

Supreme Court of the United States

October Term, 1968

In the Matter of:

Docket No. 492

CLARENCE BRANDENBURG,

Appellant,

vs.

STATE OF OHIO

Appellee.

Office of the Supreme Court, U.S.
FILED

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C O N T E N T S

ORAL ARGUMENT OF:

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on behalf of Appellant 2

Leonard Kirschner, Esq.

on behalf of Appellee 18

REBUTTAL OF:

Allen Brown, Esq.

on behalf of Appellant 33

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X
4 CLARENCE BRANDENBURG, :
5 Appellant; :
6 vs. : No. 492
7 STATE OF OHIO, :
8 Appellee. :
9 - - - - -X

10 Washington, D. C.
11 February 27, 1969

12 The above-entitled matter came on for argument at
13 1:00 p.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 492, Clarence Brandenburg, Appellant; versus the State of Ohio.

Mr. Brown?

ARGUMENT OF ALLEN BROWN, ESQ.

ON BEHALF OF APPELLANT

MR. BROWN: Mr. Chief Justice and Members of the Court:

We have before us a case arising in the State of Ohio under a conviction under Ohio's Criminal Syndicalism Act. We have, indeed, before us something of a rarity. It is, as far as I know, the third case ever tried under Ohio's Criminal Syndicalism Act, and the first to ever reach an appellant level.

There was earlier in Ohio, under a peculiar proceedings in which a prosecutor could bring a proceeding before the Supreme Court on appeal for a question of law only, a proceeding in which a motion was made in the lower court in Ohio attacking the constitutionality of Ohio's criminal syndicalism law.

The lower court in Ohio held the law to be unconstitutional. It was appealed to the Supreme Court in State versus Kassey, and in what is basically an advisory opinion, the Court stated that it was constitutional. But the Court also stated several engaging other things.

It stated that the First Amendment did not apply to the States of the Union.

It also stated that the measure of its application was

1 an issue in its constitutionality and that it would attend the
2 first trial of the case to see what is the proper measure of
3 its application.

4 The Court waited patiently for the first application
5 to a case, and it arose some 40 years later in this case, and
6 surprisingly, despite the invitation sent out in Kassey, the
7 Court declined to even hear a constitutional question on the
8 application in this case. It, in effect, defaulted to this
9 Court Ohio's privilege of setting forth the limitations of the
10 application of its statute, and Ohio's privilege of setting
11 forth the potentiality of clarification and delineation of a
12 statute which obviously, on its face, rushes headlong into the
13 First Amendment.

14 These are the facts in this case:

15 A television reporter received a telephone call indi-
16 cating that if he wanted to, he could come and take movies of
17 a Ku Klux Klan meeting. He came. He met some hooded figures
18 and arrangements were made for the taking of a movie. A movie
19 was taken in which a cross was burned, some figures milled about
20 and yelled some stupid and rather senseless slogans, and then a
21 single figure was panned in on who made a speech, a speech full
22 of conditions, precedents, and reservations, and hyperbole self-
23 evidently stupid and silly.

24 He asserted that the Klan was the largest organization
25 in the State of Ohio. He then went on with a conditioned

1 precedent that if the various branches of the Government, in-
2 cluding this Court, do not mend their ways, that "revengeance",
3 a word of his own coining, I assume, would be taken. He did
4 not specify the "revengeance" and we do not know what particu-
5 lar aspect of the democratic process he was going to involve him-
6 self in "revengeance".

7 He then spoke of a march, not identifying it as an
8 armed march or any sort of march of force or violence, into
9 Washington and then into two Southern States -- incidentally,
10 raising Federal questions, perhaps, rather than internal State
11 questions.

12 Another film taken is inside a house --

13 Q There were guns in this first movie.

14 A There were guns in both films.

15 Q In both of them, were there?

16 A In both films there were guns.

17 It is also to be noted that the film was taken on a
18 remote private farm in which apparently there is no evidence
19 whatsoever that these people were not invitees present on that
20 farm by authority of the ownership of the farm.

21 There was nothing, nothing adduced. An indictment was
22 returned. After some preliminary maneuvering, including a
23 frontal attack upon the constitutionality of the statute, the
24 case came on to trial. The State produced nothing but the film
25 in question. The only other evidence that the State produced

1 was basically geared to identifying the personnel involved in
2 the film; in other words, showing that the man Brandenburg had
3 a gun similar to the guns in the film, and that he had markings
4 on his person similar to the markings and that his voice was
5 similar. Other than this, the State offered nothing.

6 It is critical that the State offered nothing on the
7 nature and history of the Klan. It offered nothing showing the
8 course of the Klan's history, any continuing historical or ex-
9 pert opinions concerning any possible commitment to violence.
10 It offered nothing on the continuing organization of the Klan,
11 nothing whatsoever.

12 It offered nothing other than the film itself and the
13 words intrinsic in the film itself.

14 The State then rested. The defense --in which I was
15 not involved; I am appointive counsel, appointed for purposes of
16 appeal -- made a motion for dismissal at that time. I will
17 frankly admit that the motion for dismissal which was made by
18 then counsel was simply a weight of evidence motion, and he did
19 not specifically denote the constitutional question that had
20 arisen at that point in the presentation of the State's case.
21 I suggest that it is completely immaterial that he did not.

