

ORIGINAL

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PROCEEDINGS BEFORE

SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-6766

TITLE JOE HAYES, Petitioner v. FLORIDA

PLACE Washington, D. C.

DATE January 9, 1985

PAGES 1 thru 41



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IN THE SUPREME COURT OF THE UNITED STATES

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JOE HAYES,	:
	:
Petitioner	:
	:
v.	:
	:
FLORIDA	:
	:
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No. 83-6766

Washington, D.C.

Wednesday, January 9, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

MICHAEL E. RAIDEN, ESQ., Bartow, Florida; on behalf of the Petitioner.

WILLIAM I. MUNSEY, JR., ESQ., Assistant Attorney General of Florida, Tampa, Florida; on behalf of the Respondent.

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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 Hayes against Florida.

4 Mr. Raiden, you may proceed whenever you're
5 ready.

6 ORAL ARGUMENT OF MICHAEL E. RAIDEN, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MR. RAIDEN: Mr. Chief Justice, and may it
9 please the Court:

10 In 1980 in the city of Punta Corda, Florida,
11 there were a series of burglaries and rapes. The
12 primary clue as to the identity of the perpetrator
13 available to the investigating officers were
14 fingerprints. In the particular case for which the
15 petitioner was convicted, these fingerprints were found
16 on the bedroom doorknob of the victim. The petitioner
17 was one of a number of suspects which the police desired
18 to obtain the petitioner's fingerprints in order to
19 compare them with the latents found in the victim's
20 home. They did not have probable cause. At least that
21 was argued in the trial court, and the appellate court,
22 the Florida appellate court agreed there was no probable
23 cause. There was no prior judicial authorization for
24 obtaining the prints, and the court of appeals found and
25 agreed with the petitioner's argument that there was no

1 consent to accompanying the officers to give the
2 prints. However, the police officers went to the
3 petitioner's house, made it very clear that he had no
4 choice but to go with them --

5 QUESTION: Excuse me.

6 MR. RAIDEN: Yes, sir.

7 QUESTION: It's agreed that there was no
8 probable cause?

9 MR. RAIDEN: It was argued by the defense that
10 the state --

11 QUESTION: It wasn't agreed to.

12 MR. RAIDEN: The court agreed with the
13 petitioner.

14 QUESTION: The court did.

15 MR. RAIDEN: Yes, sir, Your Honor.

16 They obtained the prints at the police station
17 after seizing Mr. Hayes at his home and taking him to
18 the station and obtaining the prints. Upon comparing
19 them with the prints found in the victim's home, they
20 uncovered a match, and he was then arrested and charged.

21 He moved in the trial court of Charlotte
22 County, Florida to suppress the fingerprint evidence.
23 His primary case authority was Davis v. Mississippi,
24 along with a couple Florida cases that had followed
25 Davis. And the court denied the motion to suppress

1 without stating any particular reason. The state had
2 argued probable cause and/or consent. It went to the
3 appellate court, and again, the state argued probable
4 cause and/or consent.

5 The district court of appeal in Florida found
6 that there was no probable cause. They further found
7 that there was no consent. However, despite the holding
8 in Davis v. Mississippi, they affirmed the trial court's
9 decision not to suppress the prints, and in so doing
10 they found justification in Terry v. Ohio.

11 QUESTION: Mr. Raiden, there's some suggestion
12 in either the briefs or somewhere in this record that
13 since they could have taken the fingerprints on his
14 front porch or in his living room, it made no difference
15 that they were taken later in the police station.

16 Would you be here if they had taken the
17 fingerprints in his living room?

18 MR. RAIDEN: I think that I would be, Your
19 Honor, because --

20 QUESTION: There's no difference, in your view.

21 MR. RAIDEN: Well --

22 QUESTION: There's no difference. If they
23 took it without his consent, as you argue, then it
24 wouldn't make any difference whether they took it in his
25 living room or at the police station.

1 MR. RAIDEN: I'd maintain that it is still a
2 search, it is still a seizure. I recognize that one of
3 the distinctions between Terry and say Dunaway or Foye
4 is the movement of the person; and there does appear to
5 be that difference. But they had already set up the
6 fingerprinting process at the police station, and we do
7 have an instance of movement in this case.

8 But in answer to your question, I -- I find no
9 constitutional difference in the fact that they possibly
10 could have taken the prints at his house. They still
11 did not have probable cause to conduct this search and
12 seizure, and they did not have judicial authorization,
13 and they did not have consent.

14 QUESTION: In other words, they would have had
15 to get a warrant in order to take the first steps.

16 MR. RAIDEN: I find in Davis v. Mississippi
17 that although the -- what happened here, the district
18 court said this is the question left open by Davis, in
19 the opinion of, I believe, Mr. Justice Brennan, that the
20 court could conceive of situations wherein fingerprints
21 might be taken without necessarily having probable cause
22 to do so. However, further down in that opinion I
23 believe Mr. Justice Brennan then said that it would not
24 -- it would not seem to admit of any exception to the
25 warrant requirement.

1 In the wake of Davis, a number of states
2 passed statutes wherein under very circumscribed
3 circumstances, the police could go to a magistrate and
4 get what -- I called it a mini-warrant in the brief --
5 but some type of judicial authorization to go and take
6 prints. And it's -- there's a --

7 QUESTION: But aren't those statutes for the
8 most part based on no more than reasonable suspicion?

9 MR. RAIDEN: That's correct. They do not
10 require probable cause.

11 QUESTION: You think there's some problem with
12 those statutes; is that your position?

13 MR. RAIDEN: I think arguably there is a
14 problem. I cited in the brief a Nebraska case where the
15 Nebraska court reviewed all the various statutes that
16 had been passed in the wake of Davis. And they found
17 that in light of more recent cases such as Dunaway v.
18 New York and Royer v. Florida that whatever might have
19 been suggested in the Davis opinion, that it could be
20 done without probable cause, it probably no longer is
21 constitutionally valid, and that probable cause would be
22 required any time you wanted to move someone, detain
23 someone for that length of time.

