four cruisers that stopped  
16 in moments. Mr. Hensley's whereabouts was known. They  
17 gave two locations over the radio. One was his home,  
18 the other one was his sister's home. He didn't even  
19 illegally park when he was pulled over.

20           They say limited intrusion --

21           QUESTION: Mr. Drennen, would you concede that  
22 the St. Bernard police could have made a Terry stop of  
23 the Respondent in their jurisdiction on reasonable  
24 suspicion, even though no warrant had issued.

25           MR. DRENNEN: No, I would not concede that.

1 There was absolutely no basis.

2 QUESTION: All right. Now, what if we  
3 disagree with you on that point and think the St.  
4 Bernard police could have made a Terry stop to do what  
5 Ms. Oberly's suggesting, to wit, ask him whether he'd be  
6 willing to come in and talk to them about a robbery?

7 MR. DRENNEN: And he would have the freedom to  
8 leave.

9 QUESTION: Yes.

10 MR. DRENNEN: But we're not dealing with that  
11 particular case.

12 QUESTION: All right, but I'm asking you to  
13 suppose for a moment that the St. Bernard police could  
14 have made a Terry stop. Could the Covington police,  
15 acting on the same information, do the same?

16 MR. DRENNEN: No, I don't believe they can,  
17 because you have to permit the defendant to leave. And  
18 in the Dunnaway case -- that's what you're asking in  
19 effect for me to discuss -- are they permitted to stop  
20 an individual, question him concerning ongoing criminal  
21 investigation? Do they have to advise that he's free to  
22 leave? Do they not advise him that he's free to leave?

23 You're asking whether the St. Bernard  
24 police --

25 QUESTION: Well, I'm asking you about the

1 stop, not the content of the questions.

2 MR. DRENNEN: Well, that's correct, and if you  
3 look at the stop, would the St. Bernard police have  
4 stopped him in the same manner that the Covington police  
5 did? Guns drawn, four cruisers, get your hands on the  
6 hood, slide all the way to the rear of the car, place  
7 your hands on the rear bumper or the rear hood of your  
8 vehicle, wait for the other cruisers to show up, then  
9 get you up on the sidewalk.

10 This didn't take a few moments. Other  
11 officers then proceeded to leave. The man was at  
12 gunpoint. While he was being questioned on the  
13 sidewalk, another officer decided to search through his  
14 vehicle.

15 You know, so is that what you would want the  
16 St. Bernard police to be able to do?

17 QUESTION: Well, I suppose the testimony is  
18 that an officer saw a gun in the open door of the  
19 vehicle.

20 MR. DRENNEN: That is correct.

21 QUESTION: And that provided the justification  
22 for a further search.

23 MR. DRENNEN: That is correct.

24 QUESTION: Within three minutes.

25 MR. DRENNEN: I believe, Mr. Chief Justice, if

1 you read the transcript, the transcript was that's how  
2 long it took the officers to get there, not necessarily  
3 how long it took all of this to transpire. All the  
4 cruisers began to converge on Mr. Hensley, who had not  
5 committed any type of offense.

6 They were relying solely on a flyer which  
7 didn't say we want to question him, Covington police  
8 question him. It asked --

9 QUESTION: The flyer said he was armed and  
10 dangerous, did it not?

11 MR. DRENNEN: It also said pick him up and  
12 hold him. And Mr. -- excuse me -- Officer Ccke's  
13 testimony in the original hearing was he was going to be  
14 held for investigation. He didn't say he was going to  
15 let him go. Page 15 of your joint appendix. It said he  
16 was going to be held for investigation.

17 This idea of, well, I was only going to stop  
18 him momentarily, came up later, once it had been shifted  
19 from the state system to the federal system. The  
20 situation you have to look at, what did the officer in  
21 Cincinnati, being St. Bernard, which has been  
22 intermingled -- St. Bernard is a suburb of Cincinnati --  
23 what was his request?

24 His request was to have the man arrested.  
25 That was his testimony. He wanted the man arrested so

1 he could come over and talk to him.

2 Now, how long is a reasonable period of time?  
3 There was no warrant issued for five months. The man  
4 was never charged. He was never actually indicted for  
5 this alleged robbery that took place in St. Bernard.

