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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** No. 83-529

**TITLE** UNITED STATES, Petitioner v. WILLIAM HARRIS SHARPE,  
ET AL.

**PLACE** Washington, D. C.

**DATE** Tuesday, November 27, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 83-529

WILLIAM HARRIS SHARPE, :

ET AL. :

- - - - -x

Washington, D.C.

Tuesday, November 27, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:01 o'clock a.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of the petitioner.

MARK J. KADISH, ESQ., Atlanta, Georgia; as amicus  
curiae in support of judgment below.

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1                   P R O C E E D I N G S

2                   CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in United States against Sharpe.

4                   Mr. Frey, you may proceed whenever you are  
5 ready.

6                   ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

7                   ON BEHALF OF THE PETITIONER

8                   MR. FREY: Thank you, Mr. Chief Justice, and  
9 may it please the Court, this case is here on the  
10 government's petition for writ of certiorari to review a  
11 judgment of the United States Court of Appeals for the  
12 Fourth Circuit suppressing a truckload of marijuana  
13 seized from the respondents on the ground that the  
14 discovery of the marijuana was the fruit of an unduly  
15 prolonged detention.

16                  QUESTION: Was it really a whole truckload?

17                  MR. FREY: Well, it was a -- this was a pickup  
18 truck with a camper shell. It was 43 bales of marijuana  
19 weighing, I think, about 2,600 pounds. That is a fair  
20 quantity.

21                  QUESTION: That is quite a bit, yes.

22                  MR. FREY: The case began when there was an  
23 operation to investigate suspected smuggling, marijuana  
24 smuggling in the -- it was believed to be occurring  
25 either in the northernmost coastal county of South



1 Carolina or the southernmost coastal county of North  
2 Carolina.

3 And the main actor on the law enforcement side  
4 was DEA Agent Cooke, who was patrolling the highways  
5 near the beaches where the marijuana activity was  
6 suspected to be occurring, and he saw the pickup truck  
7 with camper shell, which turned out to be driven by  
8 respondent Savage, proceeding in tandem with a Pontiac  
9 automobile, which turned out to be driven by respondent  
10 Sharpe.

11 Being suspicious of these vehicles, he  
12 followed them for some 20 miles as they proceeded south  
13 and observed certain things about them which to his mind  
14 confirmed his suspicion that they might be engaged in  
15 marijuana smuggling.

16 He determined at that point that he might like  
17 to make a stop, and he radioed for assistance, and  
18 Patrolman Thrasher of the South Carolina State Police  
19 joined this procession of vehicles as it proceeded  
20 toward Myrtle Beach, and shortly after Thrasher joined  
21 the procession, the pickup truck and the car made a turn  
22 onto a camp road, sped along that road well in excess of  
23 the speed limit.

24 The road made a loop and returned to the main  
25 highway. They were followed all this time by Agent

1 Cooke and Patrolman Thrasher. They turned back on the  
2 main highway headed south. At that point it was decided  
3 by Agent Cooke that they should be stopped for  
4 investigation.

5 He asked Thrasher to signal them to halt.  
6 Thrasher did so. When he did so, the Pontiac automobile  
7 driven by Sharpe pulled over to the side. The truck  
8 driven by respondent Savage sped off in between the  
9 patrolman's car and the Pontiac down the road.

10 At this point, Patrolman Thrasher followed the  
11 truck down the road and Agent Cooke stopped with the  
12 Pontiac. He asked Sharpe for identification. Sharpe  
13 produced a license in the name of Raymond J. Pavlovich.  
14 Cooke made some further efforts to communicate with  
15 Thrasher which were initially unsuccessful. At the same  
16 time, he called for backup units from the Myrtle Beach  
17 Police to come and hold Sharpe and his passenger while  
18 he went on to see if he could locate the truck.

19 He went down the road, caught up half a mile  
20 down the road with Patrolman Thrasher and the truck, and  
21 in the meanwhile, to come back to that stopping,  
22 Thrasher had pursued the truck, stopped it half a mile  
23 down the road. Savage had been ordered out of the  
24 vehicle or had been coming out of the vehicle. It is  
25 not quite clear.

1 He was frisked. He was then asked for license  
2 and registration. He produced a bill of sale in the  
3 name also of Raymond J. Pavlovich, and at that point he  
4 was simply held by Agent Thrasher -- by Officer Thrasher  
5 until Agent Cooke appeared on the scene.

6 QUESTION: Mr. Frey, did he ask if he could  
7 leave?

8 MR. FREY: He did ask if he could leave.  
9 There is no question --

10 QUESTION: Why wasn't he allowed to?

11 MR. FREY: He wasn't allowed to leave because  
12 there was a reasonable suspicion that the truck  
13 contained marijuana.

14 QUESTION: At that time?

15 MR. FREY: At that time. That was the basis  
16 for the stop. The basis for the stop was Agent Cooke's  
17 suspicion of marijuana smuggling activity, which focused  
18 on the truck as --

19 QUESTION: Tell me again, why wasn't he  
20 allowed to leave?

21 MR. FREY: He was not allowed to leave because  
22 Agent Thrasher had determined to hold him until Cooke  
23 arrived on the scene to conduct a --

24 QUESTION: Any precedent of curs that  
25 justified that?

1 MR. FREY: Excuse me?

2 QUESTION: Any precedent of ours that  
3 justified not letting him leave?

4 MR. FREY: Well, I do intend to get into  
5 that. I think there is precedent of yours in terms of  
6 analysis and language in opinions that clearly justifies  
7 that. I don't think there is any holding that is  
8 directly on point.

9 QUESTION: How long was he in fact held after  
10 he had --

11 MR. FREY: Well, this detention was from the  
12 time he was stopped --

13 QUESTION: No, after he asked to leave.

14 MR. FREY: I think he was already being  
15 detained at the time he was pulled over to the side of  
16 the road, so to my mind the fact that he asked to leave  
17 is irrelevant. He was already under -- his person had  
18 already been seized within the meaning of the Fourth  
19 Amendment even before he asked to leave. It is not  
20 clear when he asked to leave. I am not certain when  
21 that is, but from the beginning initiation --

22 QUESTION: You are not suggesting there was  
23 probable cause to detain him, are you?

24 MR. FREY: No. No, our suggestion is that  
25 what there was in this case was a seizure at the time he



1 was pulled over by Officer Thrasher, supported by  
2 reasonable suspicion, which extended for approximately,  
3 and the record is not totally clear, about 20 minutes  
4 until Agent Cooke arrived.

5 QUESTION: And would it make any difference if  
6 it were an hour instead of 20 minutes?

7 MR. FREY: Yes.

8 QUESTION: What, if it were an hour? That  
9 would be too long?

10 MR. FREY: Well, we would have to know why it  
11 was an hour, but ordinarily --

12 QUESTION: Well, the same reason. The  
13 distance between the car and the truck was just greater,  
14 that's all, and it took an hour for Cooke to get there.

15 MR. FREY: Well, I think we would still defend  
16 that as being consistent with the Fourth Amendment.

17 QUESTION: Two hours?

18 MR. FREY: Well, I think there is clearly an  
19 outer limit, because you would have to ask yourself  
20 whether it is reasonable under the circumstances to take  
21 some other means.

