Supreme Court of the United States

In the Matter of:

FRED L. SHUTTLESWORTH,

Petitioner

vs.

CITY OF BIRMINGHAM, ALABAMA

Respondent.

Docket No. 42

Place Washington, D. C.

Date November 18, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

FRED L. SHUTTLESWORTH,

Petitioner,

vs. No. 42

CITY OF BIRMINGHAM, ALABAMA,

Respondent.

Washington, D. C.
Monday, November 18, 1968.

The above-entitled matter came on for argument at 10:15 a.m.

BEFORE:

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:

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P R O C E E D I N G S

MR. JUSTICE BLACK: The next case is Shuttlesworth versus the City of Birmingham, Alabama, No. 42.

ORAL ARGUMENT OF JACK GREENBERG

COUNSEL FOR THE PETITIONER

MR. GREENBERG: Mr. Justice Black and may it please the Court, this case is here on petition for certiorari to the Supreme Court of Alabama, which reversed the Alabama Court of Appeals, which in turn had reversed the Circuit Court of Jefferson County, which had convicted this petitioner for violating a Birmingham ordinance requiring a permit before a procession or parade may be held.

This petitioner, Fred Shuttlesworth, was sentenced to 90 days in jail, plus 48 days in lieu of paying a fine and costs, for parading in violation of this ordinance which appears on page 4 of our brief.

Q When was the conviction, in 1963?

A This was in 1963.

Q How in the world has it taken this long to get up here?

A Well, Mr. Justice Harlan, the case was tried in Recorder's Court in May of 1963, and the Circuit Court in October of 1963.

And appeal was promptly taken to the Alabama Court of Appeals which did not decide the case until 1965. The

State of Alabama then took it to the Alabama Supreme Court which did not decide the case until November of 1967, and we promptly took it here.

The time was essentially spent in the very lengthy consideration or very lengthy time that was consumed while the case was pending before the two Alabama courts.

The ordinance in question which appears on page 4 of our brief states that it shall be unlawful to organize or hold or assist in organizing or holding a parade or procession or other public demonstration unless a permit has been secured, and then it sets forth standards according to which the permit may be granted or denied.

Those standards include, beginning on the very last line on page 4 of our brief, public welfare, peace, safety, health, decency, good order, morals or convenience.

As I stated, this arose in 1963, and this is what one might call a prototype case. This is the case of the one petitioner whose conviction has been appealed and there are approximately 1500 other cases pending in the Juvenile Court and the Circuit Court of Jefferson County awaiting disposition of this case.

The case arose out of what one might call a classical type of civil rights march.

Q How many cases did you say?

A Approximately 1500, with about 900 in the

Juvenile Court and 600 in the Circuit Court are being held, pending the outcome of this case.

Q How is that possible? I thought there were only 15 marchers.

A Well, other persons were prosecuted for violation of this ordinance. This occurred during the series of demonstrations in Birmingham in 1963, which ultimately led to the passage of the 1964 Civil Rights Act, and there were a series of demonstrations and marches over a period of some time, while there were 52 persons arrested in this particular demonstration there were 1500 altogether.

Civil Rights marches are what one might call a classical type of Civil Rights March. The group of marchers which Petitioner Shuttlesworth, with which he was connected, left the church at approximately 2:00 or 2:30 in the afternoon. They walked on the sidewalks. They were entirely orderly. There is no question about that at all.

They proceeded approximately four or somewhat more than four blocks and then they were stopped by police officers who asked whether or not they had a permit and when they said they did not have a permit they were arrested.

I might state that the Respondent's brief is written in an effort or written as if this were some sort of disorderly conduct or breach of the peace case.

The fact is the petitioners were not prosecuted for

anything of the sort. They were prosecuted for parading without a permit. The opinion of Judge Johnson in the Court of Appeals which has been adopted essentially by the Supreme Court of Alabama is express on the fact that the petitioners were orderly.

The testimony of police officers is unequivocal that they were orderly. There was a group of on-lookers, there is some dispute as to whether or not the on-lookers were disorderly. They were, however, a discrete group and even the alleged disorder which came out of the conduct of the on-lookers occurred after the arrest.

I don't think that it can be seriously contested or contended at all that these petitioners acted in violation of any disorderly conduct or breach of the peace statute, and indeed they have not been prosecuted for that.