24 QUESTION: Do you think that it is valid
25 within the Terry stop rationale to take a photograph of

1 someone on the street when you make a voluntary stop and
2 use that in evidence?

3 MR. RAIDEN: Well --

4 QUESTION: Does that violate any right of
5 privacy, in your view?

6 MR. RAIDEN: I'm not sure that I would say it
7 did, Your Honor. I --

8 QUESTION: Why is a fingerprint any different
9 than your face? It's just a different form of
10 identification like your physiognomy generally.

11 MR. RAIDEN: To take a fingerprint requires a
12 little more of the participation of the individual than
13 does submitting to a photograph. For instance, a police
14 officer conducting surveillance perhaps could be tailing
15 someone on a public street and using a telephoto lens
16 could take that person's picture.

17 QUESTION: Well, I'm talking about a Terry
18 stop. Within a Terry stop the Court has allowed a
19 pat-down search of the person, which perhaps is more
20 intrusive than taking a photograph or a fingerprint.

21 MR. RAIDEN: It's probably more intrusive than
22 a photograph.

23 QUESTION: Why is it more intrusive -- do you
24 think it's more intrusive than taking a fingerprint?

25 MR. RAIDEN: I'm not sure that I would agree

1 with that, because you have to place your hands on the
2 person and actually hold the person to take a
3 fingerprint. The way --

4 QUESTION: And you have to place your hands on
5 a person to do a pat-down search, I suppose.

6 MR. RAIDEN: Yes. Both of those involve
7 actual physical contact with the person, whereas
8 photography doesn't.

9 Incidentally, what I had urged vis-a-vis Terry
10 in these cases is that Terry, involves a sort of search,
11 it's not an evidentiary search. They're not looking for
12 evidence of a crime. But it's designed instead for the
13 protection of the officer, and the pat-down --

14 QUESTION: Have we also held that it's valid
15 to ascertain identity?

16 MR. RAIDEN: Yes, Your Honor. That's --

17 QUESTION: And isn't the taking of a
18 fingerprint a form of identification inquiry?

19 MR. RAIDEN: When they say in Terry that you
20 may ask identity, I'm not sure the purpose of inquiring
21 into identity is evidentiary in nature. The
22 fingerprint, while it is a means of identification, it
23 is a means of identification evidence.

24 QUESTION: Well, Place and Royer both
25 certainly involve something more than protection of the

1 officer. They were looking for contraband in both
2 cases. So I think perhaps Terry on its facts is
3 protection of the officer, but Terry has been held to
4 support a stop where you're looking for evidence.

5 MR. RAIDEN: What I detect in Place and Royer,
6 Mr. Justice Rehnquist, is an element of exigency,
7 although I don't find that specific word in the
8 opinions, because of the fact that these people come and
9 go in airports. And if you don't find out what you're
10 looking for right now, it's gone forever. But --

11 QUESTION: Well, the decision announced by
12 this Court yesterday in Hensley permitted a Terry-type
13 stop just for identification purposes based on a flyer.
14 Now, if fingerprinting on the scene were used for
15 identification, how does that differ?

16 MR. RAIDEN: As I understood the opinion that
17 you announced yesterday, first of all, there had already
18 been an arrest warrant for the individual; is that
19 correct?

20 QUESTION: That is not correct.

21 MR. RAIDEN: That is not correct. He was --
22 the reason they wanted to find his identification is to
23 find out if he was the person wanted. I was mistaken,
24 and I thought it involved the existence of an arrest
25 warrant in another jurisdiction. I apologize. I must

1 have misunderstood the opinion.

2 The question again was?

3 QUESTION: Well, why, if it's valid to make
4 that kind of a stop to check on identification, would it
5 be invalid to go ahead and print someone at the scene of
6 the Terry-type stop?

7 MR. RAIDEN: I guess it might depend on why
8 you wanted the prints, although I'm not comfortable with
9 saying that now that I've just said it. I sense a
10 confusion as to the purpose of the printing. Printing
11 someone simply to find out who they are --

12 QUESTION: Of course, in this case the
13 individual was taken to the station, and you don't have
14 the typical Terry-type on the scene stop. Let me ask
15 you, if I may, suppose we agree with you that taking the
16 individual to the station was not valid with the Terry
17 stop rationale. As I understand it, the victim made a
18 later in court identification of the defendant in this
19 case.

20 Now, even if you're correct that taking the
21 defendant to the station was invalid, on retrial do you
22 think that the state can get another set of prints and
23 introduce fingerprint evidence again on retrial to
24 convict this person?

25 MR. RAIDEN: They've certainly urged, at least

1 at this level, that reversal would be, as Mr. Justice
2 Stewart said in Davis, a useless gesture. I'm not
3 prepared to agree or even to disagree other than to say
4 I don't think that is to be resolved at this level.

5 QUESTION: Well, but I think that it's
6 important to explore a bit. Is there probable cause now
7 to obtain a warrant to take this person's fingerprints?

