OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MINNESOTA, Petitioner v. TIMOTHY DICKERSON

CASE NO: 91-2019

PLACE: Washington, D.C.

DATE: Wednesday, March 3, 1993

PAGES: 1 - 51

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

MINNESOTA, :

Petitioner :

v. : No. 91-2019

TIMOTHY DICKERSON :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, March 3, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

MICHAEL O. FREEMAN, ESQ., Minneapolis, Minnesota; on behalf of the Petitioner.

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioner.

PETER W. GORMAN, ESQ., Minneapolis, Minnesota; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in number 91-2019, Minnesota v. Timothy Dickerson.

Mr. Freeman.

ORAL ARGUMENT OF MICHAEL O. FREEMAN

ON BEHALF OF THE PETITIONERS

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

This case has been called a plain touch, a plain feel, or plain view case. But when all the labels are set aside, this Court must decide whether police officers in the field, under a variety of circumstances, may continue using all their experience, all of their knowledge, and all of their senses in arriving at probable cause determinations.

In this case, Officer Vernon Rose conducted a limited, careful, and reasonable protective pat search that was well within the limits of the Terry v. Ohio doctrine.

QUESTION: Well, do you agree that, at least on the officer's testimony, it was possible for the State Supreme Court to find, as it did, that he went beyond the pat search for weapons? I presume the point of their

analysis was that whatever this lump was that he felt, it was perfectly obvious that it wasn't a gun or a knife or some kind of a weapon, and that he went a little bit further to see if he could figure out what it was. Do you agree that the court could at least place that interpretation on the testimony?

MR. FREEMAN: Yes, Your Honor, the court could have, but we believe the court erred. The facts for the trial court and facts --

QUESTION: Well don't -- don't we normally take our facts from the State -- the State courts or the courts from which the appeals are taken?

MR. FREEMAN: Yes, you do, Your Honor. But we believe that the facts in the trial court, in the Supreme Court were the same, but the Minnesota Supreme Court used the wrong legal standard, the subjective standard, to -- in which to arrive at its conclusion of the facts. If the subjective standard --

QUESTION: Well, what was subjective about its concluding that the officer had gone -- based on the officer's own testimony, had gone beyond what was necessary to determine whether there was a weapon there or not.

MR. FREEMAN: Well, Your Honor, the -- the Supreme Court majority opinion even misstated Officer

Rose's testimony. I would refer the Court to page 2 of the reply brief, because the --

QUESTION: Uh-hum.

MR. FREEMAN: -- The facts in the transcript were very limited in terms his testimony. He said, "As I pat searched the front of his body I felt a lump, a small lump in the front pocket. I examined it with my fingers and it slid and it felt to be lump of crack cocaine in cellophane." If he --

QUESTION: Well, he didn't -- he didn't claim that he thought the lump might be a weapon. And, I mean, no one -- when I read it, it didn't occur to me that this so-called lump might be a potential weapon, which is what he was authorized to search for under Terry.

MR. FREEMAN: Your Honor, we believe that the -- the facts before -- before the trial court, before the Minnesota Supreme Court, and this Court, support the conclusion at the same time he decided that it was not a weapon, that he knew it was crack cocaine. We suggest that he can do that because of his experience as a police officer, because he had seized crack cocaine out of this very same house at 1030 Morgan Avenue, North in Minneapolis on previous occasions, and, in fact, he had arrested suspects with weapons on their person.

So when he was doing a legitimate Terry stop and

a subsequent search for weapons --

QUESTION: Could a reasonable trier of fact conclude that the officer went beyond the bounds of what was necessary in order to determine if the subject had a weapon?

MR. FREEMAN: Your Honor, a reasonable trier of fact could make that conclusion, but we believe since the Minnesota Supreme Court used the subjective standard rejected in Horton, that that so colored their judgment that they did not provide the proper analysis.

I would point to the Court --

QUESTION: Well did -- would you agree, then, that a police officer cannot, in conducting a Terry frisk, go beyond what is necessary to make the determination that the subject does or does not have a weapon?

MR. FREEMAN: Yes, Your Honor, the limits of the Terry search say that that is a search strictly for -- is a search for weapons. And it -- the position is that, in fact, if -- at the time he decided it was not a weapon, that that search must stop.

QUESTION: So the conduct of the search cannot extend beyond the object of the search, beyond the purpose of the search.

MR. FREEMAN: That is correct.

Your Honors, we're suggesting that Officer Rose,

using his knowledge and experience in touching the suspect in the front of his thin nylon jacket, reasonably concluded, with probability, that, in fact, he had crack cocaine in the pocket and therefore he was authorized to seize it.

And what, I guess, we're suggesting is that the Court should confirm what Officers Rose -- Rose's experience and knowledge, and, yes, his hands told him, that at the time he touched this object in the nylon jacket during a protective pat frisk authorized by Terry, that he concluded that it was not a weapon and at the same time contemporaneously decided it was crack cocaine.

QUESTION: Suppose he needs 5 seconds to manipulate the object from the outside of the jacket. Is that permissible?

MR. FREEMAN: Well, Your Honor, the -- the police officer is entitled to do a thorough and reasonable search for a weapon.

QUESTION: Now, suppose that he's satisfied by touching an object that it's not a weapon. Now, can he linger for 3 or 4 seconds to determine whether or not it might be contraband?

MR. FREEMAN: Your Honor, he could under the concept of a continuing search based on reasonable suspicion. This Court in -- in the discussion beginning

in Terry extending to Arizona v. Hicks and subsequently in -- in place, suggested that if, in fact, a reasonable suspicion existed in the minds of the police officer, that, in fact, a limited additional investigation might occur under four criteria.

First, the officer --

QUESTION: That would be an extension of our precedents, I take it.

MR. FREEMAN: That would be, Your Honor.

QUESTION: Thank you.

MR. FREEMAN: We would suggest that the officer would have to have a right to have his hands there in the first place, have reasonable suspicion that there is an object there, but not yet have reached the level of probable cause, that additional search would have to be limited in scope and duration, it would have to be only to quickly confirm or deny what the object was, and it would have to be within operational necessity.