22 The defense then proceeded forward and offered basic-
23 ally a defense of depositive testimony in which various officers
24 of the Klan testified as to their ostensible peaceful purposes
25 and things of this sort, and the historical evaluations of the

1 presence of weapons and the burning of a cross.

2 The Court then charged the jury. The Court's charge
3 to the jury -- and I specifically ask this Court to consider it
4 carefully -- begins in the appendix, page 72, and met with a
5 statute that thrusts itself clearly within the First Amendment,
6 makes on its face no attempt to give us an indication of a line
7 of demarcation between the mere abstract teaching and advocacy,
8 or even advocacy in relation to a clear and present danger as to
9 advocacy in a hypothetical sense that in no way on its face
10 does this, the Court perpetuated the evil of the statute by
11 making the charge even more general, in which he indeed defined
12 the term "advocacy" as involving intrinsic in it, in his own
13 charge, teaching.

14 So we had at this point a man who had been tried with
15 none of the safeguards of the First Amendment applied to the
16 trial of his cause, to the measure of his evidence, or to the
17 instructions to those who were to be the triers of the fact
18 which would demarcate a point at which the First Amendment would
19 be operative in relation to what happened on that isolated farm
20 on that isolated day.

21 Q How large was this meeting?

22 A The testimony and the pictures indicated that per-
23 haps 20 persons were involved.

24 Q Any spectators?

25 A No spectators. All were participants in the

1 meeting. There is some indication in the record that there were
2 no womenfolk in the picture or in the meeting. There is some
3 testimony in the record that one of the TV reporters said he
4 heard women's voices in another room. I know nothing else about
5 the women.

6 Q The film is in court, is it?

7 A Pardon?

8 Q Is the film an exhibit?

9 A The film is an exhibit.

10 Q It is here in the Court, is it?

11 A I pray it is. I have ordered it and the last
12 word from the clerk was that they were having trouble finding
13 it but they would find it and send it on up here. I devoutly
14 pray, because we do have in this case some issues as to what is
15 shown in the film.

16 Q Is there a dispute between the parties here as
17 to whether there was or was not a call to engage in violence?

18 A Yes.

19 Q There is a dispute.

20 A There is a distinct dispute. It is our contention
21 that there was nothing in this speech, which is part of the
22 record, and as shown in the film, and since the State limited
23 itself to this, there is nothing in it that is a call to vio-
24 lence.

25 Q And your adversary disputes that?

1 A I assume my adversary disputes that.

2 Q The State's whole case was the film, plus the
3 identification of the defendant as the person shown in the film;
4 is that right?

5 A That is correct. The language in the film is
6 actually in both parties' briefs. The difference between us is
7 that they tend to ascribe certain slogans by the persons milling
8 about to the given defendant. We contend that the only words
9 that the given defendant uttered were the formal, set speeches.

10 Q This film was shown over a local television sta-
11 tion and then over a network, wasn't it?

12 A This film was shown a local television station
13 and a network.

14 Q And a network.

15 A That is correct.

16 Q Who was the Trial Judge in this case?

17 A Judge Simon Lease.

18 Q Does it ring any bells, Mr. Justice?

19 Q Yes, it does.

20 Q Mr. Brown, I gather the indictment, however, was
21 for the events, is that right, the events depicted in the film,
22 not for the exhibition of the film, was it?

23 A That is correct.

24 Q In other words, all the film was in evidence for
25 was depicting what happened on a certain day.

1 A That is correct.

2 Q And it is because of what happened it is alleged
3 there had been a violation of the statute.

4 A That is correct. The act of showing it over
5 television. They had intervening parties, the authorities run-
6 ning the television station are not the basis of the indictment
7 and the charge.

8 Q So that I gather if we are to read the record of
9 the case, we have to see the film, don't we, to know what the
10 truths were?

11 A Precisely. As a matter of fact, in the Supreme
12 Court of Ohio -- we didn't raise it here, because we wanted to
13 make sure we would get cert -- we asserted that the film was in
14 the same position as a book in an obscenity case.

15 Q That doesn't help you.

16 A I know it doesn't help us now, but at that point
17 when we were before the Supreme Court of Ohio, we asserted that,
18 saying that the film in and of itself is the entire context of
19 the alleged offense.

20 Q I don't understand your point that nobody but the
21 audience was being, members of the group, were being addressed.
22 I don't see the relevance.

23 The reason I ask that is that in the Dennis case,
24 Dennis versus the United States, involving the prosecution of
25 Communist teachers who taught the Marxist creed, nobody was

1 exposed except the students in the classroom.

2 A May it please the Court, there is this important
3 distinction to be made between the Dennis case and that case:
4 In the Dennis case, the teachers who taught these classes, this
5 was evidence within a total context of a total conspiratorial
6 activity leading to a total action result.

7 In this instance, the State contented itself merely
8 with showing a given speech and did not choose to present any
9 evidence to make it part of a conspiratorial whole. It took the
10 speech in and of itself and presented only that.

11 Q That is why I asked you earlier, the indictment
12 was for the events depicted.

13 A That is correct.

14 Q Not for the showing of the motion picture in con-
15 text of a conspiracy or anything else. It is just what happened
16 on that particular day.

17 A That is correct; what happened on that farm on
18 that day, and that is the important distinction to be made.

19 Q Did this defendant have anything to do with
20 arranging for the events to be televised?

21 A There is evidence in the record that indicates
22 that his was the voice that called the radio-TV announcer.

23 Q Well, if that is so, then it is debatable whether
24 this was addressed only to the people who were physically there.