6 As we see it, there's no question. This was  
7 not an investigatory stop. It was an arrest. The  
8 purpose was to arrest him, to detain him, take him back  
9 to the station until St. Bernard could come down and  
10 talk to him.

11 The reason the warrant was issued in May was  
12 because that's when the officers from St. Bernard  
13 finally decided to come down and talk to him.

14 QUESTION: Well, Mr. Drennen, I think the  
15 Court of Appeals took a little bit different view of  
16 these facts than you're now stating. At least their  
17 opinion recites the officers' testimony that they only  
18 wanted to determine if there was a warrant and that  
19 Officer Coke testified he intended to release Hensley.

20 MR. DRENNEN: That was the testimony that  
21 Officer Coke elicited before the district judge. But  
22 the testimony was also, as appears in the transcript and  
23 was submitted to the district judge and was argued to  
24 the Court of Appeals, was that was not what happened.

25 QUESTION: Well, we're not hear to parse

1 through minute factual details in the record. We have a  
2 holding of the Court of Appeals on a point of law that  
3 we think should be reviewed.

4 MR. DRENNEN: That is right, and our position  
5 is that, though their wording is somewhat inconsistent  
6 with the actual findings as I would see them, their  
7 finding is correct. The officers had elicited an  
8 illegal act by the Covington police department. There  
9 were no specific, there were no articulable facts upon  
10 which to base their finding.

11 Mr. Hensley had done nothing wrong. If you  
12 take the step and see what the flyer initiated, the  
13 flyer, as it was testified to, was based on an affidavit  
14 of an individual that it's bantered back and forth  
15 whether she was or was not actually involved. It was  
16 our position at the district court, it was our position  
17 in the Court of Appeals, it's our position here, that  
18 woman was not involved; she was just relating what  
19 someone had told her.

20 The St. Bernard police relied on that  
21 information, relied on an affidavit which doesn't even  
22 mention my client's name. It never did. It relates to  
23 a man named Tommy.

24 Now, I think the difficulty is, if you're  
25 going to have flyers issued and when the officer says in

1 his own testimony, I did not personally believe I had  
2 probable cause to get a warrant, if there's a judge  
3 involved then I think it can be made proper. But when  
4 the police determine for themselves what is going to be  
5 probable cause solely for the purposes of investigation  
6 and solely for the purposes of arrest, then you're  
7 getting a situation that is tantamount to causing the  
8 police to have unbridled power to pick up anyone they so  
9 choose.

10 In this particular case, you've got a  
11 situation where, if the officer from St. Bernard had  
12 taken the information he had to a magistrate or a  
13 district judge and requested a warrant and that warrant  
14 was issued, then I don't think we would be here because  
15 I wouldn't have really any argument to try and second  
16 guess what was submitted and what is or is not probable  
17 cause to the judge.

18 But when the district court makes that  
19 determination, after the defendant's been arrested,  
20 after everything's been complete, he looks back and  
21 says, well, I disagree with the officer in St. Bernard,  
22 I think there was probable cause, I don't think he can  
23 do that.

24 This is closing the gate after the barn door  
25 -- the horse has gotten out of the barn. What we have

1 is a situation that, if you're going to balance the  
2 tests, then the officers' in Covington sole knowledge is  
3 that what they receive from St. Bernard. It was a  
4 flyer, a flyer which requested an illegal act, because  
5 it didn't ask them to question him; it asked them to  
6 hold him. It didn't ask them to do --

7 QUESTION: Do I understand you correctly that  
8 if a warrant is outstanding in St. Bernard, everything  
9 that happened here would have been all right?

10 MR. DRENNEN: I believe if a warrant had been  
11 issued for the man's arrest, the Covington police have  
12 no option but to arrest that person based upon that  
13 warrant. But that was not what they did here. They  
14 didn't go get a warrant. They simply decided for  
15 themselves, and that's what the officer testified to: I  
16 don't think I had probable cause to get a warrant, so I  
17 issued a probable cause flyer.

18 But the probable cause flyer requested the man  
19 to be arrested. It also elicited information that the  
20 man was armed and dangerous, which could have resulted  
21 in the death of the individual.