22 The reason why the detention was extended in  
23 this case was quite clearly because Officer Thrasher  
24 didn't know -- he was acting as agent for Cooke in  
25 making the stop. He knew nothing about the

1 investigation, what Cooke had observed, what the joint  
2 task force that was investigating the smuggling activity  
3 knew.

4 He didn't know really what questions to ask or  
5 what things to do. Once Agent Cooke arrived on the  
6 scene, it was a matter of about five minutes for him to  
7 ask a couple of questions, seek and he denied consent to  
8 search the camper.

9 QUESTION: Mr. Frey, could I ask at this  
10 point, is the analysis the same with respect to Mr.  
11 Sharpe as it is with respect to Mr. Savage? He was back  
12 in a different location, wasn't he?

13 MR. FREY: Well, I would say that as to  
14 respondent Sharpe, there is no -- he might as well have  
15 been sitting at home in Kansas City in terms of the  
16 discovery of the evidence.

17 QUESTION: Except that he was by the side of  
18 the road with an officer telling him he couldn't go any  
19 place. That is not quite the same as being at home.

20 MR. FREY: Well, it is possible, although we  
21 contend it is not true, that Sharpe was unlawfully  
22 detained. However, the evidence in question in this  
23 case is the marijuana seized from Savage's camper.

24 QUESTION: I understand.

25 MR. FREY: And whether Sharpe had -- Sharpe

1 could have been arrested without probable cause. He  
2 could have been --

3 QUESTION: Your main position with respect to  
4 Sharpe is, he doesn't really have standing to object.  
5 Is that --

6 MR. FREY: It is that he doesn't have  
7 standing, but really standing and fruits are intertwined  
8 in this case. That is that nothing was the product of  
9 the detention of Sharpe except for the discovery of the  
10 license which occurred immediately when --

11 QUESTION: Really what I am trying to ask, I  
12 am trying to follow up on what Justice Brennan asked  
13 you. Is the timing any different? Could you have held  
14 -- you say you would get a point with respect to Savage  
15 when perhaps it would have been too long if they hadn't  
16 ripened into probable cause.

17 How long could they have detained Sharpe? The  
18 same length of time?

19 MR. FREY: I think it would be essentially the  
20 same length of time that they could detain either of  
21 them. The detention of Sharpe was longer from the time  
22 that he was --

23 QUESTION: They could detain Sharpe because  
24 they had reasonable suspicion about Savage?

25 MR. FREY: And about Sharpe.

1 QUESTION: That they might be connected.

2 MR. FREY: Because Sharpe and Savage were  
3 clearly together. So there are two separate questions.  
4 One is whether Sharpe was unlawfully detained, and my  
5 point in this connection is that what you must focus on,  
6 because what is at issue is the admissibility of the  
7 marijuana seized from the camper, is only the detention  
8 from the time the camper was stopped until the time  
9 probable cause to believe it contained marijuana  
10 developed is the relevant period of time.

11 Now, for Mr. Sharpe, he was detained longer,  
12 but in our view, that detention was not unlawful, A,  
13 because it was justified by the circumstances, certainly  
14 the last ten minutes or so of it were after probable  
15 cause had already developed, and in any event, whether a  
16 lawful or unlawful, irrelevant to the admissibility of  
17 the marijuana.

18 Sharpe could have been detained for ten  
19 hours. It had nothing to do with finding the  
20 marijuana.

21 QUESTION: May I ask one other question about  
22 the -- you mentioned in your description of the case  
23 that they apparently were speeding when they went in and  
24 out of the camp site or whatever, the pull-off part, and  
25 also that the camper in effect sort of sped away when he



1 pulled the car over.

2 MR. FREY: Yes.

3 QUESTION: Do you rely on those two  
4 circumstances merely as buttressing your showing of  
5 probable smuggling activity, or do you rely on them in  
6 part as violations of law?

7 MR. FREY: Well, with respect to the speeding,  
8 I rely on it only insofar as an issue which is not  
9 before the Court, which is the validity of the initial  
10 stop, which the Court of Appeals didn't pass on. I  
11 think the initial stop would be justified by the  
12 speeding. I do not rely on the extended detention on the  
13 basis of the speeding, because there is no evidence in  
14 the record that the speeding would have led to a  
15 custodial arrest or would ordinarily have led to an  
16 extended detention.

17 So, the extended detention we seek to justify  
18 only by the suspicion of marijuana smuggling. Now,  
19 the --

20 QUESTION: Mr. Frey, I want to ask about this  
21 point if I may. You say we don't have to decide the  
22 question of whether there was reasonable suspicion to  
23 make the initial stop. Is that right?

24 MR. FREY: I believe that's correct. I think  
25 you could decide it.

1 QUESTION: Would it be remanded for that  
2 purpose then, since the Court of Appeals didn't decide  
3 it?

4 MR. FREY: Leaving aside the question of  
5 respondents' fugitivity, I would say that it would be  
6 within the discretion of this Court either to go ahead  
7 and decide it if it chose to or to remand it.

8 For instance, in United States against  
9 Hasting, where the issue was harmless error, there was a  
10 question, A, whether the Court of Appeals was obliged to  
11 consider harmless error, and B, whether if it was  
12 obliged to consider it the error was harmless. And this  
13 Court chose to rule --

14 QUESTION: Would we have enough before us in  
15 the record to determine the reasonable suspicion issue  
16 as it stands?

17 MR. FREY: Well, we think there quite clearly  
18 was enough to amount to a reasonable suspicion --

19 QUESTION: Of a narcotics -- transportation of  
20 illegal drugs?

21 MR. FREY: Yes, we think so. Yes.

22 QUESTION: And so in responding to Justice  
23 Stevens, you are not asking the Court to rely on the  
24 speeding violation as --

25 MR. FREY: No, because -- I think the speeding

1 violation would justify the initial stop, but I don't  
2 think that carries the day for us because the problem  
3 here is the validity of detaining Savage for 15 or 20  
4 minutes while Cooke was able to arrive on the scene and  
5 conduct his investigation.

6 QUESTION: I take it you also are not really  
7 relying on the pulling away of the van at the time they  
8 -- they had already decided to stop them.

9 MR. FREY: That is true. We are not relying  
10 on it to justify the stop, because the siren already had  
11 been turned on, if they didn't have reasonable  
12 suspicion.

13 QUESTION: Do you think that activity made it  
14 reasonable to detain them for a little longer than if he  
15 had not pulled away as --

16 MR. FREY: Definitely. Definitely. And --

17 QUESTION: So there is kind of reasonable  
18 suspicion enough to stop them, and then a little more  
19 reasonable suspicion to justify 15 minutes --

20 MR. FREY: It is not just that it adds to the  
21 increment of suspicion.

22 QUESTION: There are two levels of reasonable  
23 suspicion.

24 MR. FREY: It is that it necessitates the  
25 extended detention, which otherwise would not have been

1       necessary.

2               QUESTION: I see. Sort of like an exigent  
3       circumstance that made it necessary.

4               MR. FREY: Part of the question is whether it  
5       was justified to detain respondent Savage for 15 or 20  
6       minutes until Cooke conducted his investigation, and we  
7       are saying that the fact that Savage sped off down the  
8       road, almost running into Thrasher's police car, and was  
9       only apprehended a half a mile away, separate, and there  
10      are only two police officers involved in the  
11      investigation, so if they wanted to investigate both of  
12      these individuals, one had to stop with one, the other  
13      had to pursue the other.