25 A That may be the case, Justice Fortas. However,

1 the State of Ohio chose not to charge him for that.

2 Q If he had arranged for it to be televised, pre-
3 sumably he intended that his remarks reach a larger audience.

4 A It is quite potentially possible. This is not,
5 however, what the State chose to charge him with. Read the
6 indictment.

7 Q If the Court took notice that the Communist Party
8 was conspiratorial and out to conquer the world, why couldn't
9 the Court take notice that the Klan was up to no good?

10 A In the Dennis case, I submit that the Court did
11 not take such judicial notice. In the Dennis case, as a matter
12 of fact, there was the adoption of evidence to show that.

13 Q We may be taking some liberties with the record
14 in the Dennis case.

15 A In any event, it is true that in the Dennis case
16 there was additional evidence over and above that adduced in
17 this case. In this case they showed nothing but the film itself.
18 They showed no other plan or purposivity other than this.

19 Q So you ask us to deal with this case as if it
20 were just a group of school boys, hooded school boys, sitting in
21 a room listening to --

22 A That is a potential distinction between this
23 case and the Dennis case, as well. These are paltry unknowns,
24 rather silly characters. In the Dennis case we are dealing with
25 the established leadership of a national organization. This does

1 make a difference in relation to the rights prevailing under the
2 First Amendment.

3 There are other distinctions which I will pass to in
4 a moment, but in this given case we are dealing with a statute
5 which, on its very face, thrusts itself into the First Amendment.
6 We are dealing in this situation not with an address to an evil
7 from which we must move back to a possible restraint on the First
8 Amendment. We are dealing with an entry particularly into the
9 right, and then a proscription upon the right as it might en-
10 gender an evil.

11 For instance, the statute itself starts off, "No per-
12 son shall, by word of mouth or writing, advocate or teach the
13 duty" and goes on from that point. It denotes "First Amendment,
14 here we come." It does not say that no person shall not advo-
15 cate or teach the duty and necessity or propriety of crime. It
16 does not then become so broad that it could possibly take symbolic
17 acts, or acting out that goes beyond mere words of mouth and
18 printing. It announces boldly, "Here we come, First Amendment,"
19 and proceeds from that point on.

20 Advocate or teach. Now, the prosecution in this case
21 has said that the issue of "teach" is not involved here because
22 the man was charged only under "advocacy". But if the distinc-
23 tions between "teaching" and "advocacy" are so simplistic, we
24 would have a very simple solution to this case. But as a teacher
25 who teaches in the first grade that the American Revolution was

1 a noble thing, is she merely teaching, or is she advocating?

2 The lines of demarcation between "teaching" and "advo-
3 cacy" are so difficult that they leave us vulnerable when we
4 charge "advocacy" alone.

5 In order to reserve a portion of my time for rebuttal,
6 I would like to point out, however, what I think is the most
7 absurd aspect of this particular statute.

8 It also forbids not only speech or printing. It be-
9 comes very, very evasive on the whole question of intent,
10 scienter and mens rea. Read it carefully. It becomes very,
11 very unclear on the whole area of willfulness, except for an
12 occasional phrase in its multiplicity of phrases, in addition to
13 which it forbids the assembly with any group.

14 It forbids not only membership, a problem that has
15 been before this Court, not only affiliation, a problem in this
16 Court, but it even forbids sitting down with such a group. In
17 an era when we are trying to preserve the dialogue benefits to
18 society of the First Amendment, it is incredible that the Legis-
19 lature of Ohio forbids even to sit down.

20 Q Well I gather, Mr. Brown, that apart from your
21 argument addressed to the statute itself, divorced from the
22 actual prosecution, you do argue, don't you, that the First
23 Amendment considerations are so close to the surface in a pro-
24 secution under such a statute that at the very least it required
25 an instruction which was not given here.

1 A That is correct.

2 Q And if we agree with you on that score, I gather
3 we don't have to reach the question of the constitutionality of
4 the statute itself, do we? You would rather we did, but --

5 A I certainly would prefer that you did.

6 Q But we don't have to, if we strike it down on
7 instruction, do we?

8 A This Court could potentially strike this down
9 not merely on the instruction, but, indeed, on the face of the
10 record that it is not constitutionally sufficient to constitute
11 an offense.

12 Q You mean on the evidence.

13 A On the evidence. This Court has those alter-
14 natives. I cannot escape that.

15 However, I offer this posture: that the defendant in
16 this cause asserted that he was not triable by a motion to
17 quash the indictment, and that this Court, perhaps, must assume
18 his posture and find that he should never have been brought to
19 trial, and that under those circumstances --

20 Q I know, but what is before us is the conviction,
21 isn't it?

22 A What is before you is the entire record. I cannot
23 escape that.

24 Q If we reverse the conviction, I take it that is
25 as much as you are entitled to, isn't it?

1 A I had hoped for more, but that is all I would be
2 entitled to.

3 Q I wonder what you say to this statement on page
4 6 of your brief that "We are marching on Congress July 4th,
5 400,000 strong." That seems to tie this group into a rather
6 big, national movement.

