Appendix A: The Stop and Frisk Conference Notes of Justices Douglas, Brennan and Fortas; and Appendix B: A Side-by-Side Comparison of the Stop and Frisk Conference Notes of Justices Douglas, Brennan and Fortas

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APPENDIX A: THE STOP AND FRISK CONFERENCE NOTES OF JUSTICES DOUGLAS, BRENNAN AND FORTAS

Wainwright v. New Orleans
The Supreme Court's Conference, October 13, 1967

JUSTICE DOUGLAS'S CONFERENCE NOTES

Conference
October 13, 1967
No. 13 -- Wainwright v. City of New Orleans

CJ [Warren] question whether case is properly here for he was found guilty only of assaulting officer in jail house - he thought when we took the case that he was arrested and tried for vagrancy - what happened outside the jail - on that ground he would reverse - but it looks like it was improvidently granted - no simple element of vagrancy or resisting arrest -

HLB [Black] he was wrong in granting this man was not even civil - nothing done to damage him - dismiss as improvidently granted - of course he was not a vagrant -

WOD [Douglas] reverses - he was unconstitutionally in jail

\[528\] These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.
JMH [Harlan] is there a federal right
to resist an illegal arrest?
Yes - he takes a chance

he was wrong - arrest was
illegal - no vagrancy - no
probable cause - was amount of
force he used to resist police
in jail beyond the pale? he
can’t make out the answer on
this record - record too
opaque so he would
dismiss or vacate +
remand for findings on
amount of force used

CJ [Warren] he would be willing to vacate
for findings

WJB [Brennan] Schmerber indicates there is
no right to resist search-
dismisses as improvidently
granted - his presence in station
house was result of illegal
arrest - his May 14 trial
was dismissed - then started
(App B) the trial of assaulting
the officer in the station
house -

CJ [Warren] opinion of La Ct
says he was legally
arrested -

PS [Stewart] dismisses as
improvidently
granted

BW [White] dismisses
AF [Fortas] “

No. 13, Wainwright v. City of New Orleans 10-13-67

The Chief Justice [Warren]
Not vagrant - but question whether we can reach it

Black, J.
He voted to grant, but was wrong - because P [petitioner] was not hurt!
Dismiss as improperly granted -

Douglas, J.
Would reverse - If P was properly in jail that would be one thing. But here, what's he supposed to do [if - crossed out].

Harlan, J.
You have a right to resist an unlawful arrest - not excessive force -
No probable cause to arrest him on vagrancy - Illegal arrest -
Was the amt of force used excessive - Can't tell from this record -
Believes per cur can be written that this record is too opaque to [dismiss - crossed out] reach questions.
Otherwise would vacate + send back for findings on reasonable amt of force -

Brennan, J.
Dismiss as improvidently granted ----
Most of the evidence is on different

529 These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
charges -- a different case - that
were discussed -- Conviction on new
charge -----

Stewart, J.
Dismiss as improvidently granted

White, J.
Dismiss --
[crossed out: Indigent before used or not]

Marshall, J.
Dismiss as improvidently granted

A.F. [Fortas]
Dismiss as improvidently granted

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530 This transcription is of questionable accuracy; the note is extremely hard to
read beneath the lines crossing it out.
Sibron v. New York
The Supreme Court's Conference, December 13, 1967

**JUSTICE DOUGLAS'S CONFERENCE NOTES**

Conference
Wednesday, December 13, 1967
No. 63 -- Sibron v. New York

CJ [Warren] looks like a manufactured case - does not reach constitutional question - it was not stop + frisk - not in ordinance - were arrest without probable cause - reverses would not go on mootness - would not remand to let AG confess error below

HLB [Black] reverses on confession of error + remand to Ct of A to consider that confession - search was illegal

WOD [Douglas] reverses -

JMH [Harlan] (1) this case is moot - (2) can't take DA confession of error against by Ct of A (3) on merits he would agree with CJ [Warren] - dismisses as moot - or vacate on confession of error

WJB [Brennan] reverses

PS [Stewart] he would forget mootness + reverses on merits - does

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531 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.
not reach statute - it was
an illegal search under
4th A

[page 2 of 2:]
BW [White] reverses

AF [Fortas] "

TM [Marshall] " it was conditional
arrest
No. 63, Sibron v. New York

The Chief Justice [Warren]