14              And as it turned out, quite reasonably,  
15      Thrasher had the equipment, pursued the vehicle that was  
16      trying to flee, and Agent Cooke stopped with the vehicle  
17      that had pulled over.

18              Now, I think this case poses as its primary  
19      issue, stated most broadly, whether the Fourth Amendment  
20      generally prohibits the prolongation of a stop based on  
21      reasonable suspicion short of probable cause for more  
22      than a few minutes.

23              And if the Fourth Amendment does sometimes  
24      permit such extended detentions, the narrower question  
25      is whether the circumstances of this case were such as



1 to justify the detentions here.

2 Now, in addition, because the respondents are  
3 fugitives, the Court may also deem it necessary to  
4 consider the effect that that has on the proper  
5 disposition of this case. We have addressed it in our  
6 reply brief, and I would be happy to answer any  
7 questions that the Court may have.

8 QUESTION: Your position basically is, heads  
9 you win, tails they lose. Is that right?

10 MR. FREY: Well, it's the same essentially as  
11 their position. That is, their position is, if they win  
12 the case, maybe they will show up again, and if they  
13 lose the case, then they won't. So it is true in a  
14 sense that --

15 QUESTION: If your position is right, the  
16 third alternative in your reply brief, what motivation  
17 would the other side have to really fight the case as a  
18 true adversary, you know, all the problems that are  
19 involved in cases --

20 MR. FREY: Well, the other side is not a true  
21 adversary. The Court declined to appoint Mr. Kadish to  
22 represent the respondents, I assume precisely because  
23 they were fugitives.

24 QUESTION: But do you think that is an  
25 appropriate case for us to decide constitutional issues

1 in --

2 MR. FREY: I have no doubt that --

3 QUESTION: -- when there is no way in the  
4 world that you can lose?

5 MR. FREY: Well, when you say that there is no  
6 way in the world that we can lose, it is as though we  
7 were here arguing about a constitutional question as in  
8 Milton against Wainwright, which may in the end turn out  
9 to be harmless error. There may be no way in the world  
10 we can lose because an error is harmless.

11 In United States against Leon the argument was  
12 made that if you had a reasonable mistake exception to  
13 the exclusionary rule, then that would freeze the  
14 development of Fourth Amendment law, because you would  
15 always know when you had a new Fourth Amendment issue  
16 that the government in the end was going to win on the  
17 suppression motion, and yet this Court said there is  
18 nothing in the Court's jurisprudence that makes it  
19 inappropriate to first consider the merits, and then if  
20 it is necessary and appropriate to do so, turn to the  
21 question of remedy.

22 No question that we have a full adversarial  
23 presentation. I expect Mr. Kadish to be every bit as  
24 vigorous today as if he were here representing Sharpe  
25 and Savage --

1 QUESTION: You mean there is no difference  
2 between amicus curiae and respondent?

3 MR. FREY: Well, it is frequent in this  
4 Court's past jurisprudence that there has not been --

5 QUESTION: That wasn't my question. There is  
6 a difference.

7 MR. FREY: There is a difference, but I don't  
8 think it is a difference that deprives this case of its  
9 adversarial --

10 QUESTION: Well, it is not a normal  
11 adversarial proceeding, is it?

12 MR. FREY: Well, it is not a normal one, but  
13 it is one that is far from unknown to this Court. Going  
14 back -- the first case that I am aware of, although I am  
15 sure it happened before, was a case called Granville  
16 Smith, which involved the validity of a Virgin Islands  
17 divorce law where both parties took the position that  
18 the law was valid and that the divorce they had was  
19 good, and the Court appointed an amicus to defend the  
20 judgment --

21 QUESTION: There is also a difference between  
22 a divorce and going to jail, believe it or not.

23 MR. FREY: Well, the problem of -- the  
24 Molinaro principle seems to me quite clearly to suggest  
25 that as far as the going to jail aspect of this case is

1 concerned, respondents, by taking it upon themselves to  
2 become fugitives, are going to end up going to jail. I  
3 don't understand -- that seems to me the rock bottom  
4 principle, that is, that the Court will not allow a  
5 party to place itself beyond the reach of the Court's  
6 judgment, and if the Court's judgment is unfavorable,  
7 not to be subject --

8 QUESTION: Mr. Frey, had they been released  
9 before --

10 MR. FREY: They were on bail.

11 QUESTION: Was that it, on bail?

12 MR. FREY: They were on bail.

13 QUESTION: And they forfeited the bail? Is  
14 that it?

15 MR. FREY: Bail has been forfeited. A bench  
16 warrant has been issued for their arrest. There are  
17 also other charges at least against Sharpe in other  
18 jurisdictions from which he is also a fugitive.

19 But it seems to me that the one point that is  
20 clear, and we analogize this in our brief to the  
21 situation in Walder and Havens, because this is a claim  
22 for suppression of evidence under the Fourth Amendment  
23 exclusionary rule. This is not a claim that these  
24 defendants are innocent, which might cause a different  
25 set of concerns.



1           So that if you view it as a matter of  
2       exclusionary rule policy, you must ask yourself the  
3       question whether these defendants are entitled to a  
4       favorable judgment reversing their conviction on the  
5       grounds of an illegal search or seizure when they are  
6       not willing to submit to an unfavorable judgment should  
7       the Court render one.

8           QUESTION: Well, I think you make a very  
9       persuasive argument that -- at least alternate two, that  
10      if they are fugitives, they forfeit their right to have  
11      the benefit of any judgment. Once they have forfeited  
12      that right, they are not the kind of adversary I  
13      normally like to have arguing constitutional questions.  
14      That is my problem. I understand that there are  
15      precedents of the Court that support your view, but  
16      isn't there at least some argument to the contrary?

17          MR. FREY: In the Haslip case last term you  
18      had to appoint someone who was an amicus to defend the  
19      judgment of the Court of Appeals.

20          QUESTION: That was not a fugitive involved,  
21      though.

22          MR. FREY: It did not involve a fugitive,  
23      but --

24          QUESTION: And the litigant himself -- I mean,  
25      you have to look not only at the lawyer, but the

1 litigant himself here has no interest in the -- if we  
2 agree with you on Molinaro, the litigant himself has no  
3 interest in what happens in this case.

4 MR. FREY: That is precisely the argument that  
5 was made in the exclusicnary rule case.

6 QUESTION: Well, I realize that, and that is  
7 one of the unfortunate things about the courts.

8 QUESTION: And Villamonte-Marquez.

9 MR. FREY: Well, but that was a little bit  
10 different, because there the claim was that the case was  
11 moot, or that we scmehcw had lost the right to pursue  
12 our case by deporting them, but the respondents had done  
13 nothing wrong other than their drug smuggling. That is,  
14 their departure from the jurisdiction of the Court was  
15 not their fault, whereas here it is clearly their  
16 fault.

17 QUESTION: Of course, they didn't bring this  
18 case. You did, didn't you?

19 MR. FREY: We certainly did bring this case.

20 QUESTION: The government looks over a whole  
21 list of cases, and finds the one that the man is gone  
22 and doesn't have any lawyer.

