Supreme Court of the United States

October Term, 1968

In the Matter of:

Frances Mattiello, Appellant, vs. State of Connecticut Appellee.	**Docket No.** 150

Place Washington, D. C.

Date December 11, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Frances Mattiello, Appellant,	:	
v.	:	No. 150
State of Connecticut, Appellee.	:	

Washington, D. C.
Wednesday, December 11, 1968

The above-entitled matter came on for argument at 10:10 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

ROBERT N. GROSBY, Esq.
Public Defender,
First Circuit Court
21 Isaac Street
Norwalk, Connecticut
Counsel for Appellant

GEORGE F. CARROLL, JR., Esq.
Prosecuting Attorney,
Circuit Court of Connecticut,
First Circuit, Norwalk
Counsel for Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 150, Frances Mattiello, Appellant, versus Connecticut.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Grosby.

ORAL ARGUMENT OF ROBERT M. GROSBY, ESQ.

ON BEHALF OF APPELLANT

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

The appellant in this case was arrested in March 1966, and charged with violation of Section 17-379, causing the arrest and imprisonment of someone who has fallen into vice or leads a vicious life.

The appellant filed a demurrer on this on two grounds one was that its terms were vague and uncertain and meaningless, thereby depriving her of due process. The second was that the statute discriminates against certain females that is unmarried demales between ages of 16 and 21 on the basis of its support and thereby timing protection.

On the same day demurrer was filed the State committee filed a substitute for alleging two additional charges. One was violation of Section 53-219 of the general statutes, that statute entitled Vicious Carriage and Fornication.

Section 53-175 of the statutes which is the sordid conduct statute, the demurrer was overruled, pleaded not guilty

of both charges and elected a trial by court, was found guilty of 17-379, guilty of 52-219 and not guilty of sordid conduct.

Sentence was commitment to the Connecticut State Farm for Women.

I think that the running of these sentences was concurrent.

Q How does that work? I looked at your Connecticut statutes and I found some difficulty with them.

As I see them, as far as the lascivious carriage charge, the maximum term she could get was two years in the reformatory whereas under the manifest danger or whatever that other statute is that she got a three-year sentence.

A That is right, sir.

Q How are they concurrent?

A Except this way. If at the time of sentencing the law was that the sentence on the city's carriage could also be for three years to the reformatory. This is particularly the cases that we cited in our brief, two District Court cases and two Connecticut Superior Court cases have held that by having a three-year sentence on the lascivious carriage, that is the discrimination against the female because boys can only be convicted for two years under the applicable statute for boys.

Q What is that? I didn't know there was a comparable crime for males.

A Not with respect to 17-379; 17-379 deals only with manifest danger and 17-360 says that a female over the age of 16 who has been convicted of misdemeanor and lascivious carriage of misdemeanor can go to the Connecticut State Farm for three years.

17319 says a young boy who is convicted of misdemeanor can go to the reformatory for two years. Therefore, in subsequent ---

Q The cases in the court dealt with situations where men and women or boys and girls could be convicted of the same offence?

A Yes, sir.

Q Not so here? Give me something comparable that a man can be convicted to for lascivious carriage.

A A man could be convicted of fornication or breach of peace.

Q Do you think those raise the rationale of those cases?

Do you think that comparison invokes the rationale of those cases that cited the woman may not be imprisoned for more than two years?

A Yes, sir, so District Courts held ---

Q No, they didn't. They had comparable crimes. They were the same crimes between man and woman weren't they?

A Yes, sir.

A young boy convicted of lascivious carriage could be sentenced to two years in the reformatory while a young girl convicted of the same statute could be sentenced for three. These cases in our reply briefs said this is improper and that two is the maximum sentence for boys as well as girls, so that it appears that the sentences were in three parts where this new law was held.

Q Is it clear which sentence she is now serving?

A Yes, sir, we take the position that two-year sentence has expired and the maximum sentence on lascivious carriage which is two years has expired and the whole thing that is going on now is that the manifest danger and therefore we take the position that if we reverse that conviction she will be set free.

Q I had the impression she was at liberty now.

A She is on parole.

Q What is the maximum age under this statute?

A The lascivious carriage statute as applied by recent sentence is two years. Manifestation statute says until age 21. We do have interpretations in the record that three years is the maximum, so she is liable for the lascivious carriage statute until June 1969 and the lascivious carriage sentence has expired in 1968.

Q If the female is 21 years old, what is the maximum sentence?

A Commitment on manifest danger is until she is 21 with three years whichever occurs first. A commitment on lascivious carriage the statute is three years but the court say two years. Because there is discrimination between boys and girls.

Q A female at any age can be convicted of lascivious carriage?