Now Judge Cait's opinion in the Alabama Court of Appeals which reversed the conviction of the trial court is a lengthy opinion, appearing at page 88 of the record. However, it is summarized in his conclusion in a brief section on page 143.

His position was that the permit ordinance is unconstitutional because it is vague, and includes such terms as welfare, decency, and good morals, which are not susceptible to any precise meaning. Relying upon judicial notice of records in several other Alabama cases he held that the pattern

of enforcement, that is, prosecuting these petitioners for walking down the sidewalk was discriminatory in the sense of Yick Wo against Hopkins and he also held in his third point that there was no need shown, no State interest shown in enforcing an ordinance of this sort against persons who were merely walking down the sidewalk.

The dissenting opinion of Judge Johnson which was adopted and without any variation really by the Alabama Supreme Court consisted essentially of reconstruction of the statute in the mode of Cox against New Hampshire. He read the statute and he said, if the statute contains the word decency, and morals, and welfare and the various other vague terms, but I read all of those words out of the statute so those words are no longer there, and now I am going to read something into the statute, and after having read that out he read into the statute those traffic considerations and considerations that avert to convenience of the publich, which was the basis of the Cox decision and the Supreme Court of Alabama said that is right, we read out the bad words and read in some good words, and therefore the conviction stands.

Now, our position in this case in summary is that under the decisions of this Court, it uniformly has been held that a permit ordinance which imposes a prior restraint on First Amendment rights may be disobeyed with impunity if it is unconstitutional on its face.

This Court held that in Staub against Baxley and in Lovell against Griffin and in case after case since then. There seems to be conceded that the language in question just to take three of the terms, welfare, decency and morals, are so vague that they ought to be unconstitutional, and indeed that is why they were read out of the statute by Judge Johnson and by the Alabama Supreme Court.

There is the question of the Cox case. Our position on the Cox case and I will come to it in a moment, it is that it is distinguishable and that in any event it did not take into account and did not discuss certain due process considerations appearing which are central to this petition.

Q Which Cox case is that?

A I will be speaking about the Cox against New Hampshire, yes.

Q You don't claim there is anything unconstitutional as such in the state of having a permit requirement for a parade, would you?

A Oh, no, providing that it meets certain substantive and we might add certain procedural standards, and we say that this statute as rewritten, even if it were constitutional as rewritten, first cannot be applied to convict this petitioner who acted before it was rewritten, and secondly we claim it is not constitutional because it does not provide for a speedy review and certain standards and record keeping

requirements and so forth, that would be necessary upon review.

Secondly, we claim that five years after the event this statute cannot be reconstructed without violating fair notice. To convict this petitioner in a substantive sense as distinguished from the procedural sense, such a rewritten statute might be constitutional.

Now under decisions of this court, as I stated at the outset, a march made without a permit, contrary to a regulation requiring a permit is constitutional and it is protected by the First Amendment if the permit ordinance or regulation is unconstitutional on its face.

Now it is conceded that this ordinance is unconstitutional in its face, and I have seen no argument serious or otherwise to the contrary.

An alternative would be if the Staub doctrine and the Lovell doctrine were not the law of this court, that dissenters before they march would have to engage in expensive litigation, as in let us say the Dombrowski case, or would have to submit themselves to lengthy administrative proceedings and there would be a chill upon free expression.

Petitioner in a case such as this would be in an especially grave disadvantage in an administrative proceeding, and in a judicial proceeding, because of the scope of review on appeal in the Alabama courts is so circumscribed that in dealing with a vague statute he would have great difficulty in

proving just what right of his had been denied. But this ordinance like the one in the Cox case was construed in the Supreme Court of Alabama for the first time apparently to make it constitutional, and it was held below that Cox saved the ordinance and saved the conviction.

Our position is, as I stated before, that even if this were the case, it could not save the ordinance in the sense that it could convict this petitioner.

We distinguish the Cox case on a variety of grounds. First of all in Cox there was a statute which was essentially blank as to standards, and it is conceivable that one might have read that ordinance and said, well, what is it they mean and reasonably might apply to traffic considerations, but here is a statute which quite explicitly has other standards in it, welfare, decency, and good order and so forth.

One need not be at a loss to guess what the State means. The State means these various vague general things about which one can't really predict whether one is entitled to march or not.