23 MR. FREY: No, when we petitioned, they were  
24 not fugitives, and when the Court granted this petition  
25 we were still unaware, and I am not sure whether Savage

1 was a fugitive. It was only after the Court granted the  
2 petition that Savage was declared a fugitive, and it was  
3 only in August, after we filed our opening brief in  
4 August of this year, that we learned that both  
5 respondents were fugitives.

6 And I must say that the Court has in the past  
7 always been satisfied -- if you are not satisfied that  
8 you have an adequate adversarial presentation, if you  
9 are not satisfied that you have an adequate basis to  
10 decide the merits of the Fourth Amendment issue in this  
11 case, then by all means simply vacate the case and  
12 remand with instructions to dismiss their appeal. But I  
13 think you will find that there has been a competent,  
14 full adversarial presentation, and that you will have --

15 QUESTION: And wcr't there be another case  
16 just like this?

17 MR. FREY: Well, that is the nature of cases  
18 before this Court by and large. Because they involve  
19 important issues, there will be another case.

20 QUESTION: Right down by Myrtle Beach there  
21 will be another one.

22 MR. FREY: There will certainly be other  
23 cases. This is an important and recurring issue. It is  
24 the nature of the beast that there will be other cases.

25 Now, I think the main burden of our argument

1 on the merits here is that both from the standpoint of  
2 Fourth Amendment policy and from the standpoint of this  
3 Court's precedence, the Court of Appeals erred in  
4 holding that there is some strict and brief time limit  
5 on detentions based on suspicion short of probable  
6 cause.

7 This kind of issue can arise in various  
8 circumstances, and I would like to just give a couple of  
9 examples for the Court to have in mind. For instance, a  
10 car may be stopped on the basis of a reasonable  
11 suspicion that it is stolen, and it may take five or ten  
12 or fifteen minutes to run a computer check on the  
13 license plate or registration that is produced in order  
14 to determine whether or not it is stolen, and in those  
15 circumstances law enforcement officers would have  
16 substantial reasons for wanting to detain the individual  
17 in the automobile long enough to conduct such a check.

18 That doesn't mean if it took an hour or two  
19 hours that they would be justified in doing it.

20 QUESTION: Well, Mr. Frey, what is your  
21 suggestion as to the outer limit of time in  
22 circumstances where there may be detention?

23 MR. FREY: My suggestion is that there is no  
24 hard and fast outer limit of time, and that the Court in  
25 fact made that quite clear in United States against



1 Place when it rejected the ALI 20-minute formulation.  
2 ALI had proposed a strict outer limit of 20 minutes.  
3 But I think it is quite clear --

4 QUESTION: What formula do you suggest ought  
5 to guide us?

6 MR. FREY: I suggest that the Court has  
7 adopted the formula of Professor LaFare in his treatise,  
8 which has been endorsed quite clearly in the opinion of  
9 the Court in Michigan against Summers, and essentially I  
10 would sum it up by saying that in determining whether a  
11 detention is reasonable, the inquiry should focus on the  
12 purpose of extending the detention, that is, the  
13 specific course of action that the police tend to pursue  
14 during the period, whether these actions are likely to  
15 produce confirmation of their suspicions within a  
16 relatively short period, and I am not willing to give a  
17 precise number to that.

18 The Court should consider such factors as the  
19 gravity of the offense under investigation, the risk  
20 that the suspect would avoid apprehension if he is  
21 released, the substantiality of the officer's suspicion,  
22 the degree of inconvenience caused to the suspect by the  
23 detention, and the intrusion of circumstances beyond the  
24 officer's control, and this is quite relevant to this  
25 case, that caused the prolongation of the detention,

1 and, of course, considerations relating to the officer's  
2 personal safety.

3 Now, I understand that you have consistently  
4 adopted the position, but ordinarily in dissent, that --

5 QUESTION: I won't stop for that reason.

6 MR. FREY: Hm?

7 QUESTION: I won't stop for that reason.

8 MR. FREY: No, well, perhaps not, but I would  
9 like to suggest that even under your views that in this  
10 case the government's position ought to prevail, and let  
11 me explain that. You did join the decision of the Court  
12 in United States against Cortez, where there was -- the  
13 issue was whether there was reasonable suspicion.

14 The Court all agreed that there was. The car  
15 was pulled over, and within a matter of a couple of  
16 minutes, there was consent to a search, which produced  
17 the illegal aliens who were hidden in the back of the  
18 vehicle.

19 Now, in this case, if you look at what  
20 happened from the time Officer Cooke arrived at the  
21 pickup until he acquired probable cause, there was a  
22 question and answer period, a request for consent to  
23 search. All of this took somewhere around five  
24 minutes.

25 Savage had claimed that the vehicle was empty,

1 and that he was on the way to get the shock absorbers  
2 fixed. Cocke then conducted what we might call a  
3 non-search inspection of the vehicle. He stepped on the  
4 bumper to see whether it was empty, as had been  
5 suggested, or fully loaded, as he thought he had  
6 observed in pursuing it. And he put his nose up to the  
7 vehicle, took a strong breath, and smelled marijuana.

8 Now, all of this would be, I think, within the  
9 confines of what you would agree would be a permissible  
10 Terry stop, a very concise, directed inquiry of short  
11 duration. The only reason in this case that that didn't  
12 happen right away is because of the conduct of the  
13 suspects in one of them separating himself from the  
14 other and proceeding down the road.

15 Now, it seems to me that at least in those  
16 circumstances the government ought to be permitted to  
17 conduct that narrow investigation, and the delay here of  
18 ten or fifteen minutes in Agent Cooke getting to the  
19 scene so that he could conduct that brief investigation  
20 should not be counted in the balance against the  
21 government. This should be held to be within the scope  
22 of a permissible stop even under the view that only the  
23 narrowest kind of intrusion is justified.

24 QUESTION: Well, Mr. Frey, what do you do  
25 about this? Had there been two agents who were

1 qualified to act as drug investigators, the detention  
2 wouldn't have -- even though the man sped away, if the  
3 agent following him hadn't been a trooper but a drug  
4 agent --

5 MR. FREY: There probably would have been no  
6 excuse in that case for extending the detention.

7 QUESTION: What is the excuse for having  
8 people conduct drug investigations who aren't  
9 qualified? I am just asking you whether there is a --

10 MR. FREY: Exigent circumstances --

11 QUESTION: -- whether there was a less  
12 intrusive alternative.

13 MR. FREY: Well, it wasn't planned in this  
14 case that Patrolman Thrasher would be conducting a drug  
15 investigation. He was called in when --

16 QUESTION: Well, whether it was planned or  
17 not, I would suppose that experience would indicate that  
18 you might need two agents. As a matter of fact, as soon  
19 as they decided to stop one car they called for help.

20 MR. FREY: There were a large group of agents  
21 who were conducting an investigation in a two-county  
22 area who were part of the task force that was  
23 investigating this suspected landing of large quantities  
24 of marijuana on the beaches of North Carolina.

25 QUESTION: Nevertheless, if there had been two



1 qualified agents, this case wouldn't be here probably.