A Yes, sir. Yes, sir.

Q But manifest danger is only between 16 and 21 and unmarried?

A Yes, sir. I think the court anticipated the jurisdictional question when you raised the four questions you asked us to answer in connection with our jurisdiction statement and to clarify this once again we take the position that these sentences are separate sentences that she is serving her sentence under lascivious carriage and manifest danger that the sentences were once concurrent and her maximum sentence under lascivious carriage has expired. And she is only under parole under conviction for manifest danger.

Our brief on the merits make three points.

The first one was whether manifest danger under the statute and we covered that because the appellant under the Circuit Court decided it is not a penal statute. It is a remedial statute and, therefore, it was not necessary for them to take up the constitutional questions.

We claim that this is a statute that provides for the deprivation of liberty and, therefore, the due process provisions of the Constitution must apply whether Connecticut chooses to call this remedial penal.

Our second point is that the terms, having been applied for vicious life, render that manifest danger statute void because they fail to warn the accused a clear state of conduct.

We claim that this statute is so vague that unmarried female of common intelligence must necessarily guess at its meaning and we claim that the trier of fact has no standard on which to judge a case and no standard by which to charge a jury.

Q Have there been any Connecticut decisions construing the statute?

A No, sir, there have not. I listened to the argument yesterday of the construing by Illinois Supreme Court of that statute but we have not. There has not been any adjudication and there is no way that any of our courts have set for a definition of manifest danger of falling into vice and vicious life.

Q Can you think of anything that almost anyone would agree is vice or vicious?

A I suppose that I could, your Honor.

Q What if she performed just exactly that, that

act that you could think of was an example of vice or the example of vicious life? What if it is a matter of fact in this case, the facts show that is the conduct in which she engaged.

Do you think then that the statute would be vague?

A No, we feel that this statute is so vague that no recourse need be made of the facts, that this is unconstitutionality in toto on its face rather than in application. We feel that this ---

Q Do you think vice or viciousness is that vague that you really, no one could even imagine a situation that would be covered by this provision against the vice or vicious life?

A I may have some personal predilections of what is vice or vagueness and I am sure the trial judge would, too, but until there is a definite definition by statute or perhaps an instruction by court, I think it is clear on its face this is the issue to be raised squarely by our demurrer and this is why we presented the facts.

The third point in our brief is that manifest danger statute applies only to men, only to girls and not to women. A young man cannot be convicted to the habits of falling into vice or vicious life. He must be convicted of a substantive crime and the same of married women in order to be convicted.

A married woman must first be convicted of substantive

crime before she could be sent to the reformatory. We submit that female vices are no more dangerous than male vices. And we see and can find no substantial or natural difference to render the subject which justify such delineation.

Q How old is this statute?

A The statute is 1917. I think the legislative history is set forth in the State's brief in the appendix.

Q From the record that we have here does not include the transcript of what went on at the trial. Is that right?

A That is right, sir.

Q Why is that?

A We took the position, Mr. Justice, that the statute is so vague on its face that a recourse to the facts would avail nothing, that this is unconstitutionality in toto and not in application and the examination of the facts would not serve any purposes and this was the issue squarely raised by the demurrer.

Q She pleaded not guilty to the two counts?

A Not guilty to all three counts.

Q And then without a trial the court found her guilty?

A No, sir, she had a trial.

Q What happened at the trial?

A Testimony was taken.

Q Is there a transcript of that?

A There is a transcript, sir.

Q Yet you did not file it in this court?

A Nor did we file it with the court division.

Q There is a transcript but it was not filed even in the Appellate Division or this court?

A Yes, sir.

Q So we really don't know what happened here or what the facts are and you say we ought to consider this as unconstitutional. And we should do that even if we are divorced from any reference to the facts.

A I take that position, sir. This court did it at the trial.

Q You are relying squarely on your demurrer as you did in the Connecticut Appellate Court?

A Yes, sir.

MR. CHIEF JUSTICE WARREN: Mr. Carroll.

ORAL ARGUMENT OF GEORGE F. CARROLL, JR., ESQ.

ON BEHALF OF APPELLEE

MR. CARROLL: Mr. Chief Justice, and may it please the court.

There is really no quarrel about the facts as recited by Mr. Grosby. The State does, however, want to, with due respect, correct two things in those facts.

And that is the age of the statute, 53-379, was

originally passed in 1905 in substantially its present form and Mr. Grosby's reference to the State brief in terms of legislative history really was in connection with 17-360 which is the commitment vehicle statute, so that the statute really goes back to 1905, the words manifest danger falling into the habits of vice but that is when they first appear.