7 A May it please the Court, let me say several things
8 concerning that.

9 Q Then they go on and they say the Jews should go
10 back to Israel and the blacks should go back to Africa. The
11 program seems to be pretty clear.

12 A How do we know this is a program? How do we know
13 this is a --

14 Q I mean if we believe what they say, what the
15 speaker says.

16 A If you believe what the speaker says, this absurd
17 hyperbole is a program. However, the program is a program of
18 ostensible social reform but does not necessarily indicate on
19 the face of his remarks an intent to violence or to commit a
20 crime. I agree with the Court. It is absurd.

21 Q How else do you persuade some people to go back
22 to Africa without violence?

23 A I assume that he is offering this. I agree that
24 we are operating from an absurd premise. Indeed, the absurdity
25 itself may mitigate against a clear and present danger. But let

1 us assume that he means by this that we will now bring pressure
2 upon Congress to repeal the Fourteenth Amendment and to pass an
3 amendment saying that persons of certain ethnic backgrounds are
4 no longer eligible for citizenship in the United States.

5 He may be calling upon absurd, horrible, frightful,
6 possible processes of law, but they might still, nevertheless,
7 be processes of law. There is nothing in this statement that
8 indicates he is calling for violence.

9 Q Not to get some people to go back to Africa. You
10 are going to need more than a change of law.

11 A I am afraid that if such a law were passed, it
12 might very well leave us in the position, Justice Marshall, of
13 finding that perhaps under certain circumstances it is necessary
14 to advocate violence to redress abuses of law.

15 Q Mr. Brown, before you sit down, I have inquired
16 of our clerk as to whether or not the film is here. He advises
17 me that it is not here. Would you just tell us what efforts you
18 made to get it here?

19 A Certainly. Upon the filing of this matter, I
20 went to the Clerk of the Supreme Court and ordered a transcript
21 of the entire record. The Clerk of the Supreme Court indicated
22 to me that since cert was not allowed, that portions of the
23 record were still with the Court of Appeals.

24 I went to the Clerk of the Court of Appeals and
25 ordered from him an entire record, specifically in my praecipe

1 asking for the film. We then actually engaged in physical
2 search for the film. It had last been in the possession of
3 Sheriff Dan Teehan. Dan Teehan went to his safe and couldn't
4 find it, but the Clerk then shipped up the entire remainder of
5 the record and indicated to me he would continue the search for
6 the film, and upon receipt of the same, would forward it to this
7 Court.

8 I have not checked further. I will upon my return
9 to Cincinnati immediately check further with the Clerk.

10 Q Maybe counsel could answer it better than you
11 could.

12 Q Mr. Brown, we don't have anywhere a complete
13 transcript of what was said in the film, either, do we?

14 A Yes, you do.

15 Q Where is that?

16 A In the appendix on page 24 and 25.

17 Q Is that all? That is not all that was said.

18 A There is a second portion on the second page.

19 Q No, no. I mean to say, is there anywhere we can
20 look and see what is in that film, from the first word to the
21 last word? It is one thing to read excerpts taken from here and
22 there. It is quite another thing to read it consecutively. Does
23 that appear anywhere?

24 A Yes.

25 Q Where?

1 A In the appellant's brief.

2 Q Where?

3 A On pages 5 and 6. That describes in full the one
4 film, and then, in effect, synthesizes the second film. I believe
5 there is no dispute as to the content of the second film.

6 Q On pages 5 and 6, can we read that and after we
7 read that do we have the full text of the transcript of the film
8 beginning with the first word and ending with the last word?

9 A Of one entire film. There were two films.

10 Q All right, now how about the second?

11 A The second film is indoors and is basically the
12 same as the speech portion of the first film. The man apparently
13 repeated basically the same words, with some deletions and some
14 additions. These deletions and additions are indicated in the
15 brief and both prosecution and defense agree that this is an
16 accurate statement of the second film. The only questions are
17 concerning the first film.

18 MR. CHIEF JUSTICE WARREN: Mr. Kirschner?

19 Would you mind stating, if you can, why the film it-
20 self is not here if it is as important as Mr. Brown has stated?

21 ARGUMENT OF LEONARD KIRSCHNER, ESQ.

22 ON BEHALF OF APPELLEE

23 MR. KIRSCHNER: Mr. Chief Justice and Honorable Members
24 of this Court: I do not know why the film is not here at the
25 present time.

1 I do know that I did know where it was as of two
2 months ago. I viewed it subsequent to the Supreme Court of
3 Ohio hearings and it is in the Clerk's office of the Clerk of
4 the Hamilton County Court of Common Pleas, in his possession,
5 locked up in a file, a fireproof file I might add, and I don't
6 know why it is not here.

7 I am certain that it can be forwarded to this Court
8 for examination.

9 Q Will you see that that is done?

10 A I will endeavor to follow through on the Court's
11 request.

12 With the Court's permission, as I take it basically
13 there are two points involved in this case. One is the Ohio
14 statute on criminal syndicalism; and two, the evidence that was
15 presented to a judge and jury upon which a finding and verdict
16 of guilty was returned.

17 I believe that the Ohio criminal syndicalism law is
18 constitutional. I have cited various authorities relative to
19 my beliefs in this matter in my brief. I believe that the basic
20 matter before this Court is the application of the evidence as
21 was presented to the jury to determine whether or not there was
22 sufficient evidence upon which a jury could return a verdict.