2 MR. FREY: Well, I assume the detention would  
3 not have been as extended, but I find it hard to see how  
4 that could possibly have any effect on the correct  
5 disposition of this case.

6 QUESTION: Why? Why?

7 MR. FREY: Because there cannot -- I mean,  
8 unless you are saying that whatever number of agents  
9 they are going to use in an investigation, they ought to  
10 double them, so in case they run into two cars together,  
11 they have two people to stop them.

12 QUESTION: Well, it seems to me that if a  
13 single agent is patrolling, I suppose he is out there to  
14 do something like making a stop if he has got reasonable  
15 suspicion. Now, just as soon as he decided to stop, he  
16 called for help.

17 MR. FREY: That's right, but the only help  
18 was --

19 QUESTION: I thought that -- is it  
20 unreasonable to suggest that the government ought to  
21 have -- they ought to travel in pairs or not?

22 MR. FREY: This is a little bit like the  
23 suggestion of Florida against Royer that the government  
24 ought to have a dog handy at every airport. I mean, the  
25 fact of the matter is that --

1 QUESTION: Or like in Place, they should have  
2 had one at every airport?

3 MR. FREY: Well, they don't have one at every  
4 airport. I mean, in this case it seems to me perfectly  
5 clear we have no evidence about the nature of the rest  
6 of the investigation, what the agents were doing. The  
7 idea that Cooke should have been -- the Court has no  
8 basis, it seems to me, for suggesting that Cooke should  
9 have been accompanied by another drug agent. Cooke -- a  
10 situation developed in which --

11 QUESTION: Well, they just take their risk,  
12 though, in terms of the Fourth Amendment.

13 MR. FREY: If the Court concludes that the  
14 respondents should gain because Savage refused to stop  
15 when asked to stop and sped off down the highway and  
16 created this situation, which could not have been -- I  
17 mean, even on your hypothesis, there is no reason why  
18 Cooke wouldn't suppose that one trained DEA agent would  
19 be enough. How could he anticipate this kind of  
20 development? If they have to staff their investigations  
21 to anticipate something like that, you will have nothing  
22 but --

23 QUESTION: Well, you anticipate making  
24 arrests, and as soon as you decide to make a stop, you  
25 call for another agent.

1 MR. FREY: Well, but the other agents, who  
2 knows where they were? I mean, this seems to me a  
3 prescription, if the concern of the Fourth Amendment is  
4 about police -- controlling the conduct of the police,  
5 the prescription --

6 QUESTION: The concern in Terry kind of stops  
7 is to don't do anything more than you really have to.

8 MR. FREY: Well, don't do anything more than  
9 is reasonably necessary for the purpose of confirming or  
10 rebutting your suspicions within a reasonably short  
11 period of time, but I simply cannot see how the Court  
12 could say in this case that the agent --

13 QUESTION: Well, Mr. Frey, supposing that the  
14 camper was following -- I don't know what kind of  
15 vehicle the other one was, a white Chevrolet or  
16 something, and the man, the agent was by himself. He  
17 pulled the camper over and the other car sped off. They  
18 didn't both stop. And he happened to be alone. Could  
19 he have called the state police and said, stop a green  
20 Chevrolet or whatever it might be, and say there are  
21 four green Chevrolets in the next five miles, could they  
22 stop them all?

23 MR. FREY: Now you are asking me -- I have no  
24 doubt that he could call and ask for help in stopping  
25 that vehicle. Now, if his --

1 QUESTION: Just a green Chevrolet?

2 MR. FREY: Well --

3 QUESTION: Well, you would have to be sure it  
4 is --

5 MR. FREY: At 7:00 o'clock in the morning, I  
6 think there probably would not have been four green  
7 Chevrolets speeding down the highway.

8 QUESTION: Take a blue Honda then.

9 (General laughter.)

10 MR. FREY: The question is whether there is  
11 reasonable suspicion to justify the stop, and I have no  
12 difficulty in saying that he could call for help. Now,  
13 if you suddenly ran into a car dealers' convention then  
14 you might not be able to stop any of them.

15 If there are no further questions.

16 CHIEF JUSTICE BURGER: Mr. Kadish.

17 ORAL ARGUMENT OF MARK J. KADISH, ESQ.,

18 AS AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

19 MR. KADISH: Mr. Chief Justice, members of the  
20 Court, it is hard for me to refrain from calling Sharpe  
21 and Savage my clients since they were. I was trial  
22 counsel, so if I slip, please forgive me.

23 There are certain facts which Mr. Frey has  
24 mentioned which I think need some clarification. One is  
25 that at the time of the actual stop of the Sharpe



1 vehicle, that was done by Cooke. That is on Page 17 of  
2 the record. He waved Sharpe over. Then, over the  
3 radio, Thrasher said to Cooke, I'll take the camper. He  
4 then moves forward.

5 There is no evidence in the record that he  
6 sped forward. The record is that the camper and the  
7 state trooper vehicle almost hit accidentally. That is  
8 what the record actually says. And he put on his blue  
9 light, and apparently about a half a mile down the road,  
10 which isn't very far, they both succeeded in pulling  
11 over to the -- on the south side of the road.

12 Now, you have both vehicles stopped. Cooke  
13 gets out of the car, and he goes over to Sharpe, and he  
14 says, give me your license, and Sharpe gives him a  
15 license that says Pavlovich on it, but at that time  
16 Cooke doesn't know who the man is. So he thinks he is  
17 Pavlovich.

18 He then immediately calls for Myrtle Beach  
19 Police backup. They arrive. In the meantime, there is  
20 no colloquy between Sharpe and Cooke. He doesn't ask  
21 him a single question in the stop. He doesn't say, what  
22 are you doing? Are you in tandem with the camper? Is  
23 there dope in the camper? What are you doing out here  
24 at 6:30 in the morning?

25 Even more than that, Cooke follows them for 20

1 miles to this point from the beach area in North  
2 Carolina, and during the entire time Cooke doesn't  
3 attempt to raise any DEA people on the radio, even  
4 though there is an entire DEA task force operating in  
5 the area, to answer Justice Blackmun's question about  
6 that.

7 Now, what we have is that the vehicles arrive  
8 in Myrtle Beach on the outskirts and Cooke says, uh-ch,  
9 I am going to lose them in town. I've got to do  
10 something now. I am really not sure what is happening.  
11 He pulls them over, asks no questions, calls the Myrtle  
12 Beach backup, they get them and put them in the back of  
13 a police car, marked police car, two armed officers, and  
14 they sit there for 40 minutes.

15 He takes Sharpe's license, puts it in his  
16 pocket, puts the other passenger of the car, who was  
17 never prosecuted, in the back of the police car, leaves  
18 them both there under armed guard, never having asked a  
19 question, goes up the road and sees Savage.

20 In the meantime, Savage has asked Thrasher  
21 twice to leave, right in the record, admitted by  
22 Thrasher. He says, what do you want me for? Here is my  
23 driver's license, here is my bill of sale, which by the  
24 way happened to be in the name of Pavlovich. He says,  
25 and I want to go.

1 Thrasher says, you can't go, I'm holding you  
2 for Cooke. However, if I really want to get you, I can  
3 hold you for that speeding. Clearly, the record  
4 factually suggests that speeding was a pretext.