There is another dispute or I don't think it is a real difficult dispute but disparagement of facts. This girl was 17 when she was convicted and as I said in our brief, her birthday was April 15, 1949. There is a great deal of confusion here in the record and in the decision of our Appellate Division.

I believe they say she was 18 but that is incorrect. She was born in 1949 and convicted in June 1966.

Q Why is that of any importance and does that bear on whether or not these are concurrent sentences?

A No, it does not do that, Mr. Justice, but it may have a bearing in terms of the applicability of the three-year maximum provision for the age 21.

In Section 17-379 which is the statute that is under appeal here, 17-379, in which are contained the words manifest danger of falling into habits of vice, it says until she is 21.

A caucasian, unmarried female, between 16 and 21 should be committed there until she is 21. But Section 17-360 which I think you can agree is the actual committing vehicle.

Q Limited to the maximum.

A Limited to the maximum of three years but it has certain limits there and it is our opinion in Appendix A, we set forth the Attorney General's opinion in which he says none of the statutes are different, and I think there is no quarrel about this.

If the girl becomes 21 first, then she has to be released, whichever comes earlier. I set that forth in my brief and opinion but it is buttressed by the Attorney General's opinion and I don't think there is any quarrel about that.

In terms of your question, her age would have an affect on that. In other words, if she is 17 as I claim she was, before 1949, then her time would be up in three years, no twhen they reached 21 so she would be free from parole in June 1969.

Q In June 1969?

A Yes.

Q Under the falling into danger?

A Under the falling into danger.

Q And she is already free, do you agree with counsel that she is already free under the lascivious carriage?

A No.

Q You don't?

A No. That is our main argument. This conviction and sentence stand on independent State grounds. Namely,

the conviction under lascivious carriage charge under 53-219.

Now that statute she received a concurrent sentence and the sentencing provisions again are under 17-360. The same sentencing vehicle, the same sentencing maximum, namely for three years, are applicable to this girl and this charge under which she was convicted, lascivious carriage at the same trial was not appealed.

There is no appeal from that statute. There is no habeas corpus involving it. And, in addition to Mr. Justice White's noting the fact that there is no comparable statute for men, not only the sentences are different, maximum sentences are different, but there is no statute comparable to manifest the danger for falling into habits of vice for young men.

Q Wasn't the rationale of the edification that said in spite of the three-year provision that a woman could only be held for three years?

A It was.

Q And since men convicted for the same crime could only be held two years it was illegal to hold the woman three?

A That is correct.

Q And your argument is that there was no comparable crime here for the men?

A That is correct, Mr. Justice. My argument is

more than that; it is also that those decisions are not binding here at all.

This statute 53-219 is not before the court at all. That is why in the cases cited in the brief we claim that the threshold of this whole case the court is met by a conviction without infirmity on another statute with concurrent sentence because there is nothing here before the court that says that the limitation on 53-219 conviction is two years as far as young girls between 16 and 21 are concerned.

There is nothing to that effect before the court. When that girl was sentenced ---

Q I know. But the claim is that under the Connecticut law no matter what the statute says the woman can only be held two years. Isn't this a direct appeal?

A This is a direct appeal.

Q Yes, and they are saying that under the applicable Connecticut law as revealed in these cases, this sentence on lascivious carriage is not three years, it is only two because the Connecticut courts have construed sentences like this to be only two years because of the equal protection law?

A I take issue with that because of the fact that the high court of Connecticut has not said so and the fact is that the only ---

Q Well, he can certainly make the claim here,

which he has, that this is a denial of the equal protection.

A He can make the claim that it is denial of equal protection but I can make the claim that this conviction stands on independent State grounds.

Any two-year limitation under Section 53-219 under which he was duly convicted.

Q What is your independent State ground, that there was no appeal ever taken from the conviction?

A Yes, your Honor.

Q And no appeal was ever taken in Connecticut Appellate Court?

A I don't understand the question.

Q I am trying to find out what you mean by independent State Ground. That no appeal was ever taken from a Connecticut Appellate Court from the conviction for lascivious carriage. And, therefore, I gather your point is that whatever may be the case as to two years, this petition is precluded by the failure of the appeal by the three years?

A That is right.

There has been no ruling, administratively or otherwise, or no decision of the Connecticut Supreme Court that in a case like this with a minor female between 16 and 21 convicted of lascivious carriage that the maximum sentence should be anything less than three years.

Q You are saying that the cases of petitioner

relies on just didn't happen to be decided in this particular section. And you are saying more than that?

A I am saying more than that.

Q Isn't this a direct appeal?

A This is a direct appeal from the denial of the demurrer.

Q If I understand you, you are saying that there has never been an appeal from conviction of lascivious carriage that carried a three-year sentence that is what you are saying and there can't be any issue as to that sentence before this court as it has never been brought before the Connecticut Appellate Court. Is that it?