No stop + frisk - a plain arrest + search without probable cause

\footnote{These conference notes are in the William J. Brennan, Jr. Papers, Library of Congress, Manuscript Division.}
JUSTICE FORTAS'S CONFERENCE NOTES

No. 63, Sibron v. New York

The Chief Justice
Dont reach constlty of statute
No reasonable basis for stop -- + it was
  a search, not a frisk

Black, J.
[Revse -- crossed out]  Vacate on confession of error + send it back
  It was an illegal search --

Douglas, J.
Follow Chief - reverse but just to
  send back to Ct of Appeals -

Harlan, J.
Moot - +
Wouldn't take DA's confession
of error in face of
highest court of state -
If reached merits, would agree
with Chief --
Dismiss as moot - or vacate -

Brennan, J.
Reverse

Stewart, J.
Reverse -- unreasonable search
under 14th or 4th -

White, J.
Reverse

---

533 These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
Reverse

Marshall, J.
Reverse --
Conference
Wednesday, December 13, 1967

No. 74 -- Peters v. New York

CJ [Warren] if this is stop + frisk, anything can be - police in his home + through peephole sees stranger - he calls police - gets gun + they start to run - probable cause to believe they were committing a crime - he arrested them - need not be a policeman to make an arrest - does not reach Act -

WJB [Brennan] can citizen arrest on probable cause? need not decide it for he was a policeman --

HLB [Black] affirms

WOD [Douglas] " - probable cause for believing a burglary was under way

JMH [Harlan] can't find probable cause - NY courts did not treat it that way - rests on the Act - if stop + frisk, it's OK

534 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.

PS [Stewart] " " " "

BW [White] affirms

AF [Fortas] "

TM [Marshall] "

No. 74, Peters v. New York

The Chief Justice
He had probable cause -
Treat this as if he were not a policeman - but he has jurisdiction

Black, J.
Affirm

Douglas, J.
Affirm

Harlan, J.
Affirm
ok if under stop + frisk

Brennan, J.
Affirm

Stewart, J.
Affirm

White, J.
Affirm

A.F.
Affirm

Marshall, J.
Affirm

These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
Conference
Wednesday, December 13, 1967
No. 67 -- Terry v. Ohio

CJ [Warren] would use the case to lay down hard rules for stop and frisk statute can't enlarge a policemen's rights.

CJ [Warren] no stop and frisk law here - did police have "probable cause"
(1) to talk to them (2) to think he was in danger of his life -- an officer who sees what he saw has a duty to pursue it + frisk if there is a crime about to be committed -- they don't have to answer + they can walk away -- at that point there would be no probable cause -- but their actions may give him probable cause to think he's in danger -- he can protect himself by seeing if they are armed -- affirms - he rests solely on "probable cause"-- would not disregard probable cause There was probable cause (1) to talk to the man (2) to fear he might be

535 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.
endangered --
stop + frisk law can't
change these hereafter

HLB [Black] - affirms
agrees with CJ [Warren]
to stick by
"probable
cause" -- he
would construe reasonable suspicion
in NY law to mean

[page 2 of 4:]
[in circle:]
TM [Marshall] interrupts to say that
police did not go up to them
to question them
[end circle]

HLB [Black] probable cause - he
did not make arrest by talking
to them - he arrested them
only [crossed out: by] when he stood them
up - right to question citizen
is not a 4th A right - right
to stop + ask questions is part of
body of law, not 4th A -
4th A does not fit into it
until there is an arrest
policeman has right to defend
himself + to frisk them to
save his life - evidence taken would be admissible -
he would say this citizen
can't just walk away +
refuse to talk to the police
when questioned - there
is a right to investigate -
he could delay him
temporarily tho not
arrest him - no need
not decide that now but
that's how he would decide it -

**WOD** [Douglas] affirms - agrees with 
CJ [Warren]

**JMH** [Harlan] affirms - frisking took
place pretty early - cop can’t
do that i.e. frisk without probable
cause that a crime is
committed - he does not look
at this as a questioning case -

**WJB** [Brennan] affirms - there is 4th
A - it deals with seizure of
persons + there must be
“probable cause” - there is
a seizure not for purpose of
booking him for a crime but
for purposes of frisking - is this
probable cause to stop him
question him, frisk him -
he passes over case where
there is a frisk + nothing
found + police yet detain
him - refer to **Miranda** +
custodial detention includes a jail.