5 At any event, Cocke comes up and Savage says,  
6 I want to leave, give me my license back. In the  
7 meantime, Thrasher has put Savage's license in his  
8 pocket. Cooke says, you can't leave.

9 Then, and only then, Cooke looks at the  
10 registration and sees the name Pavlovich, and the bells  
11 go off, because he now connects the two vehicles. Until  
12 that point, there wasn't even a connection that they  
13 were traveling in some kind of a concerted action except  
14 for the fact that they were just driving one behind the  
15 other, and because they had gone through the campground  
16 together.

17 QUESTION: When two cars travel together, one  
18 behind the other, and make a complete circle, they are  
19 not together?

20 MR. KADISH: That did suggest, I agree,  
21 Justice Marshall, that did suggest that they were  
22 together, but not that they were involved in criminal  
23 activity together, only that they were together. Once  
24 he had seen the name Pavlovich on the registration of  
25 the camper and on the driver's license of Sharpe, that

1 drew the people definitely together.

2 Now, at this point, Sharpe, who has not been  
3 advised of anything, has not been advised of his rights,  
4 has not been advised of why he was stopped, has not been  
5 advised why he has been put in a police car with two  
6 armed officers watching over him, he is just sitting  
7 there with his passenger. Forty minutes goes by.

8 Then the officer goes over and does the test  
9 that Mr. Frey has mentioned. He steps on the bumper.  
10 It feels like it is heavy. He looks at the windows. He  
11 sees he can't look inside, and he goes to the truck and  
12 opens the door himself, pulls out the keys from the  
13 ignition, opens the camper lock, and there are burlap  
14 bags. No marijuana, mind you, but burlap bags which  
15 look like marijuana that he has seen in other cases. He  
16 then says, you are under arrest.

17 It is our theory, as set forth in our brief  
18 amicus curiae that this case is closest to Dunaway in  
19 the scheme of cases that this Court has adjudicated in  
20 recent years. It is closer to Dunaway and different  
21 than most of the others.

22 For example, this case is atypical to the  
23 airport cases. It is not like Mendenhall, Reid, Royer,  
24 Place, or Rodriguez, for a whole bunch of reasons that  
25 are obvious.



1 QUESTION: Weren't there some observations by  
2 the agents that the car was riding low?

3 MR. KADISH: Yes.

4 QUESTION: And through all of this rather  
5 abnormal turning and weaving?

6 MR. KADISH: The only abnormal turn, Mr. Chief  
7 Justice, was the turn through the campground.

8 QUESTION: The big circle that Justice  
9 Marshall referred to.

10 MR. KADISH: If you look at the record, and  
11 you look at that on a map, which I believe is actually  
12 in the record, you see that there wasn't any weaving or  
13 erratic type of turn. It was a simple turn through the  
14 campground. I believe they actually stopped at a stop  
15 sign, both vehicles, and then when they came out to the  
16 other side of the campground, they turned back on the  
17 main highway.

18 It wasn't necessarily, I think, viewed as  
19 erratic or evasive, and the record doesn't reflect that,  
20 and the Fourth Circuit didn't quite view it that way.

21 QUESTION: Taken into account --

22 QUESTION: Do you know the best way to --  
23 excuse me.

24 QUESTION: Taken into account with the  
25 overweighted load and all the other factors, do you

1 consider -- are the agents required, the police required  
2 to consider each item alone or the aggregate of their  
3 observations?

4 MR. KADISH: I think I would have to concede  
5 the aggregate of the observations or what the officer  
6 should look at. I don't think, however, that  
7 necessarily coming from this area of North Carolina  
8 which the record reflects is a heavy camping vacation  
9 area, that an overloaded camper with covered windows is  
10 necessarily the signs of a vehicle transporting drugs.

11 I mean, you have to go some to reach that  
12 conclusion, and that is what the Circuit Court felt, but  
13 I would agree that certainly all of the circumstances  
14 need to be looked at before you can --

15 QUESTION: Counsel, getting back to going  
16 around the circle --

17 MR. KADISH: Yes, sir.

18 QUESTION: -- do you agree that the best way  
19 to find out whether you are being followed is to make  
20 four right turns?

21 MR. KADISH: I couldn't disagree with that.

22 QUESTION: So when you make a circle it is the  
23 same thing.

24 MR. KADISH: Yes.

25 QUESTION: So once they made the circle, they

1 knew they were being followed.

2 MR. KADISH: I would say that was a fair --

3 QUESTION: And that's the time that any police  
4 officer knows that he has to make an arrest.

5 MR. KADISH: I am not as much debating here  
6 the articulable suspicion, although I think it is  
7 extremely weak. I think it is extremely weak compared  
8 to other cases, but the circuit has assumed that, at  
9 least for the purposes of their opinion.

10 What I was focusing on just a minute ago, if  
11 the Court permits me to get back to it, is that in the  
12 airport searches, you just have an area unto itself. In  
13 the original Terry trilogy of Terry, Adams, and  
14 Brignoni-Ponce, followed later by Brown versus Illinois  
15 and Collander versus Rawson, you have these situation of  
16 the patdown, the frisk, the Brignoni-Ponce momentary  
17 stop of an automobile, like Cortez, these are clearly  
18 the purest Terry type of cases.

19 Then you have the automobile cases, the other  
20 automobile cases like Mimms and Delaware versus Crowse,  
21 which are traffic cases, clearly related to either the  
22 random traffic stop in Crowse, and Mimms, the legitimate  
23 traffic stop followed by come out of the car, patdown,  
24 but clearly brief Terry situations.

25 Now, none of these cases that I am talking

1 about except for the airport cases are cases where  
2 detentions have lasted more than a few minutes, none of  
3 them.

4 QUESTION: When you say a few minutes, do you  
5 have any particular amount of minutes in mind?

6 MR. KADISH: Well, it is hard to say what --  
7 the time that took place in Terry versus Ohio, I think,  
8 for example, just being actually that, a few minutes,  
9 two, three, four minutes for the patdown.

10 QUESTION: How about Michigan against Long?

11 MR. KADISH: I am not sure exactly what the  
12 time was in that case. I don't know in Michigan versus  
13 Long. I know that the time was extended somewhat in the  
14 airport cases. For example, in Place, I believe we had  
15 a 90-minute detention of the luggage. That was the  
16 outside limit that I think the Court has gone.

17 This case -- and of course the distinction I  
18 would make there is, we are dealing there with things,  
19 luggage. Here we are dealing with persons. There we  
20 are dealing with expectations of privacy which are to  
21 some extent in an airport minimized.

22 Everybody subjects themselves to searches in  
23 airports. We all know that. But on a highway, in your  
24 own car, that is not necessarily the case, although in  
25 the automobile cases of this Court there is perhaps a



1 little wider breadth to what an individual subjects  
2 himself to.

3 But by and large, we then go to Cortez, the  
4 Chevron shoe case, which is a quick case, and  
5 Brignoni-Ponce, as I said, which is a quick case. There  
6 is an aberration kind of in that Van Leuwen case, which  
7 is the 29-hour coin, counterfeit coin case, which  
8 involves the postal authorities and really doesn't bear  
9 any analogy to what we have here.