QUESTION: Would it therefore be appropriate for him to peek into the pocket if he could do that real promptly?

MR. FREEMAN: Your Honor, I don't believe this Court's doctrine, in discussion, of appropriate pat frisks would suggest he could not.

QUESTION: So your answer is yes, that would.

MR. FREEMAN: That's correct.

Your Honors, we're suggesting that reasonableness is the touchstone of the Fourth Amendment. It's reasonable for police officers to be able to use all of their sense and all of their experience in arriving at probable cause determinations.

This Court recognized in Coolidge the use of sight is an important sense in developing probable cause. This Court, in Johnson, recognized smell through the sense of burning opium as an appropriate probable cause determination, and in Terry itself, this Court recognized that the sense of touch is an important determination to decide whether or not a suspect has a weapon.

In short, this Court's decisions reflect the common sense and reasonable principle that officers in the field are entitled to use all of their senses to gather information to make the difficult decisions they must make.

QUESTION: Mr. Freeman, your objection to the decision below is that they said you cannot use feel, that that can never be the basis for a probable cause determination.

MR. FREEMAN: Yes. That's one of them, Your Honor.

QUESTION: Well, what is it addition? Suppose I

agree with you on that, but I also think that even -- even if he was using feel permissibly, there is considerable question whether he felt beyond what -- beyond the feel that was necessary in order to determine that this wasn't a weapon and therefore violated the Fourth Amendment. What do I do? Is the case remanded or what?

MR. FREEMAN: Well, Your Honor --

QUESTION: I mean I don't see -- I don't see why you should win so long as there is some possibility, as Justice Souter indicated, that the manipulation of the thing he felt was -- was more than was necessary to determine that it wasn't a weapon.

MR. FREEMAN: Well, Your Honor, that goes right back to the Minnesota Supreme Court's mischaracterization of the facts. Because they used a subjective standard, because they were focusing solely on what was in the mind of the officer and not his objective -- objective actions, that they were so colored in their determination that they, frankly, mischaracterized the evidence.

QUESTION: Well, I'm willing to say that, fine. So let's give them a chance to characterize it correctly. So, I mean, we wouldn't say that the search was valid, we would just say it was not invalid for the reason that the Minnesota court gave. It may be invalid for another reason, but we don't know because they were using the

wrong standard.

MR. FREEMAN: Well, Your Honor, the breadth of the search was not challenged in the district court, it was not challenged in the appellate court. It arose first in the Minnesota Supreme Court where they used words like "squeeze" and "manipulation." The officer said in his transcript, "felt and examined."

Now, consider the hypothetical: a police officer is frisking a person, he's bent over the police car, and he comes down in a nylon jacket. It is not unreasonable under the Fourth Amendment to touch and have to ascertain what it is. And what we're suggesting is "feel" and "examine" are the real words of Officer Rose in the Supreme Court, and that those two verbs are one action that occurred -- that was a brief and a reflex action that occurred at the same time.

But the Minnesota Supreme Court took those same words. First, they reversed them. They said -- instead of "it slid," they said "slid it," and certainly that is clearly a different concept or connotation of the action that occurred. And then secondly the Minnesota Supreme Court went beyond that in terms of using the subjective standard and focusing only what was in his mind. The fact that the officer was looking for weapons and contraband does not make his search inappropriate.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And certainly this Court and a number of other courts, in decisions have held that when you find contraband in a legitimate Terry search, that the officer is not required to ignore that contraband but, in fact, can seize it and it will not be suppressed under the Fourth Amendment. That was set forth in --

QUESTION: Well, Mr. Freeman, I suppose doctrinally you're more interested in -- in having us hold that there such a principle as plain touch. That's really the most important question in the case, isn't it?

MR. FREEMAN: Yes, sir.

QUESTION: I know you want to win the case, but -- straight across the board, but you will have won considerably if -- if we held that the Minnesota court was wrong in refusing to recognize plain touch.

MR. FREEMAN: Yes, Your Honor. And I think it's also a victory for police officers on the street who ought to be able to use all their senses. That's really -- this Court has already recognized a number of them --

QUESTION: To search for weapons.

MR. FREEMAN: Justice Kennedy, the court --

QUESTION: Well you wouldn't -- would you object to our saying that a police officer ought to be able to use all of his senses to search for weapons? Is that sufficient? Is that a correct statement of the law?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. FREEMAN: That is a correct statement of the existing law previous to this case, but we believe, Your Honor, that they ought to be able to use all of their senses in all of their criminal act -- in all the work that they do in terms of law enforcement. I mean --

QUESTION: Well, they can search for weapons, but if -- but if in the course of searching for weapons they touch something that -- that is plainly contraband, they can seize it.

MR. FREEMAN: Well, Your -- yes, Your Honor.

QUESTION: That's -- that's your proposition.

MR. FREEMAN: That's -- that's what we're arguing.

QUESTION: Well, it sounds like you're arguing for more, that you're arguing for an extension of Terry and just an outright recognition that officers can search not -- can pat down under Terry not only for weapons but also for drugs.

MR. FREEMAN: Your Honor, I don't think we have to --

QUESTION: That's what it sounds like.

MR. FREEMAN: Okay. Let me -- let me try to be more precise. I do not believe we have to get to the reasonable suspicion theory that I suggested that was already -- that was evolving in this Court's opinions. We

believe probable cause was ascertained at the time the officer reached down, he felt and examined, and he knew at the same time it was not gun but it was crack cocaine. And crack cocaine has got --

QUESTION: Well, that gets us back to whether we accept the factual findings of the Supreme Court of your State.

MR. FREEMAN: And in -- Your Honor, under Ker v. California this Court can, and has in the past on a number of occasions, disregarded findings of fact that were based on the proper -- improper legal conclusions. If a court below uses the wrong legal standard, that has to impact their judgment. And in deciding constitutional questions, this Court has the right, and has done in the past, to make their own conclusions.

The facts are quite simple.