8 MR. RAIDEN: I'm faced with a record where
9 some things were not done the way I would like to have
10 done them, and one thing that disturbs me about this
11 record is there was no move to suppress the
12 identification by the victim. I'm not saying it was
13 suppressible. I don't think we can determine that on
14 the face of our record. Yes, she did identify --

15 QUESTION: Well, faced with this record, is
16 there now probable cause to get the -- Mr. Hayes'
17 fingerprints?

18 MR. RAIDEN: If a court -- and I submit most
19 properly it should be the trial court -- found that Mrs.
20 Hollander's in court identification was constitutionally
21 permissible, then there probably is probable cause now,
22 yes.

23 QUESTION: And if that's the case, what
24 possible use is there in ordering a new trial just to
25 consider the exact same evidence?

1 MR. RAIDEN: Because I'm not prepared to state
2 at this point that her identification is
3 constitutionally permissible. It may not be. I don't
4 think we can determine that on the record we have,
5 because no effort was made in the trial court.

6 QUESTION: But why should you have a second
7 shot at that issue, just because on a purely unrelated
8 matter there may have been a violation of the Fourth
9 Amendment in taking the fingerprint?

10 MR. RAIDEN: Ordinarily, Your Honor, there may
11 not be. I may not deserve a second shot. But this --
12 the inevitable discovery argument that the state makes
13 is being made for the first time at this Court. We did
14 not have the benefit, either at the appellate level -- I
15 was not trial counsel -- or at the trial level of the
16 Nix v. Williams decision.

17 In the light of the fact that a very
18 significant U.S. Supreme Court decision exists now that
19 we were not aware of, I think perhaps we should be
20 allowed to litigate that. In other words --

21 QUESTION: To mean to relitigate Nix against
22 Williams?

23 MR. RAIDEN: No, sir. I'm sorry. To
24 relitigate the identification issue, the admissibility --

25 QUESTION: Well, what possible -- what

1 possible flaw could there be in the identification --

2 MR. RAIDEN: I don't --

3 QUESTION: -- if in open court she identified
4 him as the attacker?

5 MR. RAIDEN: Well, if that's the first time
6 that she's ever seen him, that is arguably a suggestive
7 procedure. I'm not saying that Hayes would prevail on
8 the identification issue. It's just that I don't think
9 we have a sufficient record, and that issue was never
10 raised, so we don't have a judicial determination
11 whether or not her identification was permissible. If
12 the court determined that it was, then Hayes --

13 QUESTION: Was no objection made to her in
14 court identification?

15 MR. RAIDEN: Here's what happened in that
16 regard. When you get to the cross examination by the
17 trial counsel at about page 398 of the trial record, he
18 asked this lady, "What you're saying, then, is that
19 nobody knew until this exact moment that you were going
20 to come in here and identify this person; is that
21 correct," and she said, "Yes."

22 Apparently, there were no efforts for her to
23 make an in person identification of Hayes up until that
24 moment. Once had completed his cross examination, he
25 made a motion to strike the testimony. I don't think

1 that helps in the determination we're talking about for
2 two reasons. Number one, under Florida rules of
3 criminal procedure, any type of motion to suppress made
4 after the trial begins is discretionary. There's no
5 absolute requirement that the judge hear it at all. But
6 number two, and perhaps more important, as I understand
7 Mr. Bader's motion to strike, it was directed wholly
8 toward credibility and not legal admissibility. So I
9 don't think we can infer from that that Judge Adams, who
10 was the trial judge, ever made a specific finding that
11 Mrs. Hollander's identification was legally valid and
12 admissible.

13 Getting back to the question that was left
14 open by Davis v. Mississippi, as I noted, after Davis
15 there were a number of states that passed statutes
16 permitting fingerprinting and similar
17 identification-oriented investigations. Some of them
18 could be done at the police station, and I suppose, as
19 Justice O'Connor has pointed out, it could be done, if
20 you had all of your equipment and everything that was
21 necessary, you probably could go to the person's house
22 and do it.

23 Two distinctions I want to make there. Number
24 one, the fact remains in this case that the defendant
25 was moved, and what I sense from some of the frustration

1 that I detect in trying to resolve the Royer case was
2 the end conclusion was that it doesn't necessarily
3 matter that they could have detained Royer under a sort
4 of Terry stop. Nevertheless, they didn't do it that
5 way. What they did to Royer was to move him, and that
6 brings -- that presents problems. And if he's moved,
7 he's detained for an unreasonable length of time, that
8 it's too bad. It could possibly have been done in a
9 legal manner. It wasn't done in a legal manner.

10 QUESTION: A point I wanted to make about
11 these statutes is that regardless of the exact procedure
12 specified, I in the brief quoted from the Colorado
13 statute which is quite rigorous in its requirements.
14 When you have only a reasonable suspicion, you may still
15 get an authorization to take prints or whatever. Very
16 vigorous requirements have to be followed.

17 But the point that I want to hammer home is
18 it's always done with prior judicial authorization, and
19 that was -- that never came into play in this case.