A Yes, your Honor.

It should have been brought by appeal by habeas corpus if they wanted to attack the sentence. But the sentence stands for a maximum of three years. There is no change in that sentence.

Q Mr. Carroll, the statute that she was convicted on I understand from your brief on page 13, am I correct, that you take the position that vice and habits of vice are no more or no less unambiguous than the word obscene. Is that the position you take?

A I think that at least the word vice is at least in clear.

Q But no more so than obscene?

A That is a hard thing to answer there, Justice. I think vice is more clear. But I may expound from that, a Federal case which did involve a criminal conviction but did say about vice that nothing is more clear than promiscuous and uninhibited sexual intercourse is vice.

That if anything is vice, that is it. And you see here unfortunately we don't have the facts before the court or of the record of the conducts of this young woman to measure against the words of the statute because I think this is the type of statute that could be applied in some cases in an unconstitutional manner that is not unconstitutional void for vagueness on its face but that the court should have the benefit of the conduct to measure against the words of the statute and after all isn't that only logical because the reasons for the statute being void for vagueness and, therefore, denial of due process are to primarily that the act or didn't know what conduct is called vice.

I say that the record in this case would reveal that this actor or any actor would know that the conduct would come within the purview of the word vice but not having that before you is another reason the State maintains that the court should not disturb ---

Q Would it not have been proper in this situation to bring the record here?

A It was not made a part of the record. You

mean the transcript, your Honor, of the evidence?

Q Would it have not been proper for counsel to put that in the Appendix, under the appellate procedure?

A Not the way the appeal was taken, no, because it was just an appeal from the overruling of the demurrer.

Q Then you don't question whether it should have been here or not?

A Yes, I do because under our practice in the case that I cited in my brief called State versus Sul is that you cannot be overruled on a demurrer, the constitutionality of the statute, and then proceed to a full trial and be convicted and then appeal the overruling of the demurrer without any evidence before the Appellate Court.

That is our law under the case of State versus Sul. I should add as I did in the brief, however, that the court said but anyhow we are going to look at the situation because of the constitutional issues that were involved but they clearly said under Connecticut law namely that this should not be in the Connecticut Appellate Court in this form because the demurrer having been overruled, then the trial, then the conviction, defense counsel made the motion to dismiss, that on the appeal the record of that trial should be before the court.

Q The overruling on the demurrer or the conviction?

A The overruling on the demurrer.

Q And what you said is that the Connecticut practice

is that you appeal from the overruling of the demurrer but there has been a subsequent trial after the overruling of the demurrer, that the Appellate Court has to have the trial record before it?

A Yes, your Honor.

Q What I am interested in, do you question whether the appeal is properly before us in this posture?

A Yes, I do.

Q You argue that in your brief?

A Yes, I don't know if I argued just in the terms the Chief Justice means but I argue it in terms of this court being unable to pass upon the statute without having before it the facts that were brought out at the trial and with the basis of her conviction under it.

Q So that is additional independent State grounds, isn't it?

A Yes, but I think Mr. Chief Justice's point is that I haven't made a procedural argument on that, I have tried to make a substantive argument of it in terms of whether the court should consider it not having the record before it.

Q Yes, but you said there was an appeal in Connecticut. Nevertheless, we can question the statute even though it was not brought as your practice required, the trial record was brought on the appeal on the overruling of the demurrer?

A Yes.

Q Why would we not be able also to do that?

A I certainly would not deny you that prerogative. I would say though and I think that is why I cast this more in practical terms of applying a statute to a set of the facts hat are nonexistent. I think Justice Frankfurter said in one case it was like playing Hamlet without Hamlet.

I think that is what we have here and I think there are statutes that come under free speech restrictions that this court can look at and has looked at and said these are patently and on their face unconstitutionally void for vagueness but I don't think this is that kind of statute.

It is talking about conduct which is not within the constitutionally protected area and I think in that type of case and in the cases I cited in my brief on this point that the court should have the facts before it and if it didn't that is vagueness.

Q May I ask you another question to try to clarify the underlying sentence situation in my mind. If a woman age 22 were arrested and convicted of the crime of lascivious carriage under your statutes, what would be the sentence?

A Six months maximum.

Q What happened here is that this woman, being under 21, 16 or 17, was convicted of that same crime under the lascivious carriage. And your position is that the effective

sentence was three years because of the order committing her to the State Farm for Women; is that right?

A Yes, sir.

Q But so far as that conviction of the crime of lascivious carriage is concerned, the sentence provided by Section 53, whatever it is, is six months; is that right?

A Yes, sir.