23 I believe that in this case, when counsel says sending
24 the Jews back to Israel; let's give them back to the dark garden
25 that this might not involve violence, I would like him, perhaps

1 in his reply, to explain how the statement "Bury the niggers"
2 would not constitute a violent form of action.

3 In this case there is two basic parts of the film,
4 one that was taken inside of a room in which the defendant,
5 Clarence Brandenburg, was identified, and I don't believe there
6 is any question in the record either between the appellant and
7 the appellee in this matter relative to his identification as he
8 being the person saying, "This is an organizers' meeting. We
9 have had quite a few members here today which are -- we have
10 hundreds, hundreds of members throughout the State," and so
11 forth.

12 Then there is a second portion of the film in which
13 a group of people are walking or marching around a burning
14 cross, hooded, armed, shouting profanities, in which there is a
15 question of whether or not the defendant himself said the words
16 attributed to him in the transcript and on page 5, "How far is
17 the nigger going to -- yeah," "Send the Jews back to Israel,"
18 and so forth, with the other profanities.

19 There is some evidence in the transcript itself which
20 could indicate, as a jury sitting and listening in, that the
21 defendant himself made one or more of these statements, and I
22 apologize to the Court for not having this as part of my brief.
23 I notified counsel of the possibility of my bringing this matter
24 up.

25 Ohio has a section in its code, Ohio Revised Code,

1 Section 1.17, which provides:

2 "Any person who aids, abets or procures another to
3 commit an offense may be prosecuted as if he were the
4 principal offender."

5 We have a group of people marching around, as an
6 organizers' meeting, toward the acts of violence, an end that
7 they had attributed and desired the suppression of the Negro.

8 Q What was the size of this group of people?

9 A With the Court's permission, at the time of the
10 marching around the cross, the size was approximately 10 to 20,
11 as counsel for appellant has stated.

12 Q Is there anything in the record that shows that
13 more people were involved at any time?

14 A Yes, sir. I believe that the defendant's own
15 statement, in his statement when he is inside the building,
16 "We have had quite a few members here today which are"-- and
17 then he goes on to say, showing that there had been several
18 members there.

19 I might further point out that, as one of the Justices
20 I believe it was Justice --

21 Q Was that before or after he said he was going to
22 bring 400,000 people to the District?

23 A I'm sorry, sir.

24 Q Was that before or after he said he was going to
25 bring all these thousands of people down to the District of
Columbia.

1 A That was just before that. That is the preface
2 to the opening of that statement there.

3 Q Is there anything else in the record to show
4 there was any possibility of him carrying out any of these
5 things?

6 A If Your Honor please, I believe we have to take
7 the entire actions of the defendant himself; that we cannot
8 limit it to just what these words say. I believe the evidence
9 clearly shows that the defendant himself contacted the television
10 station for the purpose of having a television cameraman and
11 newsman out at that meeting to take pictures, to put it out over
12 the television station.

13 So when we say there are 10 or 20 people at this meet-
14 ing, I don't think we can limit ourselves to just those 10 or
15 20 people. This is a plan, a concerted action on the part of
16 this defendant, to broadcast this, as it appears to me, and upon
17 which a jury could determine these profanities, whatever you
18 would want to call them, across a large segment of the community
19 in Ohio, and subsequently, I might add, it was picked up by a
20 network television.

21 I don't think we can limit ourselves to just the 10
22 or 20 people, although in and of itself I would say that the
23 statement such as this to 10 or 20 people, 10 or 20 people can
24 cause one heck of a lot of crime and violence and terrorism in
25 a community. It only takes one person to cause it. But you get

1 10 or 20 with hoods, shotguns, rifles, and other things, saying
2 "Kill the niggers. Send the Jews back to Israel. Send the dark
3 man back to Africa," et cetera, riding in a community, and I say
4 you can cause violence, crime and terrorism right at the start
5 with just two men, not 10 or 20 as the record indicates.

6 Q Out in the country.

7 A But the broadcast was not in the country. The
8 broadcast was to the community locally.

9 Q Except, Mr. Kirschner, the theory of the indict-
10 ment, as I read it, on page 2 of the appendix, is that these
11 people were charged with violating the statute by what they did
12 at that farm on Two Mile Road on that evening, not with anything
13 to do with the television broadcast. Have I misread the indict-
14 ment?

15 A No, I would say that perhaps my interpretation
16 of it is different from Your Honor's. As part of that meeting,
17 this man had set up right then and there a television cameraman.
18 His acts at that meeting were addressing not only the people who
19 were standing in front of him, but the vast audience of the com-
20 munity who would receive this broadcast by way of the television
21 communication, which he himself has arranged and which the record
22 shows that he was the one who contacted the television station
23 to get them there in the first place.

24 So I would say yes, his acts at the scene; but I don't
25 think you can limit it to just the 10 or 20 people who were there.

1 Q Part of his acts at the scene, you say, was say-
2 ing things knowing that they would be filmed and broadcast.

3 A That is correct, Your Honor. That is my opinion.

4 Q What was the jury's charge that they had to find
5 in order to convict? What were the elements of the offense, as
6 given to the jury by the Judge's instructions?

7 A With the Court's permission, the elements of the
8 offense as given by the Court's instruction in this matter were
9 basically that the reading of the indictment and the definition
10 of the word "advocacy" as pronounced by the statute of Ohio. The
11 definition of "advocacy" is spelled out in the code section, and
12 I believe, without giving specific verbiage, it is spelled out
13 in the appendix, it is basically that aspect that was spelled out
14 in this matter.