Q Did the Cox case of New Hampshire have any standards whatever?

A No, no, none. No standards. It is just that you needed a permit.

Q That was Chief Justice Hugh's opinion?

A Yes, I think it was, yes. It just said that you

needed a permit but it did not have any standards in it. This case on the contrary has a series of vague standards, and while I would not agree with this, but it would be conceivable to say that one might imagine that standards could be imported into a statute which is silent, I think it is asking a great deal to expect a layman or indeed a lawyer to read out of the statute a series of vague standards, and read into the statute a series of traffic-type standards.

Secondly, as we pointed out in our brief, the Cox case was in some of the earlier days of First Amendment jurisprudence in this court, and it may be that the court at this time was not sufficiently alert to the chilling effect that such a retroactive interpretation might have, and further that the court had not really fully developed its jurisprudence of First Amendment rights to apply to marches and parading and picketing and things of that sort.

But in any event, even if the statute could be said to be now made constitutional retrospectively by reading out and reading in, we say that in a procedural sense it is not constitutional in the sense of the Bantam B case and the Interstate Circuit case, which says that when First Amendment rights are denied they must be speedy, precise and efficacious opportunity for review and none of that exists here at all.

It is not even as reconstructed, standards like that weren't read into the statute.

Q Now, do you know of any case where that doctrine in obscenity cases has been applied to an ordinance, a valid ordinance, as it relates to the control of the streets?

A No, Mr. Justice Harlan, but we would say that a fortiori should apply, perhaps not necessarily to a case involving use of the streets, but to a case involving what one might call political rights, because I think it might be argued that in the case involving a book or motion picture, for example, while it is undesirable and it is unconstitutional to frustrate or delay the publication or the showing of the motion picture, that something which involves a political consdieration in which timeliness is exceedingly important and the necessity for avoiding delay is crucial, as it was in this case, the Good Friday March had a significance on Good Friday and on Easter Sunday as such, that a fortiori that rapid and effective review notion should apply to this kind of a case, even more so than to a movie case.

But the Cox case, the point we make in addition, did not addres itself, and perhaps it wasn't raised in the case, to the fair notice doctrine. This petitioner, according to the law as it stood then, and as he under any reasonable sense could read this statute, had reason to believe that he could march with impunity.

He did not have fair notice that five years later the statute would be reconstructed in a way which could convict

him, and this court not long ago, in this case of Bouie vs the City of Columbia, which was one of the sit-in cases, dealt with the trespass statute, and the court may recall that the statute said that it was a misdemeanor to enter upon the lands of another after notice from the owner prohibiting entry.

And the Petitioner in that case entered upon the lands and he did not have notice prohibiting entry, and he was told to leave. The Supreme Court of South Carolina said well that means the same thing, and this court said no, he did not have fair notice that the retrospective interpretation of the statute would cover his particular situation.

While the case is not entirely precise, I think the notion of retrospective interpretation to convict without fair notice is applicable in this case as well as in the Bouie case.

I would like to address for a moment the question of fair procedure, which I say I think is crucial in this case because the statute remains unconstitutional even after rewritten.

There is no regularity, nothing provided for in the ordinance concerning administrativepprocedure and processing applications. So far as practice is concerned, there is no evidence concerning that. There are no reasons to be given as to why a permit is denied. There was an effort to develop upon cross-examination of the witness Sarah Nowger who gave out the permits, when permits are granted and when they are

denied and are they given to walking on sidewalks as distinguished from walking in the streets. That line of questioning was cut off very soon after it began, so it was not even possible to develop this at the trial.

There are no time limits, lengthy or brief. There is some suggestion about judicial review, but as the best we can define from reading the Alabama law, the judicial review would at least involve 30 days for answer in the trial court, and there are no stated precise periods for appealing in the Supreme Court of Alabama.

And the scope of review is extremely narrow. It would be by mandamus a certiorari, at which all one reviews is the discretion of the grant or deny of the permit and in a statute as vague as this, it would be very difficult to litigate something of that sort.

So for all of these reasons we submit to the court that the conviction of Petitioner Fred Shuttlesworth should not be permitted to stand, that the statute as rewritten does not save that conviction, that even if in a substantive sense and as to future defendants that statute might be valid in a procedural sense it is and remains unconstitutional.