22 The situation that you have to relate is the  
23 proverbial balancing test: the individual's limited  
24 intrusion against the balancing of the enforcement of  
25 the law. The difficulty is, what the Government is



1 asking you to do is saying that an individual may be  
2 stopped, whether it's concerning investigating his  
3 activity at that moment, ongoing criminal investigation  
4 of a situation where they receive within moments or  
5 within an hour or so of a crime having been committed a  
6 description of a vehicle and a description of an  
7 individual and they stop the person based upon that.

8 This is weeks after an alleged robbery took  
9 place, based upon in effect hearsay information, they  
10 are asking that the man be stopped and arrested. I do  
11 not think that's what Terry warrants. I do not think  
12 that they can permit that type of conduct, because what  
13 it is in effect doing is permitting the officers to stop  
14 and harass any person that they know to be a criminal,  
15 simply because they want to stop him. They do whatever  
16 they want.

17 You know, what we've got here is a situation  
18 that Mr. Hensley, having done nothing wrong, was solely  
19 being stopped to be questioned about some activity two  
20 to three weeks before. The evidence that was elicited  
21 at trial and through the testimony and through the  
22 transcripts was that the officers knew: number one,  
23 there was no flyer within their department any longer;  
24 second, that there was no warrant within their  
25 department.

1                   Now, does that cause an officer on the street  
2 to presume therefore there is no warrant? Well, the  
3 Government's position: We need further information.

4                   QUESTION: But that information they got a  
5 little bit after they found the gun.

6                   MR. DRENNEN: To be exact, Justice Marshall,  
7 it took nine months to find that flyer.

8                   QUESTION: No, I'm talking about when they  
9 picked him up, when they found out that there was no  
10 warrant. That was after they had found the gun.

11                   MR. DRENNEN: No, that is not correct, Justice  
12 Marshall. They knew before they ever stopped Mr.  
13 Hensley: number one, that their department did not have  
14 a flyer; number two, that their department had no  
15 warrant.

16                   QUESTION: I said that the other side didn't,  
17 St. Bernard, did not have a warrant. When did they find  
18 that out?

19                   MR. DRENNEN: St. Bernard knew --

20                   QUESTION: Before or after they found the  
21 gun?

22                   MR. DRENNEN: Maybe I'm confused by your  
23 question. St. Bernard never asked for a warrant until  
24 five months after Mr. Hensley was stopped.

25                   QUESTION: When? Five minutes after?

1 MR. DRENNEN: No, five months after he was  
2 stopped, they got a warrant.

3 QUESTION: I'm talking about five months  
4 before. I'm talking about when Mr. Hensley was stopped  
5 and they found the gun. When in time did they find out  
6 that there was no outstanding warrant? Before or after  
7 they found the gun on that particular day, not months  
8 before?

9 MR. DRENNEN: I need to know which  
10 department.

11 QUESTION: Sir?

12 MR. DRENNEN: Are you asking about Covington?  
13 Covington is the department that stopped him. Is that  
14 the department that you're asking about? If that is the  
15 department, they knew before they ever stopped him there  
16 was no warrant.

17 QUESTION: Well, that's not according to the  
18 testimony I read. I read the testimony that they called  
19 to find out.

20 MR. DRENNEN: That is correct, and it was an  
21 ongoing situation. It was not something they stopped  
22 him, then tried to verify.

23 QUESTION: Well, let's take it easy. They  
24 called to find out if there was an outstanding warrant.

25 MR. DRENNEN: That is correct.

1 QUESTION: Two, they found out there was no  
2 outstanding warrant.

3 MR. DRENNEN: That is correct, through the  
4 despatcher.

5 QUESTION: Three, they found the gun.

6 MR. DRENNEN: That is correct.

7 QUESTION: Now, have you got all three of  
8 those situations --

9 MR. DRENNEN: That's how I see it.

10 QUESTION: Timewise, what was first?

11 MR. DRENNEN: The officers first called in to  
12 the despatcher.

13 QUESTION: Right.

14 MR. DRENNEN: And maybe here is where --

15 QUESTION: And what was second?

16 MR. DRENNEN: It depends on what you mean by  
17 "verify." If you mean the dispatcher tells the officer  
18 on the street there is no flyer, there is no warrant.