20 QUESTION: Well, my trouble is that the
21 purpose of getting fingerprints is singular: it's to
22 identify, right?

23 MR. RAIDEN: Well, fingerprints are
24 identification-oriented evidence, but the purpose of
25 getting these fingerprints is to find out --

1 QUESTION: Is it for any other purpose than
2 identification? Of course it's not. It's for
3 identification.

4 Now, my problem is if the officer walks up to
5 you and says can you identify yourself, is that okay?

6 MR. RAIDEN: That's -- under Terry, that's
7 what they're permitted to do.

8 QUESTION: And can you show me some
9 identification; is that okay?

10 MR. RAIDEN: That is proper under Terry.

11 QUESTION: And he says do you have any copy of
12 your fingerprints? Can he ask you that?

13 MR. RAIDEN: You mean a printed copy?

14 QUESTION: A copy.

15 MR. RAIDEN: Well, you always carry a copy
16 with you, if that's what you mean.

17 QUESTION: No. Do you at this time, at this
18 moment have a copy of your fingerprints?

19 MR. RAIDEN: Well, I suppose he could ask him
20 that. I --

21 QUESTION: And could he then say let me have
22 it? Well, let me give you the next question. Maybe you
23 can answer that one. If he doesn't have it, can he then
24 say may I take your fingerprints right now?

25 MR. RAIDEN: Under Terry I question whether he

1 could.

2 QUESTION: And what in Terry gives you the
3 right to question?

4 MR. RAIDEN: Because, if I can step back about
5 two steps to a question you asked, yes, fingerprints are
6 directed toward identification, but you may want to
7 identify people for more than one reason. When I went
8 to take the Florida bar exam, I had to be fingerprinted
9 so that they could make sure that I was the Michael
10 Raiden who had signed up to take the bar exam, that I
11 didn't send somebody to take it in my stead.

12 In Joe Hayes they don't want the fingerprints
13 just so they can say yes, this is the right Hayes. They
14 want to identify Joe Hayes in this context so that they
15 can convict him of a crime.

16 QUESTION: Well, then he can't ask you for
17 your driver's license, because if you're looking for Joe
18 Doaks and your driver's license says Joe Doaks, and you
19 show that driver's license, you're in trouble.

20 MR. RAIDEN: I'm not -- I'm not sure I agree
21 with that in every case, because it depends on why he
22 wants to know if he's Joe Doaks.

23 QUESTION: I just don't see the difference in
24 -- well, when he gets to the police station, can he
25 identify himself there?

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MR. RAIDEN: Well --

QUESTION: What good does the warrant do?

MR. RAIDEN: When you're looking for evidence of a crime, which in this particular case the fingerprints are, in order to conduct a search and a seizure for that evidence, you must have prior judicial authorization unless you have a probable cause of arrest. You could conduct a search incident to an arrest without previously getting a warrant. You don't have that here.

QUESTION: Well, why isn't your protest that he was arrested without probable cause?

MR. RAIDEN: Excuse me?

QUESTION: Why don't you say he was arrested without probable cause when he was carried to the station?

MR. RAIDEN: Well, I have argued that under the phraseology of Dunaway that it is tantamount to an arrest, but there was no probable cause. As a matter of fact, I believe I did argue that. When he --

QUESTION: But you haven't argued it here. That's what I'm worried about. You haven't abandoned it, have you?

MR. RAIDEN: No, sir. I'm not abandoning that. I'm stressing that that is one of the differences

1 between Terry and a case like Dunaway is not only do you
2 briefly detain the person on the street, which under
3 Terry is a seizure --

4 QUESTION: But on a Terry stop, could the
5 policeman, if he found a gun, take the gun away from the
6 man?

7 MR. RAIDEN: Under a Terry stop, that's part
8 of what Terry's designed to permit.

9 QUESTION: And that might well -- that might
10 well be evidence, first, of carrying a concealed weapon
11 without a license or, second, if they took some
12 ballistic tests, it might tie him to a murder. So it's
13 very, very important evidence, isn't it?

14 MR. RAIDEN: It's true. But Terry -- the
15 evidentiary value of the firearm is incidental to the
16 primary purpose for permitting that type of pat-down.
17 The primary purpose is to protect the officer. If he
18 reasonably believes that person is armed, he may then
19 conduct that limited pat-down to protect himself.

20 QUESTION: But he can also detain the person
21 for a brief period at least to question him, ask him
22 some questions.

23 MR. RAIDEN: I believe the purpose of those
24 questions -- this is what I've struggled with. The
25 purpose of the questions is to dispel the officer's

1 suspicion. Now, what does that mean exactly I'm not
2 sure, but --

3 QUESTION: Well, one of the questions that
4 Justice Marshall asked you, whether it could be asked,
5 was who are you and do you have any identification, and
6 you agree that those questions may be asked. But what
7 if they -- what if the person says sorry, it's none of
8 your business, and a person says -- he's asked do you
9 have a driver's license, and he says yes, I have a
10 driver's license, but you can't see it? Now, could the
11 officer then search him for his driver's license? I
12 take it you say he could not.

13 MR. RAIDEN: I don't know that he could unless
14 -- under Florida law we have what's called the loitering
15 and prowling statute. Loitering and prowling is an
16 individual crime with its individual elements. And if
17 the defendant's conduct grows to the level of loitering
18 and prowling under Florida law, a Florida officer could
19 probably then arrest him for that crime.

20 QUESTION: Well, yeah, but he could -- but --

21 MR. RAIDEN: If it doesn't rise to that level,
22 if the person simply refuses to cooperate with the
23 officer, I'm not sure he doesn't have a right to refuse.

24 QUESTION: And if the officer says do you have
25 -- do you have a driver's license, I want to look at

1 your fingerprints, and the fellow says well, I have a
2 driver's license, but you -- it's none of your business
3 about locking, and the officer then searches him, not
4 for a gun or anything else but for a driver's license.

5 MR. RAIDEN: I'm not sure the officer can do
6 that.

7 QUESTION: Well, I think I would say you
8 certainly have argued that he could not do that. If you
9 argue that he could not take his fingerprints right
10 there on the spot, surely you would argue he could not
11 search him for his driver's license.