**PS** [Stewart] - agrees with CJ affirms
[page 4 of 4:]
would not say a citizen can
refuse to answer a cop -
state can make stricter
standards than the 4th A -
need not reach case where
the frisk turns up contraband

**BW** [White] affirms - questioning is
not 4th A - it is involved in
a frisk or search for there
is detention -

**AF** [Fortas] affirms with a
precisely refined opinion
not a **Miranda** type - we
are writing a new kind of
probable cause - he would be
cautious - he would go case
by case - he would leave
untouched the round up type
of frisks.

**TM** [Marshall] affirms
No. 67, Terry v. Ohio

The Chief Justice [Warren]

Did police officer have
prob cause to talk to these +
did he have prob cause to
believe his life was in danger
But people don’t have to answer
+ may walk away. Having
in mind a trained policeman
may read it differently from
ordinary citizen

Black, J.

Agree that should use
“probable cause” + not reasonable
suspicion. Don’t think they
arrested these people until
after he got guns. Does officer
have a right to interrogate people
doing peculiar things? Don’t
know that this is forbidden
by anything in Const. Right
to stop people does not stem
from Fourth. Further has
right to defend himself
don’t want anything said that
police can’t make guy stay
until he answers or he stub-
bornly refuses

These conference notes are in the William J. Brennan, Jr. Papers, Library of Congress, Manuscript Division.
No. 67, Terry v. Ohio

The Chief Justice [Warren]

Affirm

Policeman may accost people + ask question - They need not answer + may go off - But then Did he or did he not have probable cause to protect himself -

Wouldn't put it on any basis other than probable cause - not suspicion or reasonable grounds --

Would write at length + say rights of police stems from 4th amdmt + not from a statute -

Black, J.

Agrees up to a point --

Agrees that you should stay with "probable cause" - NY statute means "probable cause" --

Arrested only when he told them to go into store + put their hands on wall -

Here: may police interrogate persons who are acting so they suspect crime -- This does not stem from 4th Amdmt -- "Seizure" means arrest.

Douglas, J.

Affirm

Harlan, J.

Affirm

538 These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
Brennan, J.

Affirm

4th amendmt problem -- there is a "seizure" of a person here --
Is there probable cause to detain, question + frisk --
Would reserve on questions of whether fellow may walk away --
or whether other things may be used, having been found in course of frisk

Stewart, J.

Affirm

Wouldn't like to see us face question of right to go away --

White, J.

Affirm -- police man [crossed out word] may ask question -- [crossed out word] But 4th amdmt involved on frisk or search --

AF. Affirm

but narrow + precise -

Marshall, J.

Affirm

I might put it on suspicion of heist -- not that [they were -- crossed out] cop was going to talk to them - but was going to frisk them

Agrees - narrow + precise
Notes of the Court's Conference, Wainwright v. New Orleans,
October 13, 1967

Notetaker: Douglas

Speaker: Warren

CJ question whether case is properly here for he was found guilty only of assaulting officer in jail house -

he thought when we took the case that he was arrested and tried for vagrancy -what happened outside the jail -

on that ground he would reverse - but it looks like it was improvidently granted- no simple element of vagrancy or resisting arrest -

Not vagrant - but question whether we can reach it

Black, J. He voted to grant, but was wrong - because P [petitioner] was not hurt!

Black HLB he was wrong in granting this man was not even civil -
nothing done to damage him –

dismiss as improvidently granted – of course he was not a vagrant –

Dismiss as improvidently granted

Douglas WOD reverses – he was unconstitutionally in jail

Would reverse – If P was properly in jail that would be on thing. But here, what's he supposed to do [if – crossed out].
<table>
<thead>
<tr>
<th>Speaker</th>
<th>Notetaker:</th>
<th>Fortas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harlan</td>
<td>Douglas</td>
<td>Harlan, J.</td>
</tr>
<tr>
<td></td>
<td>is there a federal right to resist an illegal arrest?</td>
<td>You have a right to resist an unlawful arrest – not excessive force</td>
</tr>
<tr>
<td></td>
<td>Yes – he takes a chance he was wrong – arrest was illegal -</td>
<td></td>
</tr>
<tr>
<td></td>
<td>no vagrancy – no probable cause –</td>
<td>No probable cause to arrest him on vagrancy – Illegal arrest –</td>
</tr>
<tr>
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<td>was amount of force he used to resist police in jail beyond the pale? he can’t make out the answer on this record –</td>
<td>Was the amt of force used excessive – Can’t tell from this record -</td>
</tr>
<tr>
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<td>record too opaque so he would dismiss or vacate +remand for findings on amount of force used</td>
<td>Believes per cur can be written that this record is too opaque to [dismiss - crossed out] reach questions. Otherwise would vacate + send back for findings on reasonable amt of force –</td>
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<tr>
<td>Warren</td>
<td>CJ he would be willing to vacate for findings</td>
<td></td>
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</tbody>
</table>
Brennan, J. Schmerber indicates there is no right to resist search —

