Supreme Court of the United States

October Term 1968

In the Matter of:

GEORGE SAMUELS, et al.,
Plaintiffs-Appellants;
against
THOMAS J. MACKELL, et al.,
Defendants-Appellees.

Docket No. 580

FRED FERNANDEZ,
Plaintiff-Appellant;
against
THOMAS J. MACKELL, et al.,
Defendants-Appellees

Docket No. 813

Place Washington, D. C.

Date April 1, 1969

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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

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANDORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS, Plaintiffs-Appellants; against THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants-Appellees.	:	No. 580
FRED FERNANDEZ, Plaintiff-Appellant; against THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants-Appellees.	:	No. 813

Washington, D. C.
April 1, 1969

The above-entitled matter came on for argument at 10:45 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, 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

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P R O C E E D I N G S

MR. JUSTICE BLACK: No. 580. George Samuels and others against Mackell, District Attorney and others. Fred Fernandez, Appellant against Thomas J. Mackell, District, No. 813.

Mr. Rabinowitz.

ARGUMENT OF VICTOR RABINOWITZ, ESQ.

ON BEHALF OF PLAINTIFFS-APPELLANTS

MR. RABINOWITZ: May it please the Court.

This is an appeal from a judgment of the three-judge statutory court sitting in the southern district of New York denying to plaintiffs an injunction and declaratory judgment against the District Attorney of Queens County.

The plaintiffs sought an injunction and declaratory judgment to enjoin their prosecution under the New York criminal anarchy statute.

I think the relevant facts can be briefly stated. On June 21, 1967, the 11 plaintiffs here were indicted, together with a number of others, on charges of advocacy of criminal anarchy, conspiracy to commit the crime of advocacy of criminal anarchy. Two of them were also charged with permitting their premises to be used for assembly of anarchists.

The indictment was considerably broader than this in that it had 48 counts, of which only five are before the Court on this application. The other 43 counts, all related

to specific crimes, most of them to the possession of guns contrary to the law of the State of New York.

I think there is also a charge -- one of the counts relates to a conspiracy to commit the crime of arson.

The indictment here invoked the New York criminal anarchy statute of 1902 which was first applied in the period after the First World War, in the early '20's, in the Gitlow case and was not applied again until 1964 when it was applied by New York State in the case of People against Epton.

This resurrection of a moribund statute in the Epton case and the mass indictment in this case which follows 36 days after the Court of Appeals decision in Epton poses a threat, we think, to the radical political activity of our time and raises memories of the '20's in the prosecution of those eras which clearly seem to us to be inconsistent with modern Constitutional doctrines.

The plaintiffs brought this action and rely largely on the general authority of this Court in cases such as Dombrowski and cases which have followed and, so far as declaratory judgment is concerned, in Zwickler against Koota.

Q Do you think the narrowing crux that the Court gave the statute in Epton meets the Constitutional problems?

A No, sir.

We argue -- I, of course, will come to that in a moment. It is a major part of this case -- that the statute

both on its face and as construed in Gitlow, is both vague and overbroad and is clearly unconstitutional and I don't think there is any argument about that.

The Court of Appeals in New York held, as this Court has held on a number of occasions, that Gitlow case is no longer law. This Court discussed this very statute at some length and held it was clearly unconstitutional.

However, the defendant argues that the New York Court of Appeals in Epton, by means of a narrow construction, corrected the defect. This view was accepted by the three-judge court. The New York Court of Appeals in its opinion, narrowing the construction, said that, "Well, we think now that the legislative intent of 1902 was to write a Constitutional statute and of course Constitutional doctrines changed a good deal since that time so we will now say that the legislature in 1902 intended to conform to existing Constitutional standards."

The three-judge court echoed this somewhat over-dramatically saying, "If the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have." On the basis of this it held the narrowing construction of of the Gitlow statute Constitutional.

There are two primary questions raised on this phase of the case. The first is whether that narrowing construction in Epton is binding on the plaintiffs in this case at all. The overt acts charged in this indictment all took

place before the narrowing construction.

As I say, the indictment here was only 36 days after the decision of the Court in the Epton case. None of the plaintiffs in this case had any notice at all of the of the narrowing construction that the Court of Appeals in New York was going to -- obviously they couldn't tell -- read into the statute.

We submit that the plaintiffs can no more be charged with clairvoyance, if I may echo what this Court said just a couple of weeks ago in Schuttleworth, as to the plastic surgery that the Court of Appeals would apply to the Gitlow statute than Shuttleworth could be charged with knowing what the Supreme Court of Alabama was ultimately going to decide in the ordinance under consideration in that case.

Q Are you coming back to the jurisdictional question, the Dombrowski point?

A Does Your Honor mean the question of the injunction, the propriety of an injunction, the Cameron against Johnson problem?

Q I am talking about the point discussed in Judge Friendly's opinion and the question of whether Dombrowski, authorized Dombrowski, or any other decision of this Court, in fact, authorizes the maintenance of this action.