MR. JUSTICE BLACK: You may proceed, Mr. McBee.

ORAL ARGUMENT OF EARL McBEE

COUNSEL FOR THE RESPONDENT

MR. McBEE: Mr. Justice Black and may it please the Court, some 18 months ago, I believe, I had the privilege of appearing before this court in reference to the case of Walker versus the City of Birmingham, in which we think is a closely related case inasmuch as it deals with the identical parade and, of course, deals with and involves the same parties.

That is the City of Birmingham, and in this instance the respondent or rather the petitioner, F. L. Shuttlesworth. We think the facts in that case should be considered in this case, because they are related and even if the court has authority to so consider we would like to call attention to the fact that in the City of Birmingham, at the time this particular litigation began, there had been a number of mass parades and leading into the violence and had taxed the Police Department of the City of Birmingham to protect the demonstrators and also to protect the citizens of the City of Birmingham.

On the evening of the 10th of April, the city acquired an injunction from the State Court enjoining the holding of mass parades in violation of 1159; that is, the ordinance in question.

The reaction to that injunction was an immediate denial of any right of a state or any intent of the parties

involving the petitioner to pay any attention to the injunction, but as a matter of fact they said that the injunction was not to be respected and not to be obeyed but that they did not believe in obeying laws that they considered to be opposed to their way of life.

Q Mr. McBee, there is no issue about any injunction in this case. It seems to me you are rearguing the Walker case. You already won that one.

A No, sir, I don't mean to be doing that. I just mean to try to connect the two cases in this respect, that there was an effort on the part of the petitioner here to say that he had been mistreated and mislead into the arrest on this case. And we believe that the facts in the Walker case are at least to some extent relevant.

Q I don't see how any issue of an injunction is in this case, and I didn't understand it to be, after having carefully read your brief.

A Well, we agree that it is not an issue in the case, but we believe or we thought at least that the factual situation was relevant.

Q Well, this is a conviction for holding a parade without a permit.

A Yes, sir, that is true.

Q And it has nothing to do or there are no issues here of disorderly conduct or violence or defiance of a court

order. None of those things are in this case.

A I believe that is correct, that there is no question of any misconduct on the part of these particular defendants in the sense of any disorderly conduct. And it wasn't in that case either, but they did say that they were going to disobey a court order.

Q Disobey a court order, that is not in this case at all.

A In the facts in the case, in this particular instance, there is no question but that the evidence clearly shows the violation of the law.

Now, the question of the precedents that were before the court and which the court must consider as we believe in determining the rightfulness or wrongfulness of the conviction in this case will be, among other things, of course, the Cox case. That is the New Hampshire Cox case.

Now the New Hampshire Cox case did not place any sort of restrictions upon the issuance of the license. The license was particularly and fully and completely based upon the monetary consideration, plus whatever restrictions the deciding body might want to put into it.

For example, they could if they wanted to, use racial lines for denying the applications, and they could use religious lines to deny the application, and they could also presumably use any other criteria for denying the application.

In considering the question, and we don't believe that the ordinance in 1159 is any more void or invalid than is the ordinance in the case of Cox because of the fact that there was reference to some action on the part of the court in connection with the city commission with the various aspects of the police power of the city.

In other words, it does relate to specifically the aspects of the police power. Now, the Supreme Court of Alabama in its ruling which by the way followed the ruling of this court in the case of Walker versus the City of Birmingham, the City of Birmingham versus Walker, did hold in line with that case that the ordinance was not unconstitutional.

Now, there has been a question raised as to why the Court of Alabama waited so long. I have a strong suspicion that they were waiting until this court made its decision in the Walker case.

The court in this case, in the Walker case, was dealing with a particular ordinance in question, and, of course, was certainly expected and anticipated there would be some guidelines for the court to follow.

I think that there is some misapprehension at least in the argument of the petitioner in this case as to the significance of the two lines of cases.

Now we certainly respect and know that there are some permissible regulations that can be used in connection

with parades and other types of actions upon the streets. But on the other hand, there is also in the connection with the regular pure speech cases a less privilege on the part of local governing bodies to present and to enforce regulations which restrict or do impair the right of the demonstrators or the people using free speech.