12 MR. RAIDEN: I don't believe he could search
13 him. I think he can ask for and ask who you are, and
14 part of the reason he can ask who he is may be for
15 future reference. If the person looks suspicious, the
16 officer, under Terry, has a right to detain him if
17 there's some reason to suspect there's criminal activity
18 afoot. And he can ask him who he is, and I would assume
19 would make a report of that perhaps. But unless he can
20 connect this person to a specific crime, he can't go
21 much beyond that.

22 Now, perhaps later on the officer might be
23 patrolling that same area, and maybe he would find a
24 broken area in a business. Well, then he's got this
25 person's name for reference. He may be able to go back

1 and --

2 QUESTION: May I get back to this case for a
3 moment? In this case there are arguably two different
4 seizures of the person: one, taking him to the station,
5 and secondly, taking his fingerprints. They're at least
6 analytically separate.

7 In your view, which is the greater invasion,
8 the more serious intrusion on the person that's under
9 arrest?

10 MR. RAIDEN: I would say the fingerprinting --
11 I'm -- I'd say the transportation to the station is more
12 serious. And that seems to be the thread that underlies
13 Dunaway and Royer and those cases.

14 I am eating into my rebuttal time, and if
15 there are no further questions, I'd like to reserve the
16 last three or four minutes.

17 CHIEF JUSTICE BURGER: Very well.

18 QUESTION: I have just one I'd like to ask, if
19 I may. Does the record tell us how long Mr. Hayes was
20 kept at the station and how long it took to get him
21 there?

22 MR. RAIDEN: I've looked and looked, and I
23 can't find it.

24 CHIEF JUSTICE BURGER: Mr. Munsey.

25

1 ORAL ARGUMENT OF WILLIAM I. MUNSEY, JR., ESQ.,
2 ON BEHALF OF THE RESPONDENT

3 MR. MUNSEY: May it please the Court, and Mr.
4 Chief Justice:

5 Justice O'Connor, in answer to your question,
6 the record does not reflect either the amount of time of
7 the detention or how far it took to transport him. If
8 this Court is interested, I have spoken with Detective
9 Gandy, and I would be happy to share that information,
10 but it is not in the record.

11 QUESTION: Well, wasn't -- they took his
12 prints at the station, didn't they?

13 MR. MUNSEY: Yes, sir.

14 QUESTION: And didn't they match?

15 MR. MUNSEY: Yes, they did.

16 QUESTION: Well, did --

17 MR. MUNSEY: We had --

18 QUESTION: Did they release him then?

19 MR. MUNSEY: No. They arrested him.

20 QUESTION: Well, what's that I said. So how
21 long was he detained at the station? He was arrested.

22 MR. MUNSEY: Well --

23 QUESTION: He was detained for quite a while.

24 (Laughter.)

25 MR. MUNSEY: He was --

1 QUESTION: Well, if he wasn't arrested --

2 MR. MUNSEY: Up until -- up until he was
3 formally arrested, he had been detained for 30 minutes,
4 and it was --

5 QUESTION: That's the answer to the question,
6 isn't it?

7 MR. MUNSEY: Yes.

8 QUESTION: Well, if he wasn't legally
9 arrested, arrested as a matter of law when they took him
10 away from his home, he certainly was arrested as soon as
11 they took the fingerprints.

12 MR. MUNSEY: As soon as Officer Cardell of the
13 Sheriff's Department made that match, then he was what I
14 would call formally arrested.

15 The other answer to your question was the
16 distance between Mr. Hayes' residence and the Punta
17 Gorda police station, whether it's not in the record,
18 was one mile.

19 I think in this case and what has bothered me
20 and both Mr. Raiden with the case has been the dry
21 record of the motion to suppress hearing. And you read
22 that and the appendix, and you keep wondering why the
23 police went to Mr. Hayes' home, what was their reason in
24 going there, why did they think that he was the rapist.
25 Everything is very disjointed in that.

1 I have a finding of the Second District court
2 of appeal that I stand here in front of you today that
3 there was no probable cause. Well, let's look at the
4 reasonable suspicion. And I would ask the Court and
5 invite the Court to look at that reasonable suspicion in
6 concert with the trial testimony joined with the
7 testimony at the motion to suppress hearing.

8 Now, what did the police have? We have the
9 Punta Gorda police investigating three rapes, and we
10 have the rape of Velora Davis, a woman aged 82. You can
11 get that at the sentencing hearing at R-741 where her
12 case was null proessed. And the second rape of Helen
13 Smith, aged 60. The case against Mr. Hayes where Mrs.
14 Smith was a victim was also null proessed at Record 741.

15 Police had interviewed these victims, and they
16 had gotten a composite photograph -- not a photograph
17 but a composite representation of what he looked like, a
18 composite portrait, and they had gotten a composite from
19 Julienne Hollander and another composite from -- it was
20 either Ms. Davis or Ms. Smith. The record is not clear
21 on that in the trial. And this composite had been
22 published in the local newspaper.

23 Now, what is alluded to in the motion to
24 suppress hearing? You have one question, and that's at
25 the Joint Appendix page 11 by Mr. Bader where he's cross

1 examining Detective Shoup, and he said, "Did any
2 informant tell you they knew of their personal knowledge
3 that he had perpetrated any of the alleged crimes?" And
4 Detective Shoup answers, "Not myself." Remember, there
5 are two investigators, two detectives, Shoup and Gandy.