discharges as improvidently Dismiss as improvidently granted —

Most of the evidence is on different charges —
his presence in station house was result of illegal arrest – his May 14 trial was dismissed – then started (App B) the trial of assaulting the officer in the station house –

Warren C.J. opinion of La Ct says he was legally arrested –

Stewart PS dismisses as improvidently granted

White BW dismisses

Fortas AF

Marshall TM

Fortas A.F.

Stewart, J. Dismiss as improvidently granted

White, J. Dismiss –[crossed out: Ending it before us does not]

Marshall, J. Dismiss as improvidently granted

Fortas A.F. Dismiss as improvidently granted
Notes of the Court's Conference, *Sibron v. New York*,
December 13, 1967

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<th>Notetaker:</th>
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<td>Warren</td>
<td>CJ looks like a manufactured case - does not reach constitutional question -</td>
<td>The Chief Justice</td>
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<tr>
<td></td>
<td>it was not stop + frisk - not in ordinance - were arrest without probable cause - reverses</td>
<td>No stop + frisk - a plain arrest + search without probable cause</td>
<td>No reasonable basis for stop + it was a search, not a frisk</td>
</tr>
<tr>
<td></td>
<td>would not go on mootness - would not remand to let AG confess error below</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td>HLB reverses on confession of error + remand to Ct of A to consider that confession -</td>
<td>Black, J.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>search was illegal</td>
<td>[Revse -- crossed out] Vacate on confession of error + send it back</td>
<td>It was an illegal search --</td>
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</table>
Harlan, JMH (1) this case is moot -

(2) can't take to DA confession of error against by Ct of A

(3) on merits he would agree with CJ -

dismisses as moot - or vacate on confession of error

Harlan, J.

Moot ++

Wouldn't take DA's confession of error in face of highest court of state -

If reached merits, would agree with Chief --

Dismiss as moot - or vacate -
Notetaker: Douglas Brennan Fortas

Speaker:
Brennan WJB reverses Brennan, J. Reverse

Stewart PS he would forget mootness + reverses on merits - Stewart, J. Reverse --
does not reach statute - it was an illegal search under 4th A unreasonable search under 14th or 4th -

White BW reverses White, J. Reverse

Fortas AF " A.F. Reverse

Marshall TM " it was conditional arrest Marshall, J. Reverse --
December 13, 1967

**Notetaker:**
Douglas

**Speaker:**
Warren

**CJ if this is stop + frisk,**
any-thing can be -

police in his home +
through peephole sees
stranger - he calls po-
lice - gets gun + they
start to run -

probable cause to be-
lieve they were com-
mitting a crime - he ar-
rested them -

need not be a policeman
to make an arrest -

Treat this as
if he were not
a policeman -
but he has
jurisdiction

does not reach Act -

Brennan

**WJB can citizen arrest**
on probable cause? need
not decide it for he was
a policeman --

Black

**HLB affirms**

Black, J.

Affirm
Douglas

WOD " - probable cause for believing a burglary was under way

Douglas, J.
Affirm

Harlan

JMH can't find probable cause - NY courts did not treat it that way - rests on the Act - if stop + frisk, it's OK

Harlan, J.
Affirm
ok if under stop + frisk
Notetaker: Douglas

Speaker:

Brennan WJB affirms in CJ's hands Brennan, J. Affirm

Stewart PS " " " Stewart, J. Affirm

White BW affirms White, J. Affirm

Fortas AF " A.F. Affirm

Notes of the Court’s Conference, *Terry v. Ohio*,
December 13, 1967

**Notetaker:** Douglas Brennan Fortas

**Speaker:** Warren

The Chief Justice

The Chief Justice Affirm

CJ would use the case to lay down hard rules for stop and frisk statute can't enlarge a policemen's rights.