In the Cox case the court made it clear that there is a difference in use of public streets and in pure speech, if a municipality has authority to control the streets for parades or processions, it cannot be denied to give consideration to the time and place and manner as to the proper use of the streets, we find it impossible to say the limited authority conveyed by the statute in question as thus construed by the State court as contravening any constitutional right.

It must be borne in mind that this statute was construed just as in our case, in a conviction situation involving Cox, and it was construed post the act for which he was convicted. That is after the act for which he was convicted.

The conviction was upheld and we think in line with other decision of this Honorable Court for the reason that when he violated the ordinance he did so with the fact that it was conceivable that a valid construction could be placed upon the ordinance which would render it constitutional, and he then did at his peril violate the particular constitution of that

that interstate ordinance as it should be made valid by the construction of the court.

We come on to the Walker case and, of course, I think Mr. Greenberg refers to the fact that Lovell and Staub and Freedman, the doctrine of those cases are at odds with the holding of the court, in Alabama court in this case.

But, however, in the Walker case, we find the reference to Cox versus Louisiana, in which the court said that we emphatically reject the notion that the First and Fourteenth Amendments afford the same kind of freedom, of those who communicate ideas by conduct, such as patroling, marching or picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

At another point in the Walker case, the court said, there ought to be a body on this to impose regulations in order to assure safety for these people in the use of public highways has never been regarded as inconsistent with civil liberties, but rather is one of the means of safeguarding good order.

Then in going on over to the question of this particular ordinance, the generality of the language contained in the Birmingham ordinance on which the injunction was based, will unquestionably raise substantial constitutional issues concerning some of its provisions.

There is the citation of a number of cases. The petitioners, however, did not even attempt to apply to the Alabama courts for an authoritative construction of the orders, and this we think is very significant.

Had they done so, those courts might have given the licensing authority granted in the ordinance a narrow and precise scope, as the New Hampshire Courts in Cox versus the State of New Hampshire and Poulos versus the State of New Hampshire.

Here, just as in Cox and Poulos it could not be assumed that this ordinance was void on its face. And then going into the question of the application of the ordinance, the petitioners also claim they were afraid to question the ordinance.

These precedents, and that is to say the other cases, clearly put the petitioners on notice that they could not bypass orderly judicial review and claimed that they were trapped or mislead is entirely unfounded.

Now, may it please the court we think that the significance of that is this: That the precedent of Cox versus New Hampshire and also Poulos versus New Hampshire was available to the petitioner of this case at the time that he violated the injunction, and violated the ordinance of 1159.

Also the Kansas case would be something he should be informed of or should have known about, so these decisions

should be known to him and he could not claim entrapment because he should have known about them, and also the evidence showed that they did it with expectation of going to jail.

So far as Cox versus New Hampshire is concerned, we find that that case and also Poulos versus the State of New Hampshire, has been accepted by the courts with a steady and an unbroken line and I suppose have been cited maybe at least 50 or 100 times, as sound decisions.

Coming on down through, of course, in 1965, the Cox versus Louisiana, and by the way the decision in the Walker Case in 1967, and then the most recent case is Amalgamated Food Employees Union versus Logan Valley Plaza, and in that case Mr. Justice Marshall, writing for the court and I believe there was one concurring opinion and one dissent, said in addition the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with normal use of public property by other members of the public, with equal right of access to it.

Thus it has been held that persons desiring to parade along city streets may be required to secure a permit in order that the municipal authorities may be able to limit noninterference with the use of the sidewalks by other members of the public by regulating the time, place and manner of the parade.

Now, of course, as the Supreme Court of Alabama has

construed the 1159 ordinance, it can only be applied in reference to actually the good order and the convenience and use of the streets.

The essential contention as we understand it is being made at this time that the ordinance did not give fair notice. As a matter of fact, Bouie has been referred to, and I believe Lanzetta.

The Bouie case involves a situation where the facts showed an intent to apply an ordinance to a factual situation that it wasn't on its face designed to accommodate. For instance, the ordinance was designed to prevent or rather to punish going upon property when you were warned not to go on it.

It was applied to a situation where the parties were already on it without the notice being put up and they were warned to get off. Of course, that construction was not one that the ordinance on its face showed as a possibility of, and therefore the courts held that it was not fair notice.