6 At the trial, and that's Record --

7 QUESTION: Mr. Munsey --

8 MR. MUNSEY: Excuse me.

9 QUESTION: May I back up just a moment?

10 MR. MUNSEY: Yes, sir.

11 QUESTION: You said that in some prior case he
12 was arrested and null prossed.

13 MR. MUNSEY: No. He was not arrested on Smith
14 and Davis. They had charges against him for Davis and
15 Smith after he was arrested on Hollander. That's the
16 case before the Court now. There's three rapes.

17 QUESTION: Well, I'm talking about the one
18 that he wasn't tried on, the one he was null prossed on.

19 MR. MUNSEY: Yes, sir.

20 QUESTION: Was he arrested in that one?

21 MR. MUNSEY: I would presume that he was for
22 the state to go ahead and null pross --

23 QUESTION: Well, how in the world is it that
24 they didn't have his fingerprints?

25 MR. MUNSEY: The rape of Velora Davis was

1 April 27th, of Helen Smith was May 18th, and of Julienne
2 Hollander was May 13th. The first arrest and seizure or
3 the arrest and seizure of Mr. Hayes was on June 23rd
4 when they -- when they finally seized his prints. Now,
5 they are trying --

6 QUESTION: I just can't how you can null gross
7 a case when a man is not arrested.

8 QUESTION: Were these second charges brought
9 after his fingerprinting in the case now before us?

10 MR. MUNSEY: That is what I presume from the
11 record. This is the only mention that we have of Ms.
12 Davis and Ms. Smith is at sentencing. And this is one
13 reason that I -- and Judge Adams reads into the record
14 as to why he is retaining one jurisdiction over one
15 third of the sentencing is these prior rapes. And at
16 that point in time, because he did get such an lengthy
17 sentence, the state attorney null grosses the cases
18 against Mr. Hayes with Ms. Davis and Ms. Smith, and
19 Judge Adams says on the record, he says he doesn't want
20 these ladies to go through the humiliating, degrading
21 experience that Ms. Hollander had to go through in her
22 trial.

23 When you look at the trial record and
24 Detective Shoup is testifying, Mr. Bader, defense
25 counsel, says to him, asks him, "Mr. Shoup, did any" --

1 and I'm at Record 528 -- "did anyone whisper in your
2 ear, did anyone tell you Joe Hayes might be the one?"
3 "No, sir, not to me." "Well, did you get a whisper
4 through Mr. Gandy?" Answer: "Yes, I did." Question:
5 "Somebody whispered to Mr. Gandy?" "Yes, sir."

6 And at that point in time Detective Shoup goes
7 into the fact that he didn't know the name of Detective
8 Gandy's confidential informant, and regretfully, when
9 Detective Gandy takes the stand at trial, Mr. Bader does
10 not ask Mr. -- Detective Gandy about his confidential
11 information. Detective Gandy is not asked at the motion
12 to suppress hearing or at trial who the C.I. was, was he
13 reliable --

14 QUESTION: Mr. Munsey, may I ask what the
15 point of all this discussion of the evidence is?

16 MR. MUNSEY: Well --

17 QUESTION: What -- what relevance does that
18 have to the point that you want to make?

19 MR. MUNSEY: Okay. When they'd run the
20 photograph in the newspaper, the composite, the C.I.
21 comes forward. The C.I. tells Detective Gandy.

22 QUESTION: The C.I. being a confidential
23 informant?

24 MR. MUNSEY: Confidential informant. And says
25 it's Joe Hayes. At that point in time through the

1 record Detective Gandy goes forward and on a pretext
2 goes up to Mr. Hayes' home, knocks on the door, sees
3 those herringbone shoes, and does a pretext interview,
4 and then walks away. At that time he finds out that Joe
5 Hayes works at the Home Care Center. He goes to the
6 Home Care Center with a subpoena ducas tecum from the
7 State Attorney's Office -- now, this is from the trial
8 record -- and gets his personnel file. He interviews
9 the co-workers. He gets -- and if you go back to the
10 motion to suppress hearing, you will see that they
11 talked --

12 QUESTION: Well, what is the point of this?
13 What is the legal relevance of all of this discussion of
14 the --

15 MR. MUNSEY: Okay. That they had reasonable
16 suspicion. And I argued in the Second District, Justice
17 O'Connor, that they had probable cause to do the arrest.

18 QUESTION: Well, you're trying to argue here
19 that the court below was wrong in saying there was no
20 probable cause, is that it?

21 MR. MUNSEY: I -- yes, Your Honor. And I'm
22 saying --

23 QUESTION: And you want us to reweigh the
24 evidence and disagree with the court below and find
25 there's probable cause? Is that what you're arguing?

1 MR. MUNSEY: Well, what I -- I don't want you
2 to substitute the judgment of the Second District, but I
3 am saying that the Second District applied an incorrect
4 constitutional standard to probable cause, as this Court
5 has announced in --

6 QUESTION: Well, then you're saying --

7 MR. MUNSEY: -- Illinois v. Gates. This is an
8 alternate constitutional argument, Your Honor.

9 QUESTION: Well, then you're saying that this
10 Court is not bound by the state court's determination on
11 this issue because it's a federal issue?

12 MR. MUNSEY: Yes, Your Honor.

13 QUESTION: And that you argue here that there
14 was probable cause for the arrest.

15 MR. MUNSEY: I do, Your Honor. I do.

16 QUESTION: Well, you are going to get to
17 whether -- to the question of whether you can take
18 fingerprints on reasonable suspicion.