Q And the three-year hypothesis depends solely upon whether it is Section 17-360?

A Yes, sir.

Q And Section 17-360 makes no reference to the crime of lascivious carriage but provides only if I understand it, that the maximum commitment to the State Farm for Women shall be three years. Is that right?

Are you relying on the provision in 17-360 that says that the maximum commitment to the State Farm for Women shall be three years?

A I am relying on 17-360 but a different part of it.

Q Please tell me what part of it.

A Persons who may be committed to this institution, persons who plead guilty to the commission of felony which this is not. Second, persons convicted of or who plead guilty to the commission of misdemeanors, including prostitution, intoxication, and disorderly conduct.

Q But not lascivious carriage?

A No, but I didn't take that to mean including but not eliminating or not being exclusive.

Q You mean the listing is not exclusive?

A Yes, sir.

Q All right, go ahead. I am sorry. Read the rest of that, will you please?

A The commission of misdemeanors constitutes intoxication, drug use, and disorderly conduct, and third, unmarried girls between the ages of 16 and 21 who fall into the habits of vice which is the commitment provision for the conviction under Section 17-379.

Q All right.

Now, tell me in summary if you don't mind just how, on what theory, keeping those statutory sections in mind, you contend that appellant here is serving a three-year sentence as a result of her conviction of the crime of lascivious carriage.

A Yes, your Honor.

If I may just take Section 17-379 which was the actual conviction for manifest danger of falling into habit of vice, 17-379 says: Any unmarried female between ages of 16 and 21 who is in manifest danger of falling into habits of vice or leading a vicious life or who has committed any crime upon the complaint may be brought before the court and committed,

and then it goes on to say in effect that she may be committed to the Connecticut State Farm for Women until she is 21. In this section it doesn't mention the Connecticut State Farm for Women but there is no question but that is what it is talking about.

So she is convicted of manifest danger under 17-379; under 53-219 she is convicted of lascivious carriage and either the words in 17-379 or who has committed any crime or the words that I read before in 17-360, the commission of misdemeanors, including prostitution, et cetera, are applicable.

And she is committed under the maximum three-year sentence in 17-360 for the crime of lascivious carriage as well as for the manifest danger of falling into vice charge under the two states, 53-219 and 17-379.

17-360 says she has to stay there for a maximum of three years including parole.

Q 17-360 says she has to stay there for three years?

A Well, no, I should say she is exposed to being there for three years. That is the maximum. Three years is the maximum sentence. There is confusion in 17-379 which says 21 but as I said earlier I don't think there is any question as to this young lady, 17-360, three years maximum would be applicable because it would be longer to have her attain 21 and the lesser is applicable.

So under 17-360 she has the maximum exposure of three years and both the charges under which she was convicted.

Q This is an extraordinary chain puzzle, isn't it?

Where is the charge printed in the record? The indictment, the information or whatever it is?

A There is information in the substitute information in the record. The information that is applicable is on page, well it is right after page 4 and it is called substitute information.

Q Do you read this as making it a crime for a girl to be in manifest danger of contracting habits of vice?

A That is what falling into habits of vice, yes, sir.

Q How do you prove that by the environment or the context or the fact that she is living in a city where there is a lot of temptation? How could it be proved? That is just a possibility of what may happen to somebody in the future.

A It is a danger, yes.

Q You convict her of being in danger?

A Yes, sir.

Q We have, of course, the conduct.

A If the conduct would be before the court it would be clear that there was more than danger.

Q Well, that is not what the statute says. It says manifest danger. Has the court ever construed it as

being a crime to be in manifest danger, your Supreme Court?

A No.

Q Has it ever construed it at all?

A No.

Q Has there ever been any case in the State?

A I don't think there has ever been a case that is at all applicable, no.

Q Is this the only case that has ever been in the State since it started in 1905?

A Oh, no, there have been convictions but there is no appellate decision on the statute as far as I know that has any bearing on the problem before us.

Q How do you know there have been convictions?

A I know there have been convictions because I have been prosecuting for a long time and I know that other prosecutors in fact, in their brief, the appellant sets forth the use of the statute by prosecutors in the State of Connecticut.

Q This is not the conduct. This is for being in danger.

A I am saying, your Honor, that the cases I am referring to are all for conduct, although I have to agree with you the statute says danger of falling into vice.

Q That is the charge here and we have to consider it on the basis of what that is a good statute or not. Do you

call it a crime to be in danger?

A I won't defend the statute at all, your Honor, if I didn't believe that to mean a criminal. The criminal conduct has to be involved.

Q It is a crime to be placed somewhere where you are in danger or be tempted to do something wrong?

A I suppose there is a degree of vice, your Honor. I don't think the statute should be or could be properly applied unless the danger had been realized.