19 QUESTION: Are you taking the position you  
20 don't understand what I'm saying?

21 MR. DRENNEN: Apparently not, because as I see  
22 it --

23 QUESTION: Well, forget it.

24 MR. DRENNEN: No, no. What I see, Justice  
25 Marshall, is that the officers attempted to verify when

1 they called in to the despatcher, and when they called  
2 the despatcher there was no verification there available  
3 to them as to a flyer or a warrant.

4 Now, after they stopped Mr. Hensley, of  
5 course, they then went on to try and verify the  
6 existence of a flyer and the existence of a warrant.  
7 They did it at both times. It depends on whether you  
8 mean did they communicate with St. Bernard prior to the  
9 stop. No, they did not. They did not communicate until  
10 after, did they ever communicate with St. Bernard to  
11 find out, did you ever issue a warrant.

12 They were communicating back and forth to  
13 their department and their department said there is no  
14 flyer, there is no warrant.

15 QUESTION: Mr. Drennen, can I ask you a  
16 question if I'm not interrupting your answer? Supposing  
17 we change the facts just a little bit here and say that  
18 the Covington department knew there was no probable  
19 cause, knew there was no warrant, knew that the other  
20 department merely wanted to question the man on  
21 reasonable suspicion.

22 And they stopped -- they saw the defendant and  
23 they stopped him in motion on the streets and just  
24 pulled him over to the side, got out of the car, went up  
25 to the window and said to him: I would like you to know

1 you're under suspicion over in Cincinnati or the other  
2 town and they would like you to stop in and talk to  
3 them; you may want to exonerate yourself, or something  
4 like that.

5 And during such a conversation they saw  
6 through the window the guns. Would that be  
7 unconstitutional?

8 MR. DRENNEN: No, I don't think in any way,  
9 shape or form that's more than just a momentary  
10 inconvenience.

11 QUESTION: But it's a stop.

12 MR. DRENNEN: It is a stop, but their purpose  
13 was not to arrest or to hold; it was solely to advise an  
14 individual of something. It was a momentary  
15 inconvenience. There's a difference between stopping  
16 the man casually on the street as you walk by or you see  
17 him or coming to his home --

18 QUESTION: No, I'm saying pulling a car over,  
19 pulling a car over.

20 MR. DRENNEN: -- or stopping him and pulling  
21 him over and saying: Mr. Hensley, St. Bernard has  
22 issued a flyer, they want to talk to you, blah, blah,  
23 blah, and he looks in and sees the gun. You know, it's  
24 a situation with the officer where he should have been  
25 and I don't see that wrong in any way, shape or form.

1 QUESTION: So your whole attack on this is  
2 based on getting him out of the car and drawing the  
3 gun?

4 MR. DRENNEN: And it's whether or not, in  
5 addition to that, whether or not there are specific and  
6 articulable facts that that officer, when you look at  
7 what he had and what he knew -- and in the  
8 Whiteley-Warden case, there was a warrant. If the  
9 warrant's no good, then the ultimate action by the  
10 officer is not shielded by the wrong act.

11 QUESTION: But you've conceded they could stop  
12 the vehicle even though there were no warrant and  
13 everybody knew there were no warrant?

14 MR. DRENNEN: That's right. I don't see  
15 anything wrong with an officer simply advising someone  
16 that another department wants to talk to him.

17 QUESTION: Well, Mr. Drennen, your argument  
18 seems to turn, at least in part, on the thoughts in the  
19 mind of the Covington police officers who made the stop,  
20 rather than on objectively examining what they did and  
21 what happened. You want us to look inside their head  
22 and say: Well, what they intended to do was to make  
23 some lengthy detention here which they have no authority  
24 to do.

25 Now, we don't do that normally, do we? Don't

1 we have to look at what happened, not at what was in one  
2 of the officer's heads at the time?

3 MR. DRENNEN: I'm not asking you to look  
4 inside the officer's head. I think the officers  
5 themselves have testified. What I'm saying to the Court  
6 is that the situation is such that it is in this  
7 particular case --

8 QUESTION: Well, if the officer could  
9 legitimately have made a brief stop, as you just  
10 indicated to Justice Stevens, and that objectively is  
11 what had happened here at the time the gun was seen,  
12 then don't we stop there?