QUESTION: But it's simply existing law, is it not, Mr. Freeman, to say that -- and if in conducting a Terry pat down for weapons an officer has -- comes on reasonable suspicion of contraband, he's entitled to seize the contraband. That's no extension of existing law.

MR. FREEMAN: No, sir, that's not an extension.

QUESTION: Am I right that, in fact, you do not need -- even on your theory, you don't need a new exception to the warrant requirement? All you need, as I

understand it -- and maybe not to win this case, but as Justice White said, doctrinally, all you need is a recognition that the sense of feel can be employed like the sense of sight and smell and so on.

And if in the course of what is a -- within the legitimate scope of a Terry search, based on feel and the other senses, an officer reaches the point of having cause to believe that there is contraband there, the officer then can seize the contraband under -- under existing law. Whether it be search incident to arrest --I assume if he had probably cause to believe it was crack, he could arrest him for possession at that point under exigent circumstances, if, for some reason, arrest was not in order.

You don't need a new exception to the warrant requirement even on your own claim that feel ought to be recognized as a legitimate source of information. Isn't that true?

MR. FREEMAN: That's correct, Your Honor. What we're trying to do is to suggest that an officer can use his sense of feel to develop probable cause. And it is not the critical question about which sense you use to arrive at the conclusion of probable cause, it's whether the standard of probable cause has been met.

QUESTION: So when we say -- when we all seem to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

use the term, when we say the -- a plain feel doctrine or a plain feel exception, we should not and you are not suggesting that there would be yet another exception to the -- to the warrant requirement akin to plain view. What you're really arguing for is simply the -- the recognition that feel is a legitimate source of fact.

MR. FREEMAN: Yes, sir.

QUESTION: Okay.

QUESTION: Don't you find it rather ineffable to determine whether when he felt this little thing, he immediately knew that it -- that it was crack cocaine, or rather before he knew it was crack cocaine he knew it was not a gun and should have stopped thinking right then and moved his hand further on.

I -- is every Fourth Amendment case going to come down to this? I mean I am sure that every time policemen do a -- do a frisk, they are going to use this -- this doctrine. Why shouldn't we just adopt a clear doctrine that anything you find without strip search, without intruding into pockets and looking underneath the outer garments, is okay, and anything beyond that is not okay?

Or else, another clear line doctrine. That is you can get guns and weapons and anything else you find, you can't use at all. Wouldn't that be a lot easier? I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

just can't imagine going through this, well he slid it, he slid the package and he felt it, before it was a gun. We can't do this in every case, can we?

MR. FREEMAN: Your Honor, I would suggest that -- that this Court, in terms of judging what is a reasonable stop under Terry and what is a reasonable search under Terry, has already engaged, as the lower courts have, in this kind of analysis.

QUESTION: Right. Terry itself is sort of an absolute rule. You can do a frisk but you can't -- you can't do a strip search. That's sort of an arbitrary rule also. Why shouldn't we adopt another arbitrary rule? You get weapons, you don't get anything else. If you're lucky enough to find crack cocaine, well, it's tough luck, you shouldn't have been looking anyway.

MR. FREEMAN: But, Your Honor, the problem with crack cocaine and what it's causing in the streets and among the people, it's reasonable, that's the touchstone of the Fourth Amendment. And it's reasonable if a person is over -- the jacket opens, he comes down, he touches, he has to be able to stop his fingers there long enough to decide what it is.

And when he decides what it is, at least in our view, that he decided that it was probable cause -- that probable cause it was crack cocaine at the time of that

single touching. And there are two verbs to describe it. And the problem with the Minnesota Supreme Court is that -- way beyond the fact record and come up with "manipulation" and "squeezing" when that just isn't -- doesn't have support in the record below.

QUESTION: But what does the sentence "I examined it with my fingers" mean?

MR. FREEMAN: Well, Your Honor, I believe examined with your fingers is your fingers stop and they are there --

QUESTION: Does it mean he did it without -- I mean he immediately knew what it was without manipulating at all? The Minnesota Supreme Court thought that implied that there was some kind of manipulation before he reached the conclusion, and you say examined with the fingers means I concluded without examination with my fingers.

MR. FREEMAN: Well, Your Honor, we're dealing with police officers. Police officers should --

QUESTION: Well, I -- and we're also dealing with a -- with State Supreme Courts that interpret the testimony of their officers. They're much more familiar with their officers than we are.

MR. FREEMAN: Well, I would suggest, if I might, that that may not be the case in our Supreme Court. But I would refer to page 3. It says respondent's counsel

below, in the original suppression hearing, stated in the officer's testimony --

QUESTION: Page 3 of what? I'm sorry.

MR. FREEMAN: I'm sorry, page 3 of the reply brief, the petitioner's reply brief.

QUESTION: Right.

MR. FREEMAN: It says on the end of the middle paragraph, "Indeed, respondent's counsel admitted that," quote, "in the officer's testimony he said right away he knew what he felt was crack, he never suspected it was a weapon," period, end quote. From the -- from the transcript on T. 45.

Now, what we're saying is his hands came down, he knew what it was at the same time. That's not unreasonable when you're talking about a thin nylon jacket and the unique constituency of crack.

QUESTION: Well you're saying we should rely on the lawyers' characterization of the testimony instead of the Supreme Court's characterization of the testimony. I suggest we just look at the testimony. He says he examined it with his fingers, which means something.

MR. FREEMAN: Well, Your Honor, I guess I would suggest, without over pushing this point, that feel and examine can clearly take place within the same time. They're clearly within the reasonableness of a Terry pat

search.

QUESTION: Well, it's not a mathematical question anyway. You can't say that any human being, you know, immediately stopped thinking about one thing. There's going to be a little blurring. I mean that's true of any rule of law.

MR. FREEMAN: Yes, Your Honor, that's -- that's correct. And this is a police officer in a street in a dark alley having a person coming out of a known crack house take evasive action -- the back. He begins a pat search, the jacket is loose, he feels down, he has a right to have his hands there long enough to make sure it is not a weapon.