Q They don't fix any punishment like penalty or fine or imprisonment, do they? They just put them in a jail like you would put a child, like a parent would put a child in the back room. That is to take care of it to see that she isn't in any danger there?

A Well, I don't think we can avoid the penal nature of this. That is the idea. It is rehabilitation.

Q It seems to me like it is not a crime the way they have handled that part to put her in jail just to take care of her and take her out of danger. Of course, she may not be completely out of danger there.

A Well she is out of there now anyhow.

Q Why do we have to pass on it if she is out of there?

A Her point is that she is on parole and ---

Q Do you agree that she is on parole then?

A Yes, she is on parole.

Q It is not moot, of course.

A I don't claim it is moot, no.

Q But you did say she is on parole from a concurrent sentence that has in no way been attacked?

A That is correct. I don't think that is technically mootness but we certainly raise that and raise that very strongly.

Q Let us see if I can get this correct. First is this Chinese puzzle of extrapolating the six-months sentence for lascivious carriage and three months commitment to the State Farm for Women.

Three months, we regard that as sentence, and you get an exact identity with the length of the sentence under the danger resulting from being a female statute. And if that is so, then we have the problem of concurrent sentences because of lascivious carriage conviction which is not before us.

Then if we can consider the res ipsa loquitur criminal statute, danger of being a woman in New Haven, Connecticut, then I suppose then we get into the questions that Mr. Justice Black raised.

Is that a correct analysis of it?

A That is a correct analysis but I don't think the sentencing provisions are that much of a Chinese puzzle. Maybe I am going more by practice than by what is brought out.

I think if you read 379 and 360 and 53-219, there is no question that she is properly sent there for three years under 53-219 and these decisions mentioned by counsel I don't believe affect this case.

If I may add a word on the vice, when we were talking about vice, I think it is clear from the context of the statute and other language in the statute that it is criminal vice. I have a vice of smoking cigarettes. There is all kinds of vices that are used even more innocuously than that, of course, but the whole context of this is talking about criminal vice and the type of vice we think about when we think of a vice squad.

Q I suppose you have in Connecticut specific criminal statutes and ordinances making it illegal, that sort of criminal conduct?

A That is correct.

Q The sort of hard core conduct that everybody seems to agree is covered by this is also covered by specific criminal statutes, is it not?

A I think most of the cases that have come up under this would be covered by specific criminal conduct, yes, sir, but I think it is brought up because of the fact that this category of young person was regarded as being in need of particular treatment.

There was drinking involved in the case, too. This

type of drinking on her part may not have fit a specific criminal offense in Connecticut but she was at the time a 16-year old girl and she was drinking while this other business was going on, that particular conduct which was in the record and in the testimony.

Q What is the upper limit on age for juvenile court proceeding?

A Sixteen, your Honor.

Between 16 and 18 the adult court can refer them if they think they are amenable to juvenile court jurisdiction.

Q So would the juvenile court have been able to exercise jurisdiction over this young woman?

A Not unless she was referred by the court that heard this case prior to the court hearing.

Q So that court could have referred her and then she could have been taken care of under the juvenile court statutes until she was 21?

A Yes, that court could have but the court had background of reasons why it didn't.

Q Do you know whether there had been any convictions for a charge of danger of becoming a cigarette smoker?

A No, your Honor.

Q You mentioned that as a vice.

A Yes, I mentioned that.

Q I presume that a lot of people will agree with

you that that is a form of vice from which a person should be protected?

A Well, a person presently is not protected from that particular vice by legislation and this particular kind of vice that we are talking about here we maintain does protect society and a young lady such as this one by criminal sanctions or quasi-criminal sanctions.

Q What I am getting at is, why couldn't cigarette smoking be considered under vice under this law when in danger of becoming a cigarette smoker?

A I am thinking of the anser, Judge. I didn't realize ---

Q All right.

A I am trying to come up with an answer to that. Well, your Honor, it could come to that.

Q That could come under a statute?

A A statute could be passed.

Q I am not talking about passed. I am talking about under this statute.

A Under this statute, no, because I think the other words of the statute make it clear that this is criminal vice and habits.

Q The other words of the statute say that couldn't be considered a vice?

A When read in context it says that to me and I

point that out.

Q I don't see why it couldn't.

A Here is what I said in that respect.

The word vice must be read in the context of the general statutory scheme and juxtaposition to the phrase, "or committed any crime" which is in the statute.

Q That is a separate part. Who has committed any crime. For the first time, of course, it is being subjected to temptation of falling into vice such as cigarette smoking.

A It is a matter of interpretation. I claim the only fair interpretation of the statute is that it is criminal vice that it is talking about.