15 Q Were there any instructions as to "clear and
16 present danger"?

17 A With the Court's permission, in this matter,
18 there were no instructions relative to "clear and present danger"
19 given by the Court.

20 Q Or as to advocacy of action?

21 A With the Court's permission, in the determination
22 as to a specific spelling out, item by item, of advocacy of
23 action, no. As to a general interpretation, I believe yes. I
24 believe the Ohio Code, in its definition, does interpret advo-
25 cacy of action. It is advocacy of action, of crime, violence,

1 terrorism; not an abstract doctrine. It is the advocacy of the
2 action to do violence, to do terrorism.

3 With regard to that matter, with the Court's permis-
4 sion, as I spelled out in my brief, Ohio has a rule that an
5 error of omission is not an error in the charge.

6 I want to point out further that counsel for the
7 appellant, giving him the benefit of the doubt, inadvertently
8 left out that aspect of the charge in which the Court turned to
9 the defense counsel and specifically asked defendant's attorney,
10 "Do you have anything to add to my charge?" to which, at that
11 point, defendant's counsel says, and I may not be getting quite
12 the exact verbiage, "No, Your Honor, we are satisfied."

13 Q What page is that?

14 A With the Court's permission, that is not in the
15 appendix. However, I have spelled it out in my brief itself.

16 Q Page 5 of your brief.

17 A Page 5, if Your Honor please. This is spelled out
18 in the transcript on page 219 of the actual transcript.

19 The question, "Counsel for the State anything to add
20 to the Court's charge?"

21 "Mr. Nikolin:" -- who was counsel for the State, "No-
22 thing, Your Honor.

23 "The Court: Counsel for the defendant anything to
24 add to the Court's charge?

25 "Mr. Outcalt: (Counsel for the defendant) No, Your
Honor."

1 This is at page 219 of the transcript and it is
2 spelled out on page 5.

3 Q I gather these constitutional questions were
4 raised on the appeal, or whatever that procedure is that goes
5 to your Supreme Court, were they?

6 A With the Court's permission, the constitutional
7 issue relative to the aspect of clear and present danger was
8 raised in the --

9 Q Well, may I ask this question: I know this --

10 Q Was raised where?

11 A I believe it was raised in the Supreme Court of
12 Ohio. I took the case on at that level. I was not the trial
13 counsel, nor was I the appellant counsel.

14 Q Well, may I ask, Mr. Kirschner, I am looking at
15 page 85, which is the judgment of the Supreme Court of Ohio.
16 What does this mean: It says "The cause here on appeal as of
17 right was heard in the manner prescribed by law and no motion to
18 dismiss the appeal having been filed, the Court" -- that is, the
19 Supreme Court -- "sua sponte dismisses the appeal for the reason
20 that no substantial constitutional question exists herein."

21 Do I read this correctly if I suppose this means they
22 examined the record to see if any of the constitutional questions
23 asserted were substantial?

24 A Let me give this aspect: I cannot speak for the
25 Supreme Court of Ohio as to their interpretation of verbiage.

1 I can give this Court procedure.

2 The procedure in this matter is, defense counsel filed
3 his appeal within time and as of right. At that point, defense
4 counsel and the State appeared in Columbus, Ohio, at which time
5 the Court, through its representative, heard arguments both for
6 and against the allowance --

7 Q On these constitutional questions?

8 A On the constitutional question, by the Ohio
9 Supreme Court at that point. Subsequent to that, the Court then
10 issued this ruling.

11 Q Doesn't this suggest that whatever the constitu-
12 tional questions that were raised, and I gather that you tell
13 me the clear and present danger was among them, was considered
14 and decided?

15 A Yes, sir.

16 Q Well, if that is so, what difference does it make
17 that no objection was taken to the charge? If your Supreme
18 Court reached and decided these questions, then they are properly
19 here, if they overlooked the failure to take objection, aren't
20 they?

21 A If Your Honor please, what I am saying is this:
22 The charge that the Court gave, insofar as it went, was not
23 incorrect. I am saying further that the absence of the verbiage
24 "clear and present danger" did not make that charge void. I am
25 saying --

1 Q Suppose we disagree with that? The problem is,
2 if we disagree with that, whether we can reach it in face of
3 the fact that there was no objection. As I gather from this
4 judgment from the Supreme Court of Ohio, it considered and de-
5 cided the constitutional question. I suppose in that circum-
6 stance, it is immaterial, isn't it, that there was no objection
7 taken?

8 A I would say if you disagreed with the basic
9 premise that it is the duty of counsel to raise that objection
10 at the time, that the law of Ohio is incorrect.

11 Q It isn't that we disagree with the basic premise.
12 It is that that was not given as a reason by the Supreme Court
13 of Ohio not to decide the merits of the constitutional claim;
14 on the contrary, the Supreme Court of Ohio apparently did con-
15 sider and decide the constitutional question, notwithstanding
16 the failure to make objection.