A Well ---

Q I just wonder. I just invite you to discuss it

if you see fit.

A Yes, sir.

Now, I certainly shall, Your Honor.

We feel that, as I say, the overt act charged here, as it were, the narrowing construction was not the law of the State of New York, assuming that the New York Court of Appeals had the right to do this at all. It certainly was not the law of the State of New York until after the Epton decision and we do not believe that the narrowing construction of the defendant can be held -- or the plaintiff in this case -- liable for that.

Furthermore, even in the Epton case the Court of Appeals reconstrued only Subdivision 1 of the criminal anarchy law and left Subdivisions 3 and 4 untouched, so that as to those statutes, those sections of the statutes, which are specifically alleged in the indictment in this case, were not construed at all.

I submit that the doctrine, the statute which is clearly unconstitutional, which everyone admits is unconstitutional, can be reconstrued by the highest court of the State, is really a most dangerous doctrine. It means that any State can always resurrect a statute which has been declared unconstitutional by this Court and without any notice to the persons within the State, make a silent statute, an invisible statute, a dead statute, again, come to life.

This is much more extreme than the situation in Schuttleworth because in that case the unconstitutional interpretation was pronounced by the Commissioner of Public Safety and Mr. Justice Harlan pointed out that that was not too reliable an interpretation.

Here we have an interpretation by the Court of Appeals. An interpretation which is clearly unconstitutional in Gitlow and ---

Q I don't quite understand you, Mr. Rabinowitz. Maybe I misread Gitlow. I haven't read that opinion recently.

A In the ---

Q I thought the statute's constitutionality was upheld in the Gitlow case.

A It was upheld in Gitlow ---

Q So, how can you say that everybody agrees that this is an unconstitutional statute ---

A Well, I think ---

Q --- when the only time it has come to this Court, it has been upheld.

A Well, Your Honor, when I say "everybody has agreed", that may not be true. This Court, in Keyishian, said it was unconstitutional. The New York -- said the Gitlow statute, as interpreted in Gitlow, as read by Gitlow, was an improper, unconstitutional statute.

This Court said so in Keyishian. The New York

Court of Appeals said so in Epton. The Queens County Court said so in this case. So everyone agrees ---

Q Except for the Supreme Court of the United States.

A No, because I think that the Supreme Court of the United States, in the Keyishian case, said that this specific statute ---

Q Well, that statute was before the Court in the Gitlow case.

A Yes, sir. Discussed the statute that was before the Court in the Gitlow case and said that it was -- said it in rather strong language, I think -- clearly impermissible under current Constitutional standards and it discussed Subdivision 3 which is one of the sections here and said that under the statute as interpreted by Gitlow a man walking down the campus with a copy of Karl Marx's doctrine might be violating the law.

I believe that was the example used by the Court in the Keyishian case. So, it will not be argued here today that the Gitlow interpretation is any longer a valid interpretation under the doctrine -- even in Venice, for that matter, because even in Venice, in that opinion, suggested that the Gitlow case was really doubtful and is inconsistent, as I say, with a large range of cases -- the Scales case and the whole range of Constitutional decisions in the last 10 years of this Court.

So, I think that the situation is very similar to the Schuttleworth case. There, there was -- and I am paraphrasing the decision of the Court, but I think it is the same paraphrase that Mr. Justice Harlan used -- this Court held that where a statute is interpreted in an unconstitutional fashion by the Commissioner of Public Safety, that Mr. Schuttleworth had the right to treat that statute as void and could not be charged with clarivoyance, that the Court would later hold that the Commissioner of Public Safety was wrong.

Here we have, not the chief of police giving the statute an unconstitutional interpretation, the New York Court of Appeals giving what is today an unconstitutional interpretation, although, obviously, at the time of the Gitlow decision, ipso facto, it was a Constitutional interpretation because the Court so said.

Q Of course, the point of the Schuttleworth case was a little bit different, as you know. It involved the fact that the licensing authority could not be charged with clairvoyance, thatthe licensing authority felt that he had absolutely unbridled discretion in the question of whether or not to grant a license for a parade.

It wasn't so much the petitioner's clarivoyance. At least that is the way I understood the opinion and I did write it.

A I know you did write it, Your Honor. If that

is the way you interpret it, obviously, that is what it must mean. The language is, "It would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later."

Q Right.

A I misread it if that is what Your Honor meant.

Now, we feel that the Epton gloss on the statute still leaves it unconstitutional and this comes to Your Honor's, Mr. Justice Harlan's, question. There is still no clear guidance as to what may or may not be done under the statute.

One of the most serious defects in the Court of Appeals' interpretation in the Epton case relates to the clear and present danger, a rather unsatisfactory test under the best of circumstances. At least in the Dennis case, in applying the clear and present danger test, the Court clearly said that there must be a clear and present danger of an overthrow of the government of the United States.