Q But the word vice is not limited to criminal?

A It certainly isn't and it applies to much more innocuous things than cigarette smoking. My vice is that I don't hear the alarm clock in the morning or something to that effect. That could be a vice.

Q It would be bad to be charged with being tempted that way, wouldn't it?

A It certainly would.

Q As a matter of fact, you realize, don't you, that vice doesn't have any definite meaning. It doesn't have any boundaries. It depends on what people think.

A I made clear that it has very broad meaning.

Q To you, yes.

A To everybody. But I would also like to make clear that I think the only fair construction of this statute is that it is a criminal vice.

Q Why couldn't they write one that limited it to that? Why should they be trying people for vices and danger of falling into vice when it covers a thousand different things to a thousand different people?

A Well, if the court had before it the conduct of the person, it could judge, couldn't it, whether that is the type of vice that could constitutionally be prescribed.

Q Well, I don't know. I should think that here the sky is the limit under this statute.

A I think you start with the assumption, your Honor, that the statute should be construed so that it reasonably and possibly its constituti0nality should be upheld and I don't think that is very difficult.

Q But should we do that here?

A Well, I don't think you should get to that, your Honor. I don't think you should get to that.

Q We would have to get to that. They are challenging it on the grounds of it being unconstitutional, vague and uncertain.

A But I think because this conviction stands on independent State ground and because you don't ---

Q What independent State grounds?

A The conviction under the other statute.

Q You mean that is the one you were talking to Justice Fortas about?

A Yes, sir.

Q That is a pretty long way from this one.

A That other statute?

Q Yes.

A It is a long way from it, sir.

Q Yes, isn't it.

A No, it is a lot like it.

Q It is what?

A It is a lot like it. It is lascivious carriage, it is called.

Q It is called what?

A Lascivious carriage.

Q Carriage?

A Carriage. Demeanor, department.

Q Is it against the law, is it a crime to have a lascivious carriage?

A It is a crime to as regard to department and demeanor.

Q Demeanor? Walking, for instance?

A It would have to be conduct. Lascivious, lewd, wanton type conduct is what is meant.

Q Suppose somebody walked lasciviously. It is not without the bound of reason?

A I am thinking about that in terms of the question

Q There might be a great many of them subject to conviction.

A But that statute is not being attacked here.

Q Well, that has nothing to do with it then.

A It does only so far as the sentence arising from it provides an independent State grounds from the validity of the conviction and sentence on the other.

Q The only point I had was there is no decisions in Connecticut interpreting the statute?

A No, sir.

Q In fact, it is up to the trial judge who happened to try the case to decide whether this is vice or not and whether it is under the statute or not without any guidelines at all?

A Except as the statute provides.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Grosby.

REBUTTAL ARGUMENT OF ROBERT N. GROSBY, ESQ.

ON BEHALF OF APPELLANT

MR. GROSBY: Mr. Chief Justice, we do have a procedure in our State whereby the police has the right to present evidence to the appellant court but the State did have an

opportunity in this case to present a record of the transcript to the Appellate Court had they chose. In this case it would have been before you.

Mr. Carroll said that the Sul case requires evidence. We take issue with that. We say that the Sul case was a constitutionality case with respect to application and not in toto as we claim here.

Mr. Justice Black indicated whether there were any decisions under this or any cases under this statute and in our appendix we indicate that -- in the appendix on page 21 we indicate there were 560 cases since 1961.

Q How many?

A Five hundred sixty. One hundred twenty-eight of which were committed to the Connecticut State Farm; 356 guilty findings, 179 nol-pros, 54 not guilties and 75 to juvenile court, and some were held over to Superior Court.

Q In the Sul case, I notice that the opinion of your Appellate Division sets out, and I am looking at pages 14 and 15 of the Brown appendix, sets out the rules of the Sul case in some length and says on page 15, the rules stated in the Sul case with particular precision and particularity were ignored by appellant in the case before us.

And then also on to say but we do not rest our decision on that ground alone, which would imply to me that the decision rested alternatively on that ground and that would be

an adequate State ground, would it not?

A No, sir, we say that the Appellate Division opinion was in error.

Q That is a matter of Connecticut law whether or not it was in error, isn't it?

A Yes, sir.

Q It is not a matter for us.

A Mr. Justice, there is another point I want to take up and that is the question of the independent State grounds.

Q Before you get to that subject, may I ask you what is the characteristic of this institution, this young woman went to, is it a farm for women? Is that a juvenile camp or is that for women of all ages?

A It is for women of all ages.

Q And for all kinds of crimes?

A And with complete desegregation. In other words a woman convicted of manifest danger of falling into vice would be separated from other felons or misdemeanors.

Q It is a penal institution?