Thank you very much.

QUESTION: Thank you, Mr. Freeman.

Mr. Seamon, we'll hear from you.

ORAL ARGUMENT OF RICHARD H. SEAMON

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PETITIONER

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

The primary issue in this case is whether the sense of touch, like the other senses, may give rise to probable cause when employed in the context of a Terry search. On that issue we join the State of Minnesota in

urging the Court to hold in the affirmative that, yes, the sense of touch, along with the totality of other circumstances, may give rise to probable cause.

QUESTION: One thought that keeps running through my mind is it's perfectly obviously the sense of touch can support that kind of inference, because that's what Terry contemplates is touching looking for weapons. And when you touch and you recognize a weapon, the touch is what you rely on.

MR. SEAMON: That's correct. And we also think that Terry recognizes that the sort of conduct that is at issue here is simply a natural and necessary part of every protective pat down. So to determine whether something is a weapon, a police officer needs discretion to be able to momentarily handle items that he runs across in the course of the pat down and can't recognize.

QUESTION: Suppose the officer determines it is not a weapon, may he proceed further to determine whether it's contraband if there is a -- just a few seconds involved and it is not intrusive into the interior of the garment?

MR. SEAMON: No, he may not. As soon as he determines that an item is not a weapon, he must move on and look for something else --

QUESTION: Well, wasn't that the finding of the

Minnesota Supreme Court here?

MR. SEAMON: I'd like to address that issue in some depth.

QUESTION: Yes.

MR. SEAMON: Our difference is not with the interpretation by the State Supreme Court of the facts, it's with the legal analysis applied by the State Supreme Court. In this context, I think it would be helpful to refer the Court to page A-7 of the petition appendix which is where, in our view, the supreme -- the State Supreme Court went into error.

QUESTION: A-7 of the white cover?

MR. SEAMON: That's correct. Page A-7.

The court states as follow: "During the course of a frisk, if the officer feels an object that cannot possibly a weapon, the officer is not privileged to poke around to determine what that object is."

That's close to being correct, but the flaw in that argument is the assumption that a court can make an after-the-fact determination that an object cannot possibly be a weapon. The problem with this sort of analysis is it's based on pure hindsight.

The court begins knowing what the object is, and in this case exactly how much it weighs, and then it works backwards and tries to figure out whether a police officer

who didn't know what the object was should have known sooner what it was before he went on and continued the Terry search. It's really slicing the onion far too thin for courts, after the fact, to decide whether 1 second was sufficient and the officer erred by spending 2 seconds manipulating something in an officer's pocket, rather than --

QUESTION: If you could amend that formulation that you've read, how would you amend it?

MR. SEAMON: We would say, during the course of a frisk, if the officer feels an object that he knows is not a weapon, the officer is not privileged to poke around to determine what that object is.

QUESTION: I thought that was the subjective -- that's the subjective test that the law eschews, is it not?

MR. SEAMON: It is a subjective test and we think that in -- in the run of cases such as this one where we are talking about only a brief handling of an object in a suspect's pocket, the Court should adopt a presumptive rule that is reasonable for a police officer to briefly handle unrecognized objects in an officer's pocket. That --

QUESTION: Well, I could -- if the policeman couldn't tell it in this case, what -- what kind of a case

wouldn't he be able to -- to seize contraband and say well, gee, I wasn't sure it wasn't a gun? How big was this thing? It was what, it weighed -- how much did it weigh?

MR. SEAMON: .2 grams.

QUESTION: How much?

MR. SEAMON: It weighed .2 grams.

QUESTION: .2 grams. And how big was it?

MR. SEAMON: It's not clear from the record exactly how big it was.

QUESTION: Well, is it the size of a piece of chewing gum, you know a Chiclet or something?

(Laughter.)

MR. SEAMON: It was certainly -- it was certainly quite small.

QUESTION: Yeah.

MR. SEAMON: But the problem is -- is that the process --

QUESTION: Yeah, I mean, you know, if he could have been in any doubt that this was not a -- you know, a six-gun, you're always going to allow search and seizure of contraband is what it means. And certainly the policeman's not going to come in and say oh, yeah, I knew right away it wasn't a gun, but then I -- I felt around to make sure what it was, I was just curious. He's not going

to say that. He's going to say I -- you know, I wasn't sure what it was and by the time I found out what it was I said gee, not only isn't a gun, it's crack cocaine.

What we will be authorizing, effectively, is search and seizure -- stop, search, and seizure for contraband. Realistically that -- that's what we're talking about here, isn't it?

MR. SEAMON: Unfortunately, the problem -- that isn't what we're talking about, in our view.

QUESTION: Well, I think it --

MR. SEAMON: In our view, it would not be an extension of Terry. And it would not change police officers' conduct simply to recognize that a brief handling of unrecognized items is -- is permissible. It is a necessary part and a continuation of a Terry pat down.

Unfortunately, it's true that weapons come in all shapes and sizes. Even a small penknife secreted in a suspect's clothing can cause severe damage if the officer isn't aware that it's there.

The other problem with analyzing these sorts of cases after the fact is that the process of determining what an object is is not so different from the process of ascertaining whether nor not it is a weapon. Really, there is an overlap between the two thought processes

going on in the mind of an officer.

QUESTION: There is an overlap. And even the most honest police officer who gets up to testify and tries to tell the truth as best he can recall it, he isn't going to know whether he knew it was a -- wasn't a gun before he knew it was crack cocaine, and he's going to give himself and the State the benefit of the doubt.

So in all of these cases that's the testimony you're going to get. No, I wasn't sure it wasn't a weapon before I was sure that it was crack cocaine. He's not going to remember it. And I repeat, effectively you're asking us to say that you can do stop searches for contraband. That -- at least by feel, not -- not by opening garments and so forth.

MR. SEAMON: Now, we --

QUESTION: You're not asking us to do that unless you say that -- unless you say that the Minnesota Supreme Court should be reversed.

MR. SEAMON: We believe that the Minnesota Supreme Court should be reversed because in place --

QUESTION: In its application of whatever you call this -- this feel principle you're talking about.