10 I think -- and in Michigan versus Summers,  
11 Justice Stevens, I believe, as I read the case, tied the  
12 ruling there more to the -- and the lengthy detention to  
13 the execution of a warrant in the man's home and gave  
14 reasons that to me made a lot of sense to justify the  
15 lengthy detention there being tied to a warrant under  
16 the protection of a neutral and detached magistrate.

17 What do we have here? Here we just seem to  
18 have a Dunaway. These two men are taken to the side of  
19 the roadway. Neither of them is informed what the whole  
20 thing is about. When Savage is taken out by Thrasher,  
21 he just simply arrests him.

22 He takes him, he puts him up against the van.  
23 spreadeagled, at gunpoint. Mr. Frey didn't mention  
24 that. At gunpoint. Takes his license away, his  
25 registration away, and keeps it, and holds him there.

1 He holsters the gun at that point when he sees he is  
2 unarmed. That is an arrest. That is not a Terry stop.

3 QUESTION: Do you think, Mr. Kadish, that they  
4 were in any doubt about why they were being stopped?  
5 You seem to suggest that that left them in some kind of  
6 predicament.

7 MR. KADISH: No, they, I am sure, knew why  
8 they were stopped, but as I read it the Terry cases and  
9 the progeny are talking about the objective view of the  
10 officer -- not of the officer, the objective view that a  
11 reasonable officer would have under the situation, not  
12 the accused, so that I believe that that is the test of  
13 the Court, and I believe that would be the answer to  
14 your question.

15 So that what I am concerned about is that if  
16 Savage is apparently under arrest at gunpoint and says,  
17 you cannot leave, that Mr. Justice Brennan found out in  
18 answer to his questions before, then you have Sharpe,  
19 who is clearly under arrest. What better indicia do you  
20 have of arrest than being put --

21 QUESTION: Mr. Kadish?

22 MR. KADISH: Yes, sir.

23 QUESTION: You use the term "under arrest" or  
24 "at gunpoint" as if those were somehow inconsistent with  
25 a Terry stop. My understanding of a Terry stop is that

1 it differs from an arrest in its duration and its  
2 purpose, but I would think that the custody which a  
3 person is in under a Terry stop is just as complete as  
4 in an arrest.

5 MR. KADISH: Well, except that -- except that  
6 these people here -- I should have used the term "de  
7 facto arrest," because I think that is the progression  
8 that you see in Dunaway versus New York. When Sharpe  
9 and Savage are held as I have described it to you, which  
10 I think is a candid statement of what the record says,  
11 at that point Cooke in effect arrested them before he  
12 smelled the marijuana.

13 They were clearly in a de facto arrest  
14 situation, but the level --

15 QUESTION: What is a de facto arrest?

16 MR. KADISH: Well, I am not sure. The Fourth  
17 Circuit uses that word. I have used it. But here is  
18 what I think it means, and it is like levels, levels  
19 that Justice Stevens was talking about before.

20 You can go to a level first of a seizure, a  
21 momentary seizure. Then you can go to the level where  
22 the man is held at gunpoint and cannot move, or locked  
23 in -- or put in the back of a police car where he cannot  
24 leave. At that point you are at a probable cause  
25 level.

1 QUESTION: Supposing I try to make a Terry  
2 stop on reasonable suspicion and the person whom I am  
3 trying to stop simply tries to flee. Am I not entitled  
4 to draw a gun or use what force seems to be necessary to  
5 bring him into custody?

6 MR. KADISH: I don't know the answer to that,  
7 sir. I would have to look at the totality of the  
8 circumstances of the situation.

9 QUESTION: You suggested that the custody  
10 involved in a Terry stop is kind of a loose, floating  
11 thing that if the defendant wants to evade it he is free  
12 to evade it?

13 MR. KADISH: No, I am not saying he is free to  
14 evade it, but there has to be a justification, a  
15 reasonable justification to keep him for that period of  
16 time.

17 QUESTION: But supposing there is a reasonable  
18 justification. Isn't the law enforcement officer  
19 entitled to use reasonable means to keep him for that  
20 length of time?

21 MR. KADISH: But perhaps in this case, as Mr.  
22 -- I mean, as Justice White has suggested, perhaps they  
23 didn't use their time wisely.

24 QUESTION: Well, but I am not interested right  
25 now in whether they used their time wisely. Is it part



1 of your argument that the showing of a gun or the  
2 spreadeagle search is per se inconsistent with a Terry  
3 stop?

4 MR. KADISH: That's right, per se  
5 inconsistent. And that it is an indicia that a probable  
6 cause standard has arisen, has been injected by the  
7 officers into the case, and that at that point they had  
8 no probable cause.

9 The government concedes, the government  
10 concedes in this case that the probable cause did not  
11 occur until the olifactory actions of Cooke with the  
12 marijuana. Therefore, my position is, following the  
13 Dunaway analogy, that a probable cause situation clearly  
14 developed with Sharpe and clearly developed with Savage  
15 as I have described.

16 Alternatively, the degree of the intrusion  
17 reached a level which is inconsistent with Terry if you  
18 look at the case as a non-Dunaway but a Terry case. The  
19 intrusion had reached a level where it became so  
20 offensive to both Sharpe and Savage that they had their  
21 Fourth Amendments rights interfered with.

22 I want to say one thing --

23 QUESTION: In making that argument, Mr.  
24 Kadish, I haven't heard you say anything about the  
25 significance of their requests to be allowed to leave.

1 MR. KADISH: Oh, yes, and I thank Your Honor  
2 for the suggestion. Clearly where the individuals who  
3 are being detained into those minutes beyond brief  
4 minutes that have been viewed over and over again by  
5 this Court in terms of a few minutes -- brevity,  
6 momentary, these are the words from your cases -- where  
7 an individual says, I want to go, then the level of the  
8 Fourth Amendment violation increases dramatically  
9 because he has said, I do not want to be seized. I want  
10 to be free.

11 QUESTION: Well, isn't that inconsistent with  
12 Mendenhall and with the combination of opinions in  
13 Florida against Royer which adopted Justice Stewart's  
14 test in Mendenhall that there is not even a seizure if  
15 the defendant objectively feels he is free to leave?

16 MR. KADISH: Well, as I said, in reading  
17 Mendenhall and reading Royer, I view the airport cases  
18 and the context in which they all arise, which is almost  
19 identical, as just having a special place in this Court,  
20 and I think the plurality decisions in Royer and Place  
21 -- I think I have that right -- show that the Court  
22 itself has not fully determined in which direction the  
23 airport cases are finally going to go.

24 I think that perhaps those cases are going to  
25 end up as a special area in and of themselves, because

1 -- and I say that because of the number -- there are  
2 one, two, three, four, five cases that have been  
3 considered by the Court since 1980 dealing with airport  
4 searches.

5 Can I talk about the fugitivity of my past  
6 clients for just a moment, please? I do feel, although  
7 I didn't sound like a non-adversary probably -- it is in  
8 my blood -- but I do feel that for the Court to decide  
9 the issue before it, which I view as very, very critical  
10 issues, in the context of a case involving the  
11 fugitivity of my clients, is somewhat of a disadvantage  
12 to them for the reasons that Justice Marshall and  
13 Justice Stevens have stated. It is not that I don't  
14 feel that --

15 QUESTION: Well, your clients -- your clients  
16 certainly opted to leave knowing they had no right to do  
17 so.

18 MR. KADISH: Right.

19 QUESTION: And I just wonder whether they have  
20 a very good argument for saying the Court shouldn't deal  
21 with the issues that they were aware could be raised and  
22 were raised.