A Yes, sir.

Q Appendix B of the appellant's brief seems to set out the legislative history behind the creation of this institution back in 1917?

A Yes, sir.

Q As a progressive and enlightened advance in penology in Connecticut?

A Yes, sir.

Q In practice, is this statute used as a method of convicting women of prostitution?

A I think not. I think that prostitution cases they use the prostitution statute.

Q That is a crime?

A Yes, sir. The independent State grounds ---

Q What kind of people are brought up under this statute who were not prostitutes?

A Young girls who are found in parked cars with young men and girls who run away from home. Those are the only situations that I have dealt with. One is presently under appeal to the Connecticut Supreme Court.

Q In most jurisdictions those are handled under the juvenile court proceedings?

A That is true, sir.

Q But here is it customary or unusual for the adult court to refer cases like this from the age of 18 or whatever it is to the juvenile court?

A I think we show in our appendix that only 47 of the 560 were referred to the juvenile court in the period 1961 to 1967.

We were bound by the Connecticut law in the cases

which are not in our brief. Liker versus Turkington, 115 Connecticut 600. Connecticut versus Walker, 4 Connecticut Superior 659, and 4 Connecticut Superior 436 and Vena versus Walker 17 Connecticut 365, from attacking the lascivious danger statute.

This is the independent State grounds problem and we felt that first time we could have done this was when your decision was announced in Patton versus Roe and Patton versus Roe does not appear to be a concurrent sentence, yet it might be that the Payton versus Roe doctrine might supersede some value.

The cases suggested is -- is recounted in Mr. Carroll's brief on page 6; that is, the Hirabayashi and the Pinkerton matters for several reasons assuming for the moment which we don't concede that the lascivious dangerous situation is not still three years but we claim it is two, assuming that it is three, the effect is a reason we feel there is a compelling reason to consider the appeal for habeas corpus on one concurrent sentence.

This might have to do with period of probation, period of parole. It might have to do with getting a job. Even if this girl had to serve three years under lascivious carriage, if she was convicted of manifest danger of falling into vice, this could have some effect on here future job holding ability and effort to get a job.

I think perhaps your Patsone versus Pennsylvania case is one that may reopen this whole situation on independent State ground.

Q You mean on concurrent sentence?

A Yes, sir.

MR. CHIEF JUSTICE WARREN: Very well.

Q May I ask. Is this conviction on lascivious carriage something we can't touch because of your failure to appeal the conviction?

A Of course, the issue has not been briefed here and has not been raised.

Q The issue is that since in any event she has three years on the conviction for lascivious carriage there is no occasion on deciding the constitutional question raised by the opinion of the court. That is certainly before us.

A No, but what we do ask you to decide, Mr. Justice, is that the Federal Court decision and two State Court decisions that said the maximum sentence on lascivious carriage was two years is proper and therefore there is only ---

Q Well, I gather it is a question if they did appeal from lascivious carriage but even if they had, even if they had, you couldn't appeal from the three-year sentence from conviction for lascivious carriage?

A No, we couldn't appeal from lascivious carriage

as long as the doctrine of those Connecticut cases affects. We feel the first time we could have done anything about it was when Patton versus Roe was announced. Then we could bring habeas corpus in the Connecticut court.

Q Are you suggesting that the doctrine we have followed on cases where -- doctrines we have followed in other cases where there are convictions for two counts and one of them was concedingly is a valid conviction, ordinarily we don't reach any constitutional questions as to the other conviction, are you suggesting that Patton versus Roe called in to the question of liberty?

A Yes, sir. It may not be necessary for you to decide that.

Q If you find what the validity of lascivious carriage sentence is a maximum of two years it may not need be decided.

Q Even though you did not appeal on the conviction?

A Yes, sir.

Q Are you saying that is a question on your theory that is necessarily before us even though we don't have the conviction under lascivious carriage in order to get to the other question, the question of in danger of falling into vice question, that we have to arrive at some conclusion with respect to the sentence under the lascivious carriage

conviction is that your point?

A It is the State that really brings in the fact of the conviction into this case, Mr. Justice. The States say you may not make the vagueness attack because you have already been convicted.

Q And brings before the court the fact that subsequent to the demurrer there have been convictions for two offenses here?

A Yes, sir.

Q And consequently the offense of the conviction must be before us or there would not be any question of concurrent sentences here?

A Yes, sir.

We could have brought habeas corpus on the lascivious carriage conviction after Patton versus Roe came down but you had already noted probable jurisdiction. We thought this would be a lesson in futility.

MR. CHIEF JUSTICE WARREN: Very well.

(Whereupon, at 11:10 a.m. the hearing in the above-entitled matter was concluded.)