MR. SEAMON: We would suggest that --

QUESTION: You don't -- you don't think that the officer went -- went beyond what the law should allow.

MR. SEAMON: That's correct. We believe that he stayed --

QUESTION: Yeah, well --

MR. SEAMON: -- that his conduct fit precisely within what was contemplated under Terry.

QUESTION: Don't you think then Justice Scalia's question is certainly -- you haven't answered it yet.

MR. SEAMON: The answer is -- is no, that we don't believe that we are authorize -- if we -- if the Court reverses the Minnesota State Supreme Court, that it would authorize police officers to search for contraband. I want to be quite clear in emphasizing that.

QUESTION: Well, don't you think there's a little leeway for State factfinders to go either way in some of these cases?

MR. SEAMON: There is leeway, but not -- not in this context of simply brief handling of items in the suspect's pocket. On this -- on this point, we urge the Court to adopt an objective standard that recognizes as presumptively reasonable momentary handlings of unrecognized objects, so that courts in innumerable cases aren't confronted with the difficulty of determining well, did the police officer determine that it was -- it was not a weapon before he finished manipulating the object, did he go a second or so too far.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

It's fair to --

QUESTION: So it's objectively reasonable if it's a -- only extends the search for a brief period of time and does not involve any probing in the interior of the pockets that would not otherwise be necessary for a weapon, or something like that?

MR. SEAMON: That's correct. And, again, that presumption could be overcome by evidence that, in fact, the police officer had satisfied him or herself there was no weapon there, but continued searching because, you know, of his misapprehension of the law, he believed that he could go further to look for contraband. That would clearly be improper and we're not urging the Court to do that.

Briefly, on the -- on the -- what -- the so-called plain touch issue, I would like to simply confirm that our position is what Justice Souter suggested, that we are merely asking the Court to recognize that the sense of touch is like the other senses, that it contribute -- it can contribute to a determination of probable cause.

It is not creating a new exception to the warrant requirement. It is -- it is -- fits firmly within the framework of this Court's plain view doctrine, which means that --

QUESTION: Well, this would -- may I interrupt

you. There's one difference between what you're arguing for and the plain view doctrine, and that is, under the plain view doctrine, when you see it there is no further search necessary before you seize it. Whereas under plain feel, there is a search necessary.

MR. SEAMON: In this case --

QUESTION: And you're saying the search ought to be permissible if you have, at that point, probable cause. But it -- but conceptually it's different from plain view in that respect, don't you agree?

MR. SEAMON: I would agree, and in the context of this case that means that the search itself, namely the intrusion into the suspect's pocket, can't be analyzed under a plain feel doctrine and we have to refer to exigent -- the exigent circumstance doctrine and the search incident to a lawful arrest.

QUESTION: Or search incident, yeah, yea.

MR. SEAMON: And that is, in fact, what we say justified Officer Rose's reaching into the suspect's pocket. At that point his conduct had to be analyzed under -- under different and well-established doctrines. The -- but up until that point, up until the point that he reached into the suspect's pocket, he was within the scope of Terry.

I thank the Court.

QUESTION: Thank you, Mr. Seamon.

Mr. Gorman, we'll hear from you.

ORAL ARGUMENT OF PETER W. GORMAN

ON BEHALF OF THE RESPONDENT

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

What the -- what the State of Minnesota is asking the Court to do in this case is to make Terry -- Terry's rule into an evidence-gathering function. This Court has been asked before to allow Terry to be an evidence-gathering function and it has declined to do so and it should do so again. It should again decline that invitation.

The State's claim --

QUESTION: Mr. Gorman, do you question the proposition that if in the course of making a Terry pat down an officer develops a reasonable suspicion that the person being patted down has contraband, he can seize the contraband?

MR. GORMAN: There are two lines of cases that allow that, Your Honor. This Court decision in Michigan v. Long allows that, where the officer saw the trunk full of marijuana. There is also a line of other cases, mostly from the lower courts, that allow an officer to remove and inspect a hard object of substantial size. And if that

hard object turns out to be contraband, then the law under Terry would allow that kind of seizure. But that's as far as, I think, this Court's cases go, and it shouldn't go any further.

QUESTION: Why not?

MR. GORMAN: Because, Your Honor, we think that if the -- if the State's position is granted here, it would allow an enormous potential for pretextual abuse by police officers. As a matter of fact, it is our position, as I'm sure the Court knows, that this was a pretextual stop. We don't believe that this officer had any reasonable fear for his safety, although the Minnesota Supreme Court found otherwise and we did not cross appeal on that point.

But we think that if the Court adopts the position sought by the State of Minnesota, it will essentially allow any police officer to stop any person in the vicinity where the police officer thinks that drugs might be sold, and search that person -- not for weapons that Terry allows, but to search that person for drugs or for contraband.

QUESTION: What would be the matter with that?

MR. GORMAN: Well, Your Honor, we feel that that would be an enormous abuse of the Fourth Amendment. It would be a step that this Court has never taken. It would

subject all of us, I think, to fairly intrusive searches in such ordinary day-to-day confrontations as traffic stops.

QUESTION: But how about the more limited proposition that if -- if an officer develops reasonable suspicion that -- such as in this case, that this item that he has just patted down is contraband, he may then seize the contraband? Surely that is a fairly narrow proposition?

MR. GORMAN: Well, Your Honor, we don't think that that is a very narrow proposition and we don't think that the officer actually developed any such reasonable suspicion here.

QUESTION: Well, no, I mean -- I'm speaking in the abstract, not on the facts of this particular case. Assume that an officer does develop reasonable suspicion that, say, a particular something or other in the person's pocket is contraband; may he then at least examine it?

MR. GORMAN: Unless you're going to create a new class of searches, Your Honor, or create a new rule or broaden Terry, I don't think the officer should be allowed --

QUESTION: But isn't -- isn't that just existing law?