CJ no stop and frisk law here -

did police have "probable cause" (1) to talk to them (2) to think he was in danger of his life --

Did police have prob cause to talk to these + did he have prob cause to believe his life was in danger
an officer who sees what he saw has a duty to pursue it + frisk if there is a crime about to be committed --

they don't have to answer + they can walk away --

But people don't have to answer + may walk away.

They need not answer + may go off --

at that point there would be no probable cause --

but their actions may give him probable cause to think he's in danger --

Having in mind a trained policeman may read it differently from ordinary citizen
Notetaker: 
Douglas Brennan Fortas

Speaker: Warren

he can protect himself by seeing if they are armed --

But then Did he or did he not have probable cause to protect himself -

affirms -

he rests solely on "probable cause" -- would not disregard probable cause

Wouldn't put it on any basis other than probable cause - not suspicion or reasonable grounds --

There was probable cause (1) to talk to the man (2) to fear he might be endangered--

stop + frisk law can't change these hereafter
Would write at length + say rights of police stems from 4th amdmt + not from a statute --

<table>
<thead>
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<th>Black</th>
<th>HLB - affirms</th>
<th>Black, J.</th>
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<tr>
<td>agrees with CJ to stick by &quot;probable cause&quot; --</td>
<td>Agree that should use &quot;probable cause&quot; + not reasonable suspicion.</td>
<td>Agrees up to a point --Agrees that you should stay with &quot;probable cause&quot; --</td>
<td></td>
</tr>
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</table>
Notetaker: Douglas Brennan Fortas

Speaker: Black

he would construe reasonable suspicion in NY law to mean

Marshall [in circle:]

TM interrupts to say that police did not go up to them to question them
[end circle]

Black (continues) HLB probable cause - NY statute means "probable cause" --

he did not make arrest by talking to them - he arrested them only [crossed out: by] when he stood them up --

Don't think they arrested these people until after he got guns. Arrested only when he told them to go into store + put their hands on wall -

Here: may police interrogate persons who are acting so they suspect crime --
Does officer have a right to interrogate people doing peculiar things? Don't know that this is forbidden by anything in Const.

Right to stop people does not stem from Fourth.

This does not stem from 4th Amdmt -- "Seizure" means arrest.

right to question citizen is not a 4th A right - right to stop + ask questions is part of body of law, not 4th A - 4th A does not fit into it until there is an arrest.
Notetaker: Douglas Brennan Fortas

Speaker: Black policeman has right to defend himself +
to frisk them to save his life -

Further has right to defend himself

evidence taken would be admissible -
he would say this citizen can't just walk away + refuse to talk to the police when questioned - there is a right to investigate - he could delay him temporarily tho not arrest him - no need not decide that now but that's how he would decide it --

Douglas WOD affirms - agrees with CJ

Harlan JMH affirms -

Douglas, J. Affirm

Harlan, J. Affirm
frisking
took
place
pretty
early - cop
can't do
that i.e.
frisk without probable cause
that a
crime is
committed
- he does
not look at
this as a
questioning
case -
there is 4th A - it deals with seizure of persons + there must be "probable cause" - there is a seizure not for purpose of booking him for a crime but for purposes of frisking -

Is there probable cause to detain, question + frisk --
he passes over case where there is a frisk + nothing found + police yet detain him - Would reserve on questions of whether fellow may walk away -- or whether other things may be used, having been found in course of frisk refer to Miranda + custodial detention includes a jail.

Stewart PS - agrees with CJ affirms would not say a citizen can refuse to answer a cop - Stewart, J. Affirm Wouldn't like to see us face question of right to go away --
state can make stricter standards than the 4th A -

need not reach case where the frisk turns up contra-band
DECIDING THE STOP AND FRISK CASES

Notetaker:
Douglas Brennan

Speaker:
White

BW affirms -
questioning is not 4th A -

it is involved in a frisk or search for there is detention -

Fortas

AF affirms with a precisely refined opinion not a Miranda type -

we are writing a new kind of probable cause - he would be cautious -

White, J.
Affirm -- police man [crossed out word] may ask question --

[crossed out word] But 4th amdmt involved on frisk or search --

AF. Affirm but narrow + precise -
Marshall

Marshall, J.

Affirm
I might put it on
suspicion of
heist -- not that
[they were --
crossed out] cop
was going to
talk to them -
but was going to
frisk them

TM affirms

Agrees - narrow
+ precise