Lanzetta was a situation where anybody who was a member of a gang, a gang consisting of two or more persons, which, of course, is too broad and no one could really describe what a gang was really, know what a gang was within the meaning of the statute.

Now, in reference to the question of fair notice and the administrative procedures, here again the court in Poulos versus New Hampshire had occasion to deal with that

particular and specific problem.

In that case the ordinance or rather statute, whichever one it was, had been construed by the Supreme Court of New Hampshire and had been approved by this court, in the opinion written by Chief Justice Hughes -- the court in the Poulos case said that the application had been made for a permit but wrongfully the licensing authorities had refused to grant the permit, and because they had refused to grant the permit the defendant had proceeded to violate it.

In other words, he proceeded to go ahead and have his speech or whatever he was going to have without the benefit of the permit. A great question was raised in this court that you have put him in that situation of going into a mandamus proceeding, would be expensive, would be difficult for him to accomplish, and would delay him in his exercise of his freedom of speech and so forth.

The court rejected that argument, that is, the New Hampshire Court rejected the argument and said that that would not be permissible because he had a remedy, and he could have gone into the courts and enforced his right to speak.

This court, considering that question, said that that is exactly correct, that he could have gone in to court, and he could have presented his wrongful disallowance of the permit, and not having followed that procedure which the State courts permitted he, therefore, was not entitled to the

protection of the constitutional amendment that he was relying on.

Q Mr. McBee, suppose a convention in your city in one of the convention halls adjourned and this many people walked in exactly the same manner as these people did in this case back to their hotel.

Would they be violating the ordinance?

A No, sir, they would not.

Q What is the thing then in this case that makes this a violation of the law?

A The ordinance as construed.

Q No, what is the thing that these people did that makes them liable to the ordinance, where they wouldn't be liable under the circumstances that I just suggested to you?

A Well, I was trying to answer that question in saying this, that there was -- the ordinance does, as construed, refers to formal actual procesion-type of walks. They had the same issue in the Cox-New Hampshire case, where I think in that case there were 3 or 4 or 5 or 6 groups, of some 10 or 15 walking in single file, peaceably, and there was no question about that, and nobody raised that question, but they did walk in single file, and the issue raised was, whether or not that amounted to a parade within the meaning of the authorities.

And, of course, that was that they held that to be

a violation of the New Hampshire statute or ordinance. Now, in this case, of course the court said again there must be a formal parade, and, of course, the reason why we think that a permit is required for a demonstration or a parade of this type is simply this: That the city or local governing body is required by law, by this court, to provide safe-guarding procedures and police protection to take care of possible disorders that might interfere with their right to parade.

And, of course, in this instance, if they had no permit requirement they would not know where the parade was to be or when it was to be or what route it was to take and would have no information as to what to do in providing the protection.

Q Wouldn't the same thing occur when they broke up the convention and went to some other part of the city, and walked along the sidewalk in exactly the same manner?

A I don't know of any likelihood of anybody committing disorder in a crowd walking from one event to another event. I never have heard of that.

Q I understood you to say that there was no disorder in this case?

A Well, actually, I don't believe that -- of course, the question of the participation of the body of so-called on-lookers; that is the question really I think is disputed.

Q The so-called what?

A The so-called on-lookers. They had recruited these people to come and they had assembled them in the vicinity of the church, and while only about 52 came out of the church in the formal march, wearing blue-jeans, I believe, the numbers of the on-lookers which came along took up around, I think, maybe 1,000 or 1500, and they took up the streets and also both sidewalks. They were blocking both sidewalks.

They were completely utilizing and completely en masse moving along and pre-empting the use of both sidewalks.

Q Were they arrested?

A Some of them were, but they couldn't catch them, not very many of them.

Q But they did take all of these who were going peacefully?

A Yes, your Honor, but those that went peacefully wanted to be arrested. That was a part of the procedure.

Q It has to be?

A Yes, sir, they had recruited people to be arrested and go to jail. That is what they came there for. They had intended to do that. Now they had purposes in mind, I suppose, money-raising was one of the reasons that they did it. Of course, we can't be certain about it.

But I would assume that that was for other reasons of their own. But they did recruit people to come and to

march and to be arrested. And they were arrested.

Q When the case was tried, did they deny that they intended to parade?

A I think the only case we have tried, that is to say now at the Recorder's trial, they didn't take the stand at all, as I recall.