QUESTION: That's existing law.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: That if you develop a reasonable suspicion based on the totality of the circumstances, which might include location and furtive conduct and emergence from a known crack house and the brief feel of the object in the course of patting down for a weapon. Now, not this case, but a case could present such a situation, could it not? And I would have thought existing law would have justified, at that point, a production of the item.

MR. GORMAN: Well, Your Honor, I really don't think that you can answer that question without focusing on what type of object we're talking about. You know, the record in this case is very very sparse as to the size of the object. There -- as far as I can tell, this object was never introduced into evidence.

QUESTION: Well, we were talking about the abstract principle of law involved. And you seem to think that we haven't recognized the doctrine of the reasonable suspicion developed in the course of a pat down.

MR. GORMAN: Well, I guess I would answer that, Your Honor, by suggesting that there may someday be a hypothetical set of facts that would allow an officer to develop this kind of reasonable suspicion --

QUESTION: You're not arguing that the -- excuse me. You're not arguing that the officer can use only one

of his five sense, are you? I mean that's just silly.

MR. GORMAN: No, sir, we're not.

QUESTION: All right. So the Minnesota court, it seems to me, was not at all convincing when it said well, there's no plain feel exception. Of course the officer can use his sense of feel in making his determination of whether or not there's a weapon or contraband, if it's in the course of a lawful Terry search, can he not?

MR. GORMAN: Well, the court did that in Terry, but there's a distinction between a Terry situation and what's being asked for here. In a Terry situation, the officer can feel the barrel of a handgun or the cylinder of a handgun. The officer would then assume --

QUESTION: Or of a penknife?

MR. GORMAN: Well, the officer could feel a penknife, Your Honor. But the distinction that I'd like to try to illustrate is that if an officer, given the proper Terry pre -- conditions precedent, feels a gun, this Court's decision in Terry allows him to bringing out to examine it, and if possession of a concealed weapon is a crime, as it was in Ohio, then to arrest on probable cause.

What the State wants you to do here is to say that you can feel something, then form probable cause to

arrest when it's not a weapon, and then pull it out, examine it, and then take the person to the station house. And I think that that's entirely different than the situation that this Court dealt with in Terry.

A theme running through the State's briefing in this case is that what was the officer to do when he thought he had cocaine? Was he to let the person walk away or could he do something more coercive?

I think that that answer is best -- that question is best answered by referring to a number of this Court's prior cases. And I'd refer the Court to the concurring opinions in Terry v. Ohio, as well as the plurality opinion in Florida v. Roya.

The Court there suggested -- the judges who wrote those opinions suggested that there are lots of things short of custodial arrest that the officer could do in order to try to verify his suspicions. He could, for instance, have said to Mr. Dickerson do you live here, what are you doing here, what were you doing in the house at 1030 Morgan, may I -- will you give me consent to search you?

These are all sorts of things that the Court, in its prior opinions, have suggested that this officer could have done in order to try to verify the suspicion that he had.

QUESTION: He could have said what's the funny feeling lump in your pocket.

MR. GORMAN: He could have, I think, Your Honor. But he didn't of course, but he could have. All of these are questions that the -- that Justice White and other members of the Court have suggested, in the opinions to which I've cited you, that the officer could have done in order to try to verify his suspicions.

If Mr. Dickerson, for instance, had said yes, that's a lump of crack cocaine in my pocket then, of course, I think the officer would have had probable cause to make an arrest. But the officer didn't do that.

QUESTION: Well, what if -- what if the guy had said none of your business?

MR. GORMAN: Well, Your Honor, I think your Court's -- this Court's opinions say that as long as the officer -- I'm sorry, as long as Mr. Roya can say it's none of your business, good night.

QUESTION: Mr. Dickerson, yeah.

MR. GORMAN: Yes, Your Honor. As long as Mr. Dickerson could say none of your business, good night, I'm leaving here, and the officer didn't arrest him, then there isn't probable cause to arrest.

QUESTION: Well, so you say this is something the officer could have done, but it's very likely to have

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

borne -- very unlikely to have borne any fruit.

MR. GORMAN: Well that's -- I don't know if I can agree with that, Your Honor. Anyone that practices in the criminal courts knows that the number of confessions in criminal cases is absolutely staggering. Lots of -- I did trial work for 12 years, and lots and lots of clients confessed to police officers right away.

And I think that that is a reasonable possibility, that Mr. Dickerson might have said yes, I just left 1030 and that's a crack -- a piece of crack cocaine, and then the officer would have had probable cause to arrest. So I think it's not quite correct to say that the police officer had no choice but to let him go away, and that, I think, is a theme of the State's briefing in this case.

The reason why I think the Court should use Terry to govern this case is that Terry is a clear bright line rule and it has been for 25 years. I think there are four advantages to bright line rules in criminal cases and Terry fits all of them.

Bright line rules provide equal treatment and uniformity to people similarly situated. They provide greater predictability to people. They provide for less arbitrariness in application of the rules and they provide clear principles for -- on which later decisions can be

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

rested.

By contrast, case by case adjudication, which I think is a potential for what the State is asking for in this case, requires judges to rely on their personal values.

QUESTION: Yet if the touchstone of the Fourth Amendment is reasonableness, which is what the State is arguing and certainly what the language of the amendment says, doesn't that support the proposition that maybe some of it should be a case by case analysis? What is reasonable under these particular circumstances?

MR. GORMAN: Well you know, Your Honor, this Court said that in it's decision in Illinois v. Andreas, and said that there are three criteria for rules of searches and seizures, and one of them was reasonable. The other two rules, of course, were that they be workable for rank and file police officers and that they be capable of objective rather than subjective determination.

But as applied to the facts of this case and as applied to the extension of Terry and the extension of plain view that the State is asking you to do, this is not, in fact, reasonable, because officers are not harmed by tiny objects. Deadly weapons under Terry -- can already be seized under the Terry exception without the use of plain feel and there's no additional societal

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

purpose served regarding officer protection, and that is one of the factors that this Court has used in assessing what's reasonable.