17 If that is so, isn't it so that the issue then is
18 properly before us?

19 A With the Court's permission, as I have indicated,
20 it is my humble belief that this is basically a State statute.
21 If you determine the State statute is valid, you go to the evi-
22 dence. I believe the evidence was there and the only way it
23 should be thrown out is if there was no evidence upon which a
24 jury could have reached this finding, because the Court's charge
25 that was given was specific enough and direct enough to cover

1 the clear and present danger, to cover all of the other aspects
2 of the case.

3 Q I take it that the State's position is that the
4 advocacy in the form that it took, demonstrated by this film,
5 constitutes a violation of the Criminal Syndicalism Act; is that
6 right?

7 A I believe that the advocacy at the scene, which
8 was to be said to the members there, as well as the advocacy
9 which was planned to go out over the television network, con-
10 stituted a violation of the Ohio criminal syndicalism laws
11 insofar as the indictment charge, violence, or unlawful methods
12 of terrorism.

13 Q If that is so, were the network people, to use
14 that vague phrase, violating your law, too?

15 A With due respect to the Court, in my humble
16 opinion I believe that the network people, in working with this
17 advocacy, there has to be an intention. If it can be shown
18 that they intentionally put this out over the television networks
19 with the thought of bringing violence or terrorism, then it is
20 my humble belief that they may indicted the same as Clarence
21 Brandenburg was in this case, in violation of the Ohio laws.

22 Q Is there any evidence in here other than the
23 film itself and the network arrangements that Mr. Brandenburg
24 intended to bring about violence?

25 A If the Court please, I believe that the Court and

1 the jury may look to the words itself, the surrounding aspects.
2 As Your Honor in a reference that you recently wrote on civil
3 disobedience and civil disorder stated, even if what is said
4 does not create a clear and present danger -- and I believe it
5 was a clear and present danger at that time -- of physical injury
6 to others, the place where the speech is uttered, the size of
7 the crowd, and the circumstances, may convert the lawful into
8 the unlawful.

9 It is my humble belief that the circumstances -- if
10 this was on a rural farm where nobody was around, nobody would
11 hear this except perhaps five people in a little circle, and
12 Clarence Brandenburg was never tied in, the defendant in this
13 case, to the propagation of these epithets, derogatory state-
14 ments, or call them what you may, through the television networks,
15 I say the State of Ohio's case would be substantially weakened.

16 But in this case it is not someone else contacting
17 the television networks. It is Clarence Brandenburg himself who
18 contacts the television newsman himself, requesting that they
19 have a man there to take his picture making certain statements
20 and to take his group, of which he is the leader and organizer,
21 and propagating these statements to the general public in the
22 Cincinnati area.

23 Q I suppose it can be said that there is no ques-
24 tion that he intended to advocate whatever he advocated here.
25 But the next question is, do you have to have some additional

1 proof to the effect that he also intended that steps be taken
2 to carry out this program with respect to the Negroes and the
3 Jews, and so on, that he described.

4 A With the Court's permission, it is my humble
5 belief that you do not have to have anything further. If I were
6 to go -- and I use this as an extreme statement -- but if I were
7 to run down Harlem, shall we say, and say, "Bury the Negroes.
8 Send them back to black Africa" --

9 Q You wouldn't last very long.

10 A Probably so, Your Honor. If I were to go to
11 Israel and say the same thing, about sending the Jews to the
12 Arab countries, or something, or to any other -- I don't say
13 they are derogatory, but I say that because these are the two
14 groups that the defendant has picked upon in his derogatory
15 statements -- I say the very words themselves indicate --

16 Q Well, those words were carried on the network.
17 Why wasn't that a violation of your law? That is the question
18 I started with.

19 A As I indicated, with the Court's permission, it
20 is my humble belief that in addition there must be an intention
21 to cause the violence, the terrorism.

22 Q That is right. I will ask you again whether there
23 is any proof of that other than the utterance of the words and
24 the arrangement for the network?

25 A Other than the defendant's actions, which I believe

1 indicate his intention, there is no other proof.

2 Q Mr. Kirschner, this was in June of 1964, this
3 meeting.

4 A Yes, Your Honor.

5 Q June 28, 1964.

6 A Yes, sir.

7 Q What was the contemporary context in the Cincinnati
8 community? Those riots in Avondale came in the spring of 1966,
9 didn't they?

10 A 1967, if I am not mistaken, and 1968. However,
11 there was at the time unrest. There were marches at the time,
12 I believe, in the South. There were the propositions, specifically
13 I believe the Birmingham situation was at or around that par-
14 ticular time. There was civil unrest and dispute going out
15 through the entire country. I don't think it would be just
16 limited to the South, as such. It was played up by the press
17 in the news media.

18 Q But there was no particular local situation in
19 Hamilton County at that time, was there?

20 A As to riots?

21 Q That kind of unrest, racial unrest, in any dramatic
22 form at that time.

23 A I believe there were protest marches within the
24 concepts of legal protest, demonstration, picketing, of that
25 nature at that time in Cincinnati, but in the nature of riots,

1 of that nature, no, Your Honor.

2 Q This was not part and parcel or in response to
3 anything specifically that was going on in that county at that
4 time.

5 A No, sir. It was basically a feeling, I believe,
6 throughout the entire United States, however, limited, as such,
7 to the community.

8 Thank you.

9 REBUTTAL ARGUMENT OF ALLEN BROWN, ESQ.

10 ON BEHALF OF APPELLANT

11 Q Mr. Brown, I don't suppose whatever it is you
12 and Mr. Kirschner submitted to the Supreme Court of Ohio is in
13 the record before us yet, is it?