Q But it went up to the Circuit Court, didn't it?

A Well, now, the only thing is, may it please the court, in this case, Mr. Justice Black, this is the only case that has been tried so far as I know, of these cases.

Q Well, did it go to the Circuit Court?

A Yes, it went to the Circuit Court.

Q It was tried before a jury?

A Yes, sir.

Q Did they defend on the ground that they had not paraded or on the ground that the law was unconstitutional?

A Well, their main objection was, and so far as I know, as I recall, there was no serious objection, no serious denial of the fact that they paraded. Certainly the evidence was clear that they did.

Q Without a permit?

A Yes, without a permit. They made no contention that they ever had a permit.

Q Well, except, Mr. McBee, they must have raised it, because in the Court of Appeals, Judge Cait's opinion, and

I am reading now from the very last paragraph of his very lengthy opinion, appearing on page 143 of the record here, it says that the city failed to make a case under the purported meaning of Section 1159 of there being a need for the appellant in this case to be covered by a permit to use the sidewalk in company with others.

That is a clear holding as I read it and you tell me if I am mistaken, that the ordinance at issue here simply was not applicable to the conduct of these petitioners. And then I understand, of course, that the Supreme Court of Alabama disagreed with that, but if there is that much room for disagreement, as it appears that there was here between the Court of Appeals and the Supreme Court, don't the petitioners have a very valid and fair notice argument as to the very meaning and coverage of this ordinance?

A Well, as a matter of fact, they also had notice, I think there was some statement made at some point along the line that perhaps because they were on the sidewalk as opposed to being in the middle of the street, that they possibly were not violating the ordinance.

However, though, there was in the city code a section which defined the meaning of street to include sidewalks and had been in all of these years. So that, Mr. Justice Stewart, Judge Caits either did not know that or hadn't made any effort to find out, because it was actually in the law of the city.

Q I don't understand him to be necessarily making a distinction between the paved part of the street and the sidewalk part of the public way, but rather just to use the streets in company with others.

I gathered, perhaps again I am wrong, that his language could simply be construed that 52 people, which he elsewhere characterizes in this very lengthy 56-page opinion, is about the size of a football squad walking down the street simply is not the kind of procession or parade contemplated by the Birmingham ordinance.

Now he holds that as a matter of law in your intermediate Court of Appeals in Alabama. Of course, it is clear that the Supreme Court subsequently disagreed, but as I say, if there is that much doubt about it, don't the petitioners have a very colorful argument with respect to the notice that the ordinance gave them?

A Of course, we think this: We think that the Court of Appeals primarily was addressing itself to the idea that it was a sidewalk rather than a street case. But he did write a very lengthy opinion and we frankly think that he would not have written the opinion had he had the benefit of the Walker case in this court for his guidance when he wrote that opinion. But he did write a very lengthy report, as we know.

Q Well, the Walker opinion rather relied on his

opinion, didn't it, at least referred to it in a footnote?

A Well, I think it mentioned the case and it said, of course, it could perhaps be construed to be unconstitutional.

Q He pointed out that it had been held to be?

A Well, yes, I think it mentioned that.

Q And as support for the proposition that the place for the petitioners to have gone in the Walker case was to court?

A We would like to make one more observation in connection with the organized march. That is to say that an organized march does compete for the use of the sidewalks with other use of the sidewalks on the part of the people who have the right to use them. And that is the reason why an organized march which is known to be planned requires the permit. If you didn't have that permit there would be no opportunity to provide against overlapping parades, and there would be no opportunity to prevent violence and disorder which would result from possible situations, could develop.

And, of course, in this instance, there was an exploded situation in the City of Birmingham at the time.

The Police Department was hard put to it to try to keep the situation from developing into a very serious situation. I believe that my time has run out.

MR. CHIEF JUSTICE WARREN: Mr. Greenberg.

MR. McBEE: May I say this, though, may it please the court, since I was here before I have accumulated a little tremor here and some impediment in speech for which I apologize.

MR. CHIEF JUSTICE WARREN: I am very sorry to hear that, Mr. McBee.

Mr. Greenberg, would you proceed.

MR. GREENBERG: We have nothing further to add, your Honor.

(Whereupon, at 11:15 a.m. the above-entitled oral argument was concluded.)