19 MR. MUNSEY: Yes. Yes, Your Honor.

20 QUESTION: Scon.

21 MR. MUNSEY: Yes. Right now.

22 Your Honor, the other alternate constitutional
23 ground is inevitable discovery. Before I forget, on
24 Record 741, other than the in court testimony of
25 Julienne Hollander, we have Judge Adams as he passes

1 sentence stating that Joe Hayes is subject to an
2 outstanding warrant by law enforcement agencies in other
3 jurisdictions in connection with similar crimes -- the
4 West German Federal Republic. That's at Record 751. I
5 would proffer to the Court that the State of Florida
6 does have those fingerprints.

7 So there are two prongs, two approaches that
8 Florida can take and have those fingerprints if free
9 trial is necessary.

10 QUESTION: Mr. -- General Munsey, may I just
11 ask this one question --

12 MR. MUNSEY: Sure-

13 QUESTION: -- on your probable cause
14 argument. I am correct, am I not, in understanding that
15 the evidence on which you rely to establish probable
16 cause was not all presented at the hearing on the motion
17 to suppress.

18 MR. MUNSEY: Correct, Your Honor.

19 QUESTION: It partly relies on the trial
20 transcript.

21 MR. MUNSEY: Correct. Correct.

22 We have a detention, investigative detentions
23 must be temporary and last no longer than necessary to
24 effect the purpose of the stop. The purpose of this
25 stop was to take Mr. Hayes' fingerprints. The State of

1 Florida did everything reasonable. We had Officer
2 Cardell of the Charlotte County Sheriff's Office on
3 standby at the police department ready to roll those
4 prints.

5 Now, where the Government has been in trouble
6 was the -- the case of United States v. Place, and
7 that's where luggage was seized and 90 minutes elapsed.
8 And it was alluded to that perhaps the Government should
9 have had some dogs ready to sniff.

10 Well, that's not a problem in this case. We
11 have someone competent, willing, ready and able to
12 compare those fingerprints, and they were compared. The
13 purpose of his detention was to take his fingerprints.
14 The fingerprints were taken. We tried to be -- we
15 didn't intrude upon his rights any more than was
16 reasonably necessary. I think it makes no --

17 QUESTION: Is there any reason why prints
18 couldn't be taken at the scene or at a suspect's home?

19 MR. MUNSEY: Only the economics of the Punta
20 Gorda police department. I don't believe they have
21 mobile fingerprint kits.

22 QUESTION: Well, what's involved -- just an
23 ink pad and a piece of paper?

24 MR. MUNSEY: That might be all that is
25 involved, Justice O'Connor. When I've been

1 fingerprinted for the bar examination, I remember it was
2 a --

3 QUESTION: Didn't you just roll your finger on
4 an ink pad and put it on a piece of paper?

5 MR. MUNSEY: It was a big -- it was a stable
6 thing, but I imagine that is all that -- correct.
7 You're correct.

8 QUESTION: May I ask you the same question I
9 asked your adversary? Which do you regard as the
10 greater intrusion on the citizen's freedom, you might
11 say -- taking him to the station or taking his
12 fingerprints?

13 MR. MUNSEY: The greater intrusion would be
14 the transportation. The fingerprints -- the taking of
15 the fingerprints you aren't asking questions, you're not
16 probing into their life. There is a bit of a chill in
17 transporting someone. Although, on balance, in
18 defending the -- the -- the detention and transporting
19 of Mr. Hayes, on the other side of that, I don't know
20 how I would feel if on my front porch of my home if a
21 policeman is there, and my neighbors are looking, and
22 I'm being fingerprinted on my front porch, or whether it
23 is not a bit more acceptable to go with plainclothes
24 policemen.

25 QUESTION: But maybe you could invite the

1 officer into the living room.

2 MR. MUNSEY: And if -- if they weren't
3 invited, we do have problems.

4 QUESTION: Right.

5 QUESTION: Well, in view of your answer to
6 Justice Stevens, doesn't this come down, then, to a
7 seizure case rather than a fingerprinting case?

8 MR. MUNSEY: Well, it's both a seizure and a
9 fingerprint case, Your Honor.

10 QUESTION: Your argument here is that this
11 would have been inevitably discovered in any event under
12 the Nix case, and therefore we're spinning our wheels up
13 here, is that right?

14 MR. MUNSEY: Yes, Your Honor. Under
15 inevitable discovery and with Nix v. Williams -- and Mr.
16 Raiden had said that I raise inevitable discovery for
17 the first time here. I find myself in a similar
18 position that New York v. Quarles was in. I believe New
19 York raised inevitable discovery the first time here.
20 But remember, New York was petitioner, and Florida is
21 respondent; and I believe I'm allowed to defend the
22 judgment on any grounds that the record might well
23 permit.

24 QUESTION: Well, quite apart from inevitable
25 discovery, is it arguable that no new trial is required

1 simply to present the same evidence all over again?

2 MR. MUNSEY: I don't believe that a retrial is
3 necessary, Your Honor. I believe that this Court could
4 well conclude on this record that there is probable
5 cause to go ahead and re-arrest Mr. Hayes on the basis
6 of Julienne Hollander's testimony at trial, and why do a
7 futile effort.

8 QUESTION: Well, it could also conclude, could
9 it not, that for reasons stated by the Florida district
10 court of appeal, this fingerprinting was proper under a
11 Terry standard.

12 MR. MUNSEY: That's true, Your Honor. That's
13 true.

14 QUESTION: I'm a little puzzled about the
15 argument. I frankly hadn't thought it all the way
16 through, but about the victim's testimony at the trial.
17 Isn't all that the product of the fingerprinting? I
18 mean if there had been no fingerprinting, how do we know
19 what would have happened thereafter?