23 MR. KADISH: Justice O'Connor, what can I  
24 say? The equities are not with me in that argument, and  
25 I know that. But on the other hand, if the Court is

1 going to make constitutional law in the critical area of  
2 the Fourth Amendment, particularly as argued by Mr.  
3 Frey, which if his argument is adopted by the Court will  
4 lead to a somewhat major expansion of the Terry  
5 doctrine.

6 QUESTION: How are they disadvantaged now?

7 MR. KADISH: Well, I don't know that they are  
8 -- I don't know that they are disadvantaged. Maybe they  
9 neither win nor they lose. It just seems to me as a  
10 lawyer who -- more as a trial lawyer than a  
11 constitutional lawyer, that the Court should direct  
12 major constitutional decisions to cases where there are  
13 real persons and defendants before it.

14 QUESTION: Well, Mr. Kadish, if we agree with  
15 you, I suppose you know we would vacate the judgment  
16 below.

17 MR. KADISH: I know that.

18 QUESTION: And leave your clients in the  
19 soup.

20 MR. KADISH: Well, as I said --

21 QUESTION: If you really feel good about your  
22 case, why don't you want us to decide it?

23 MR. KADISH: Well, I do feel good about --

24 QUESTION: You may win. You may win.

25 (General laughter.)



1 MR. KADISH: I do feel good about my case, but  
2 you know, sometimes -- sometimes winning is not what it  
3 is all about exactly.

4 QUESTION: Well, I know, but losing -- if you  
5 win, your clients lose. If you win on this present  
6 argument, your clients lose?

7 MR. KADISH: I understand that, and if they  
8 lose, they lose in one way, and I guess perhaps down the  
9 line maybe they -- in my own way they would win in  
10 another. I don't know. But I just feel, as Justice  
11 Marshall does, that there is a problem.

12 QUESTION: I suppose we've got to catch them.  
13 No matter how we decide it, they have got to be caught  
14 before anybody wins or loses here.

15 MR. KADISH: That's right. I guess in today's  
16 world, at least from where I am sitting, most of them  
17 get caught one way or the other.

18 Thank you very much.

19 CHIEF JUSTICE BURGER: Mr. Frey?

20 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

21 ON BEHALF OF THE PETITIONER - REBUTTAL

22 MR. FREY: I just wanted to make a couple of  
23 points. Mr. Kadish said that my argument would lead to  
24 a major expansion of Terry doctrine, so I wanted to  
25 remind the Court of what it said in Michigan against

1 Summers.

2 It said that Terry is not "an almost unique  
3 exception to a hard and fast standard of probable  
4 cause. Rather, the key principle of the Fourth  
5 Amendment is reasonableness, balancing of competing  
6 interests."

7 It said that if the purpose underlying a Terry  
8 stop, investigating possible criminal activity, is to be  
9 served, the police must under certain circumstances be  
10 able to detain the individual for longer than the brief  
11 time period involved in Terry and Adams.

12 It endorsed Professor LaFave's summary of the  
13 governing principles that the permissibility of  
14 extending a Terry stop should turn on "whether the  
15 police are diligently pursuing a means of investigation  
16 which is likely to resolve the matter one way or another  
17 very soon, and whether it is rather essential to the  
18 investigation that the suspect's presence be continued  
19 during that interval."

20 And in Place, while the Court struck down a  
21 90-minute detention, I think the clear inference was  
22 that it had taken 20 or 30 minutes to expose the luggage  
23 to a drug detecting dog --

24 QUESTION: Mr. Frey, do you have any Courts of  
25 Appeals decisions in your favor on this?

1 MR. FREY: Yes, I think we have some, but I  
2 don't know that I could -- they are cited in the brief.  
3 There are many Courts of Appeals decisions on these  
4 issues, and I could --

5 QUESTION: How about state courts?

6 MR. FREY: I am not at all familiar with the  
7 state courts, but I would rather have Supreme Court  
8 decisions in my favor, and I think I do.

9 QUESTION: You don't -- on these facts, you  
10 don't. You are relying on an analysis or an approach.

11 MR. FREY: I am relying on an analysis or an  
12 approach that has been consistently in recent cases --

13 QUESTION: That same approach, though,  
14 wouldn't justify two or three hours, I don't suppose.

15 MR. FREY: No, I don't know whether we would  
16 be here suggesting that two or three hours would be  
17 permissible.

18 QUESTION: I don't know why not?

19 MR. FREY: Well, because the approach requires  
20 looking at the need to extend the detention, and it  
21 recognizes, as I think Dunaway, which was a totally  
22 different cases, recognizes, that there is an outer  
23 limit on the permissible length of time that you could  
24 detain somebody.

25 But I cannot believe that we step back from it

1 and look at this case, you are a DEA agent, you suspect  
2 there is a truckload of marijuana going down the  
3 highway, you want to try to find out whether you can  
4 confirm your suspicions instead of letting over a ton of  
5 marijuana go off into the distribution chain.

6 Is it really so unreasonable to do what the  
7 officers did in this case? Does the Constitution of the  
8 United States say that these rather modest measures  
9 can't be taken for the purpose of a very important  
10 societal interest such as the detention of this kind of  
11 crime?

12 I just find it difficult to believe, and I  
13 just wanted to say to Justice Brennan that the not free  
14 to leave point, if he were free to leave, there would  
15 not be a seizure regulated by the Fourth Amendment.  
16 This case is about the difference, where the line is  
17 between a seizure that is permissible on reasonable  
18 suspicion and a seizure that requires probable cause.

19 Both of those are similarly characterized by  
20 the suspect not being free to leave, and therefore the  
21 fact that he says I would like to leave and the officers  
22 say no seems to me quite immaterial to the issue.

23 QUESTION: Couldn't you argue that the officer  
24 could say, well, if you want to leave, go ahead, but I  
25 am keeping your truck? That is what they do in the



1 airport cases. You seize the luggage. If the fellow  
2 wants to go on to Boston, let him go.

3 MR. FREY: Well, that would be true, although  
4 I think the principle of Michigan against Summers is  
5 that if you are going to find out very shortly whether  
6 you have a basis for arresting the individual or you  
7 hope to, then you are not obliged to let him go off into  
8 the twilight.

9 QUESTION: Couldn't you argue that discovery  
10 of the marijuana was a fruit of the seizure of the  
11 truck, not the person?

12 MR. FREY: You could, but I think one of the  
13 points that Mr. Kadish was in error about was that the  
14 Place case was very careful to make the point that at  
15 least in those circumstances it was not distinguishing  
16 between the seizure of the property and the seizure of  
17 the person, but was deeming them both regulated by the  
18 same standard.

19 Thank you.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
21 The case is submitted.

22 (Whereupon, at 10:59 o'clock a.m., the case in  
23 the above-entitled matter was submitted.)  
24  
25

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:

# No. 83-529 - UNITED STATES, Petitioner, v.

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WILLIAM HARRIS SHARPE. ET AL.

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BY Paul A. Richardson

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