QUESTION: Mr. Gorman, let me see if I understand your proposal. It is that if it is -- if you can -- if it feels like a weapon, you're entitled to go and look at it. And if that turns out to be a block of marijuana or something else, that's fine, right?

MR. GORMAN: I think a number of cases have held a hard object of substantial size --

QUESTION: Right.

MR. GORMAN: -- That the officer can't figure out, he can pull it out and inspect it and if it turns out to be a brick of marijuana, then he has contraband and can make an arrest.

QUESTION: Of course, that's not a terribly bright line either. I mean, you know, well, did that block of marijuana really feel like a pistol or not? Is it possible that that square hard object could have been a pistol?

MR. GORMAN: Well, that's a question that has divided a lot of the lower courts, as I'm sure you're aware, Your Honor.

QUESTION: Right.

MR. GORMAN: Some courts have taken a rather

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

strict view of a hard object of substantial size.

QUESTION: Yeah.

MR. GORMAN: In fact, we cited to you a --

QUESTION: Yeah, but I mean the point is it's not a clear line. Maybe there's no clear line no matter what you adopt here.

MR. GORMAN: On that point, I agree that there could be some haziness. But I also think that there's a distinction between, quote, a hard object of substantial size and something which is as minuscule as the item of evidence in this case.

Your Honor, you asked Mr. Freeman about -- some questions about the size of this object. Now none of that is in the record and it wasn't introduced into evidence, but I can answer that question if you want me to -- to answer the question, even though it's not in the record as to what it's size is.

QUESTION: I'm sure it wasn't big.

MR. GORMAN: It was -- it is small, Your Honor.

I would make the submission to the Court that the State's proposed plain feel rule meets none of the three criteria that this Court established in Illinois against Andrea -- Andreas. And that is because the applicability of a plain feel exception depends upon the facts of each case, and all of those facts can be resolved

in a different fashion by different officers.

And they would resolve those on matters such as the circumstances of the stop, the time, the place, the gestures, an attempt to flee, something like that, the officer's experience and the object's size and uniqueness, packaging, whether it was concealed, or anything like that. And so it's not a workable rule in terms of the language that you used in the Andreas case.

And it's not reasonable, for the reasons that I've already suggested, because it doesn't serve the Terry purpose, because an object that's a gun can already be seized.

And it doesn't serve any additional societal interest, and that's a point that this Court has considered in a number of cases, including the State Police Michigan checkpoint stop in Delaware v. Proust and some of those other cases that dealt with stops.

QUESTION: May I ask you a question that's running through my mind. Supposing that -- I don't if this is the case or not, but some items of contraband have a peculiar odor that is immediately recognizable to a police officer. And if during the course of a search for weapons, a Terry stop, he smells what -- he immediately says this is whatever it might be, would he, under your view, be permitted to seize that item that he smelled?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. GORMAN: I think you made that decision 45 years ago in Johnson v. the United States. The officer there said that he smelled opium and he knew instantly what opium smelled like. And so I think that the answer to your question is it's a different issue, Your Honor.

Touch -- while I -- while I agree, Your Honor, that touch is used --

QUESTION: But your answer is yes. Your answer is yes, he could seize that.

MR. GORMAN: I think he could seize it, Your Honor, yes. I think smell is different.

QUESTION: Even if -- even if it involves searching the person to find out where it was.

MR. GORMAN: Well, I think if he smells opium, Your Honor, and he knows what opium smells like, he's entitled to make a probable cause arrest and then he can do an incidental search. But the touch issue that's posed in this case is entirely different because touch, we believe, is not so readily identifiable as some of other senses.

For instance with plain view, I have no doubt at all, Your Honor, that in front of your bench is a black felt covered microphone because I can see it. But if I were blindfolded and I were sitting in front of your chair, I might know it's a microphone by touching it, but

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

I might not. I might think it might be a pen or one of those high intensity lamps that have a curving neck, or something like that. And that, I think, is why there's a distinction between the two types of sense.

QUESTION: On the other hand, you might see a Hollywood set that looks like New York City and it looks like New York City, and then you go up and feel it and, by God, it's --

(Laughter.)

MR. GORMAN: Well, that's true, Your Honor, but I'd still make the submission that, for purposes of this case, that sight is a whole lot better than some of the other senses, and it's a lot better than the sense of touch.

The third reason why we think that this is not reasonable in terms of the tests --

QUESTION: Well, let me just ask you to pause a little again on your -- your suggestion. It isn't always true that sight is better. Not just the example Justice Scalia gives, but sometimes in a dark room your touch -- sense of touch is more reliable than your inability to see well. I mean isn't it a question of how positive you are about the result rather than which sense enabled you to reach the conclusion about the degree of certainty that's appropriate?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. GORMAN: I would answer that, Your Honor, by agreeing that under certain circumstances sight may not be the best sense. I would say that in most circumstances, sight is a better sense.

But as to the second part of your question about certainty, I think that when you get down to the facts of this case, Your Honor, it is unreasonable for the officer to conclude that he knew immediately what this minuscule object was.

And I think that that's the problem in certainty, because it -- allowing decisions to be made based by the police officer on the sense of certainty is, like Mr. Freeman says, adjudicating the matter on the subjective basis, which this Court has repeatedly declined to do and has said that it should be the objective view.

QUESTION: Well, do you think the -- do you think the officer was entitled to -- in the course of the pat down, to just feel this little object? I mean --

MR. GORMAN: Your decision --

QUESTION: Even -- even feel it at all?

MR. GORMAN: Your decision in Terry, Your Honor, allows a probing search of the outer clothing to discover a dangerous weapon. While doing that, he felt this object inside the pocket. Yes, I think he should be allowed to feel it. I don't think he should be allowed to go further

because it was obviously not a weapon.

There is a third reason why I think that the State's proposal here is an unreasonable one, and that is because it opens up a -- in our view, a serious danger of abuse by pretextual stops. And that can only better -- can't be better shown than on the facts of this case.

The officer testified that he told his partner to stop him to search him for weapons and contraband. Now, again, that's -- of course, that's -- that's a subjective view, but that's also a fact of the case. The officer admitted that that's why he wanted to stop him.