14 A In view of the fact, Your Honor, of the amazing
15 circumstances, in my opinion, that I did not get allowance into
16 the Supreme Court of Ohio, I, in ordering my certification of
17 record to this Court, asked specifically that the briefs sub-
18 mitted to the Supreme Court of Ohio --

19 Q So they are probably here.

20 A So they are within the possession of the Clerk
21 here.

22 Q Have you any recollection whether the State raised
23 a question of failure to object to the instructions as one
24 reason that the issue --

25 A The State has not, until we appeared here, if I

1 am correct, ever raised the question of failing to object.

2 Q How do you interpret that judgment of the Supreme
3 Court of Ohio?

4 A May it please the Court, if the Court is aware
5 of the procedures and the entries of the Supreme Court of Ohio,
6 the Supreme Court of Ohio, if it is ruling that a constitutional
7 question has not been raised, will deny the motion to dismiss the
8 appeal as of right with the following language:

9 "A constitutional question having not been timely
10 raised, the same is dismissed."

11 If the constitutional question has been properly raised,
12 it will use the language in the entry before you.

13 Q I see. That is to say, then, in your view, that
14 judgment should be considered as a determination on the merits
15 of the constitutional question.

16 A That is correct.

17 Q That is just in the court of Ohio, isn't it, this
18 form on page 85?

19 A When they are turning it away on the merits on
20 the substantive constitutional question.

21 Q You mention in your brief, I think, Mr. Brown,
22 that the reason there was no opinion in the Court of Appeals in
23 Ohio was that the Judge assigned to write the opinion died.

24 A Judge Holgram.

25 Q Does that fact appear anywhere?

1 A No. That was just told to me and it would not
2 appear in the official record at any point.

3 Q Was this Kassey case back in 1932 the one that
4 Judge Florence Allen wrote quite an eloquent dissent in, do you
5 happen to remember?

6 A I don't remember a dissent to that. I don't
7 remember a dissent. I know it was a 5-2 vote, with two dis-
8 senters, but I don't remember any written dissent.

9 Q Perhaps I am thinking about a different case.

10 Q In Ohio, does everybody know who has been
11 assigned an opinion to write?

12 A No. It was only in this instance, Your Honor,
13 that there had been approximately a year's delay after the sub-
14 mission to the Appellate Court. We then approached the Appel-
15 late Court asking why, and at that time the Judge informally
16 indicated that the man who had been assigned the opinion had
17 recently, unfortunately, died, and that is how that came to
18 light.

19 Q What was the sentence in this case?

20 A The sentence was one to ten years.

21 Q On each count?

22 A On each count, and a \$1,000 fine on both counts.

23 Q Concurrent?

24 A Concurrent; yes, sir. So this man could poten-
25 tially, for this act of stupidity, serve under the laws of Ohio

1 up to 10 years maximum.

2 Q In your case you don't have to demonstrate excess
3 stupidity.

4 A No. To win my case, Justice Fortas, may I sub-
5 mit that the State of Ohio has just, at this moment, indicated
6 the massive invasion into the First Amendment that we have here,
7 when Mr. Kirschner suggested that I could run down through Har-
8 lem saying "Kill the Negroes," and Justice Marshall responded
9 "You wouldn't last very long," that Justice Marshall, who is
10 safe at the moment because the venue is in Washington, D. C.,
11 but in Ohio could be indicted for suggesting a violent reaction
12 by the Negro community.

13 This is the state of the invasion under this statute
14 into the First Amendment rights, because under the proposition
15 that Mr. Kirschner legally, that is precisely the effect of
16 Justice Marshall's remark.

17 I suggest further that we have this unusual situation:
18 We have such a deep seated invasion of First Amendment rights
19 that we get enmeshed in the difficulties that Mr. Kirschner
20 outlines when he says there was no objection. Incidentally, I
21 was not counsel of record, and I have never at this point, be-
22 cause I feel certain professional loyalties, raised the question
23 of competency of counsel in the original trial.

24 But assuming Mr. Kirschner's reasoning, what he has
25 stated here is that the Supreme Court, with the state of the

1 record before it, was saying, in effect, that a constitutional
2 issue is a mere error of omission, and that it is further saying
3 that the instructions that you have before you to read are the
4 dimensions that Ohio sets upon this statute's invasion of the
5 First Amendment.

6 I suggest that if that is the state of the record,
7 that perhaps my earlier response to you, Justice Brennan, is
8 not correct; that perhaps we must, then, reach the statute and
9 declare it unconstitutional.

10 MR. CHIEF JUSTICE WARREN: Mr. Brown, before we con-
11 clude, I would just like to say to you that the Court appreciates
12 your acceptance of our assignment to represent this indigent
13 defendant. We consider that a real public service and we are
14 very grateful to you for your efforts.

15 MR. BROWN: I should perhaps state for the sake of
16 the record that counsel for the appellant in no way agrees with
17 any of the appellant's positions. I will, however, take the
18 Voltairean position with relation to the appellant.

19 MR. CHIEF JUSTICE WARREN: Mr. Kirschner, we, of
20 course, appreciate your fair and diligent representation of the
21 people of Ohio.

22 We will adjourn.

23 (Whereupon, at 2:00 p.m. the argument in the above-
24 entitled matter was concluded.)
25