20 MR. MUNSEY: Well, her identification
21 certainly antedates the fingerprinting, the arrest. Her
22 identification stems back from the time that she was
23 raped in her home and rolled over on her elbow and took
24 a look at Joe Hayes.

25 QUESTION: But -- but you're relying on -- on

1 the pre -- the pre-fingerprinting identification --

2 MR. MUNSEY: Yes, sir.

3 QUESTION: -- rather than what she said at
4 trial?

5 MR. MUNSEY: Well, that's where her
6 identification came from. That's the source of her --
7 of her identification was the rape itself.

8 QUESTION: But how --

9 QUESTION: Wasn't her in court identification
10 based on her view of the defendant at the scene of the
11 rape?

12 MR. MUNSEY: Yes.

13 QUESTION: But how do we know he would have
14 even gotten to court if there hadn't been the
15 fingerprinting? Did they have enough to arrest him
16 without the fingerprinting and bring him into court?
17 She didn't see him any place except in the courtroom,
18 did she?

19 MR. MUNSEY: That is the only place that she
20 viewed him. She did -- there was a photographic display
21 shown to her after the arrest, but there was no -- there
22 was no hint or suggestion of a taint to that.

23 If there are no further questions, thank you.

24 MR. RAIDEN: I hope I have time to make --

25 CHIEF JUSTICE BURGER: Anything further?

1 MR. RAIDEN: I have just one or two points in
2 response.

3 CHIEF JUSTICE BURGER: Very well.

4 MR. RAIDEN: I hope I have time.

5 CHIEF JUSTICE BURGER: You have four minutes
6 remaining.

7 ORAL ARGUMENT OF MICHAEL E. RAIDEN, ESQ.,

8 ON BEHALF OF THE PETITIONER -- REBUTTAL

9 MR. RAIDEN: Thank you, Mr. Chief Justice.

10 Justice O'Connor, I think your question is a
11 good one, and I wonder if it shouldn't remain unanswered
12 at this point -- Does the victim's I.D. have an
13 independent source? I don't think we can determine that.

14 Justice Marshall, the way I understand what
15 happened in this case, back to one of your questions, he
16 was charged with three rapes. The investigation was
17 concurrent. He was informed against jointly, and I
18 think the same evidence goes to all three. So that he
19 was never convicted independently. He was never
20 arrested three times. I think he was arrested once for
21 all three. That's --

22 QUESTION: Was the null crossing after this
23 case?

24 MR. RAIDEN: After this case was tried and
25 convicted.

1 QUESTION: Well, what in the world that's got
2 to do with this case?

3 MR. RAIDEN: Excuse me?

4 QUESTION: What in the world does that have to
5 do with this case?

6 MR. RAIDEN: The --

7 QUESTION: The argument that the Government
8 made was that they had probable cause to think it was
9 him because he had been null processed.

10 MR. RAIDEN: That's not my understanding of
11 what happened.

12 QUESTION: I understood the Government's
13 argument to be that these other asserted attacks were
14 known to the police at the time they went to his house,
15 and that that furnished an additional basis for a
16 probable cause arrest at that time.

17 QUESTION: But that's not what he said.

18 MR. RAIDEN: I don't think that's what he said
19 either. They were investigating --

20 QUESTION: Well, that's the way I understood
21 his argument. Otherwise, there would have been no point
22 in talking about these null processed cases.

23 MR. RAIDEN: I'm not sure there is any point
24 in talking about them. They were being investigated all
25 at the same time, and they didn't proceed with them.

1 QUESTION: Well, I thought the point was that
2 three different people had versions of what he looked
3 like, and together they were able to arrange a composite
4 drawing that gave them their probable cause.

5 MR. RAIDEN: That leads to my last point.
6 This Court said in Beck v. Ohio that a trial judge
7 cannot make an adequate probable cause determination if
8 they're not apprised of what the officers are going on.

9 Now, they said at one point in the suppression
10 hearing that, as I understood them to say, the picture
11 didn't look particularly like Joe Hayes, for one. For
12 the second part, they didn't bring those pictures in so
13 that the judge could look at them and decide. And I
14 don't see how the pictures help the State's argument
15 when the trial judge never got to look at them. In
16 other words, conceivably they may have had probable
17 cause, but if they did -- and I don't think they did --
18 but if they did, they didn't prove it.

19 The last point I wanted to make regarded
20 inevitable discovery. My position would be that is a
21 trial court determination, and I base that on Nix. The
22 case first came to this Court in Brewer v. Williams.
23 The Court reversed on the basis of the invalid
24 confession and hinted that perhaps inevitable discovery
25 might get the body back into evidence. At that time

1 there was a second suppression hearing. Isn't it Iowa,
2 isn't that the state? Then -- then argued inevitable
3 discovery at the trial, and so when it came back to this
4 Court, we had a record whereupon this Court could make a
5 determination if the inevitable discovery rule did apply
6 in those facts. And such is not the case with Hayes v.
7 Florida.

8 QUESTION: But if your friend is right on his
9 theory that there was probable cause at the time they
10 went to the man's home, then the inevitable discovery
11 claim evaporates from the case, is that not right?

12 MR. RAIDEN: Yes, Your Honor. That's correct.

13 Thank you.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.

15 The case is submitted.

16 We'll hear arguments next in Ball against the
17 United States.

18 (Whereupon, at 10:58 a.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

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3-6766 - JOE HAYES, Petitioner v. FLORIDA

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