But there's more pretextual facts in this case. If you read the record, the officer didn't do a thoroughly probing Terry search. He searched the top part of Mr. Dickerson's trunk, focused on the pocket in his jacket. He didn't do his belt, he didn't do his legs, he didn't do his shoes, all of which are things that officers routinely do in Terry searches. Instead what he did is he worked on the top part of Mr. Dickerson body and stopped as soon as he felt this item in the jacket pocket. Moreover, the search stopped as soon as he found that.

So there are three pretextual reasons that we think exist in this record, which illustrate the danger of adopting a so-called extension of Terry that would allow the officer to do what he did in this case.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

We also believe that the State's position is not a logical extension of plain view. Plain view -- the plain view cases say that when the officer sees something from a legally -- from a position he's legally entitled to be in, that's not a search. We believe, of course, that touch is an intrusion and that is, in fact, a search.

One of the distinctions between the senses, between the two senses in this case, is that what an officer sees can be seen by others as well to corroborate, but what an officer feels can only be described after he pulls it out of the pocket and writes down in his police report what it is that he saw.

QUESTION: Well, why does that make a difference, Mr. Gorman? Certainly, we don't require corroboration in the case of a plain view seizure.

MR. GORMAN: You don't require corroboration, Your Honor. The reason why I think it makes a difference is because it helps to show that the officer did, in fact, see contraband when he sees it, but whereas with the sense of touch, he can't see something, he can only describe what he feels and then pull it out and examine it. And that we think is one of the distinctions between touch and between plain view.

Moreover, something which is seen is obviously immediately apparent. Something that is touched, in our

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

view, is not immediately apparent. For small objects such as the very small object in this case, touch requires, in our view, more intrusion than sight and more subjective reasoning rather than objective reasoning.

One of the most crucial factual issues in this case, I think, is the State's claim that the officer instantaneously recognized that this object was a piece of crack cocaine. And what the State, in arguing the plain view analogy, suggests is that because the officer instantaneously saw that -- or felt that it was a piece of crack cocaine, it should fit under the immediately apparent portion of the plain view test.

The fact of the matter, however, Your Honors, is that the trial court did not come to that conclusion. At page C-2 of the State's petition for certiorari the trial court's order is reproduced. The trial court says here "Officer Rose formed the opinion."

There's no adverb or adjective here which describes anything having to do with when he formed the opinion, whether it was instantly, whether it was immediately, or whether it was 5 or 10 or 15 seconds later. The trial court simply didn't say anything about how quickly the officer formed the opinion.

What the State would have you believe is that the trial court found that it was instantaneous. And as a

matter of fact, the brief of the solicitor general describes the trial court's order as instantaneous and immediate and that just simply isn't the case. If it were instantaneous and immediate, the trial court would have found that. And if the trial court --

QUESTION: Well don't -- don't you have a rule in your -- in your State that the findings of a trial court are interpreted to support the legal conclusion that it reached if there's ambiguity?

MR. GORMAN: I believe we do, Your Honor.

QUESTION: Well, unless the State Supreme Court doesn't read it that way.

MR. GORMAN: We think what happened here, Your Honor, is that the -- the State Supreme Court applied our clearly erroneous rule, under which it will reexamine factual determinations and overrule trial judges if they think that it was clearly erroneous.

QUESTION: But it relied on the officer's testimony.

MR. GORMAN: Beg your pardon?

QUESTION: The State Supreme Court relied on the officer's testimony as to what the officer did.

MR. GORMAN: And then the court went on to say that although the officer thought it was immediate, the fact of the matter is that it really wasn't immediate,

that it wasn't instantaneous. And that's when the court went into its discussion about the officer's manipulation of the object in the pocket.

But to the extent that the State would have you believe that our trial court concluded that it was instantaneous or immediate, that is simply not the case.

QUESTION: Mr. Gorman, who was the trial judge?

MR. GORMAN: The trial judge was Robert Lynn, who argued here 10 years ago in Minnesota v. Murphy.

There is another ambiguity in the record that I also think is worth the Court's consideration, and that is that the officer provided two inconsistent descriptions of the type of outer garment that Mr. Dickerson was wearing. At one point in the record, at page 9, the officer said that it was a "thin nylon jacket." At another point in the record, at page 20, the officer said that the jacket was "kind of fluffy," in answer to a question.

The trial court never resolved that and didn't make any conclusion as to what type of a jacket it was, but that, I think, also goes to the plain view element of the immediate apparency.

The sum and substance of this case, for -- as far as -- as far as Mr. Dickerson is concerned, is that what the State is asking you to permit is a second search of the type rejected in Arizona v. Hicks. In Arizona v.

Hicks, the officer had the right to be there but he didn't have the right to lift up the turntable and copy the serial number.

This is, in fact, a second search. The officer, according to our Supreme Court, had the right to make the Terry frisk, but once he determined that there was no weapon present, he didn't have a right to do the additional probing of the content of the pocket in an effort to try to decide what the object was.

Even if the Court concludes that plain feel could, under some circumstances, be adopted, or to use Professor LaFave's language, to be a so-called stepchild of plain view, the facts of this case do not support the adoption of any type of plain view related exception, because of the -- because of the fact that the officer violated Terry in doing the additional search, because of the fact that there was no probable cause, which is plain -- plain view requires, and because of the fact that the object was not immediately apparent.

Your Honors, it is our position that if the Court adopts the State's proposed rule here, it will allow police officers to search someone for contraband anytime they think that the Terry criteria might be met. That means that any time an officer is in the vicinity of a troubled part of town and sees someone, that they can

search that person for drugs rather than for weapons.

We believe that that would be an enormous expansion of Terry and one that poses severe risks to ordinary citizens in every city in the country. We would ask the Court to keep the bright line where it was at Terry v. Ohio and not adopt the State's proposed exception -- or extension, rather.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gorman. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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:

MINNESOTA V. TIMOTHY DICKERSON

---

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

BY Ann Mari Federico

(REPORTER)