13 MR. DRENNEN: No. Your situation is one of,  
14 number one, that an officer in his normal course of  
15 business runs across many things. If the officer is  
16 just simply following up information -- he sees the  
17 individual, he is simply saying, look, someone wants to  
18 talk to you -- I don't see that as necessarily an  
19 abusive act on his part.

20 But when the officer's intent was to arrest,  
21 when they were relying solely upon a flyer which  
22 requested an illegal act -- and let's take the situation  
23 as presented. If in that same set of circumstances the  
24 officer observes the weapon, we then have to look, what  
25 put that officer in that place, whether it was a warrant



1 issued by a judge or a flyer issued by another  
2 department.

3 Now, if it's a flyer issued by another  
4 department, then again he is acting upon what another  
5 department has requested him to do. If you then go back  
6 after the stop, they find the gun, he did nothing more  
7 than ask the man or tell the man something, it's then  
8 found out that the basis for him being there was  
9 improper, then his basis for being there is no longer  
10 good.

11 QUESTION: Well, but suppose we agree with you  
12 that the St. Bernard police could not properly ask  
13 another department to make an extended detention of  
14 someone until they arrive. But let's also suppose that  
15 the arresting officer in Covington knew that request was  
16 improper and all he was going to do was make a proper  
17 stop to say: Look, you ought to go across the river and  
18 talk to the St. Bernard police. Isn't that all right?

19 MR. DRENNEN: No, I don't perceive that as  
20 being all right, because he has to be -- whatever his  
21 conduct for being where he is has to be based upon some  
22 proper information. If the flyer is issued and he has  
23 acted upon the flyer, then we have to look at the  
24 flyer. If the flyer's no good --

25 QUESTION: Well, suppose part of the flyer is

1 properly set forth information and part isn't, and he  
2 ignores the improper part. Is that invalid?

3 MR. DRENNEN: Yes, I do, because I don't think  
4 the officer can pick and choose what he wants to be  
5 insulated against. The officer in Covington is acting  
6 solely upon the information he receives, nothing else.  
7 He can't say, I'm only going to accept this portion  
8 which I think is valid and this portion which is  
9 invalid, because what you're then asking the police  
10 officers on the street to do is tantamount to make them  
11 lawyers, make them all go to law school, make them all  
12 become judges.

13 I don't think that's proper. And when an  
14 officer in another department places himself as a judge  
15 and requests an illegal act to be performed, the officer  
16 who performs it, even though he is doing it solely in  
17 totally good conscience, he is not insulated from that  
18 act. And therefore what put him in the place, put him  
19 on the street, put him at the car of Mr. Hensley is no  
20 good and whatever he finds incidental to it is no good.

21 Thank you very much.

22 CHIEF JUSTICE BURGER: Do you have anything  
23 further, Ms. Oberly?

24 REPUTIAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.,

25 ON BEHALF OF PETITIONER

1 MS. OBERLY: Briefly, Your Honor, the case  
2 seems in the last hour to have gotten somewhat confused  
3 by a lot of different factual situations, and I would  
4 just like to reiterate. I have two main points, which I  
5 don't think depend on all the hypotheticals.

6 One is Terry stops are not and cannot be  
7 limited to ongoing crimes. It simply makes no sense to  
8 say that criminals are home free once they get away with  
9 their crime and they're not immediately detected, and we  
10 would strongly urge that that aspect of the Court of  
11 Appeals' ruling be reversed.

12 The second point is that it has long been  
13 recognized by this Court and the Courts of Appeals that  
14 police departments must and are able to cooperate with  
15 each other; that it is not necessary that they  
16 cross-examine each other about the basis of the first  
17 department's knowledge.

18 And in this case there was no reason that the  
19 Covington officers had to know precisely what the St.  
20 Bernard officers had to know. Yet that is exactly what  
21 the Court of Appeals required in this case. They said  
22 the stop -- the arrest was defective because the  
23 Covington officers did not have the personal knowledge  
24 that the St. Bernard officers had. In our view that  
25 personal knowledge is not required.

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Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:30 a.m., oral argument in  
the above-entitled case was submitted.)

\* \* \*

CERTIFICATION

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

#83-1330 - UNITED STATES, Petitioner v. THOMAS J. HENSLEY

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BY Paul A. Richardson

(REPORTER)

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