In the Epton case the Court found it quite sufficient that there was a finding of clear and present danger to commit a riot. Now, if all that the clear and present danger test means in the eyes of the New York Court of Appeals and if that is the gloss placed on the statute now, is that the crime of sedition requires only that there be a clear and present danger of disorder, which is a far cry from the overthrow of the

government of the United States or even the overthrow of the government of New York, then I submit that we still have a statute that is unconstitutional even under the Epton decision.

Now, in Dombrowski this Court held that it will not abstain, in a case such as this, such as was presented in Dombrowski, where the policy reasons were operated against it, and one of the elements in the policy considerations or among the elements in the policy considerations in Dombrowski, which motivated the Court in deciding against the doctrine of abstention, was that this was a First Amendment situation, that it did involve a statute which, to refer to those words which have perhaps been a little overused, it did have a chilling effect on those -- I can't help it, Mr. Justice. Everybody says that.

It did have a chilling effect on the operation of people who are engaged in political activity and that the statute was of such a nature that it would require repeated application, that the exact meaning of the statute would have to be hammered out in repeated prosecutions over a long period of time in the State courts if the doctrine of abstention was followed.

Q Is it your position that anytime people are prosecuted or indicted and under indictment in a State on account of the conduct that lies within the broad First Amendment area, that is to say, any kind of protest activity,

that the three-judge Federal Court has jurisdiction to consider the issuance of a declaratory judgment under Dombrowski?

A Well, has authority to issue, to consider the application for an injunction under Dombrowski and I would say -- Mrs. Piel will argue this a little more fully ---

Q All you have to show then is that the people have been indicted by the State and that the indictment relates to the conduct within the broad area of speech.

A I would say you also have to show that the statute is unconstitutional.

Q That is to get relief. I am talking about jurisdiction. Is that what Dombrowski means to you?

A I think that that is probably a broader reading of Dombrowski ---

Q What are the exceptions of the qualifications?

A I would say where the State is prosecuting -- and I may be getting back to the same point, Your Honor. I am not going to try to spell it out -- in a First Amendment area and where the circumstances are such as to cast appall, inhibit the free exercise of First Amendment rights, guaranteed by the First Amendment and the 14th, that in that kind of a situation the Federal Court has jurisdiction to determine whether the state is a constitutional statute and whether it should, under all of the standards that are set forth, on the one hand in Dombrowski and on the other hand in Douglas against Jeannette,

whether it should or should not abstain.

Q Well, could you suggest to me a First Amendment situation which would not fall within that category?

A Well, I am not sure, for example, that an obsenity case would fall within that category. I don't believe that the chilling effect of a vague obsenity statute would be the kind of thing that would cast appall on political activities within the meaning of the Dombrowski case.

Q Does that have to be political activities?

A I would say it has to be, certainly, First Amendment activities and I would say -- considering when we are talking about casting appall on the carrying on of activities -- I would say that probably it would have to be political activities. At least I would have difficulty in extending it to an obsenity case.

Q Why is that? Is that because of the chilling, for example, of artistic expression or literary expression is less important?

A I would say it is less serious in terms of ---

Q That would make the difference.

A --- the importance of political activity, yes, sir. I don't think it matters a great deal. It may be my personal view on the matter. I don't think it matters a great deal if you have to wait a couple of years to wait to find out whether you can show a movie or publish a book.

I do think it matters a great deal to wait a few years to wait until you can find out whether you can join an organization or distribute a leaflet or engage in a political campaign or carry on other activities similar in nature.

Now, I would like to point out that,in this situation, the State was amply protected by other laws. That is, as I say, 43 counts -- incidentally, two of the defendants were charged and have still since been convicted of the crime of conspiracy to commit murder. So the State has weapons at its disposal -- the gun statutes, the arson statutes, the murder statutes and all these other things -- to take care of a situation such as this and there doesn't seem to be any requirement in order to protect the interest of the State while it must impose on top of this a sedition statute phrased in the very broad and general terms of the New York statute.

Now, there are other points which I think are set off in the brief and I am sharing my time here with counsel in the consolidated case. There is, of course, the supersession point discussed in the Nelson case which I think is adequately briefed and which is involved in the next case, Harris against Younger, as well as in this one.

Finally, there is the argument of the problem of the effect of Section 42, U. S. Code 1983 on 28, U. S. 2283. That is the question of whether the Civil Rights Act is an exception to the provision of the judiciary code with respect

granting injunctions. That issue has been before this Court. It has been argued by this Court so many times that I really don't think it is necessary to do it again. It was presented in Cameron against Johnson. I think it is adequately briefed and I will rest on that.

Q Did Judge Friendly rely on that? I have forgotten.

A No, I don't think he ever got to it.

Q I see.

A He found the statute constitutional and under these circumstances following what this Court did in Cameron against Johnson. It really wasn't necessary.

Q He didn't mention that?

A I don't believe he mentioned it at all.

Q Thank you.

MR. JUSTICE BLACK: Mrs. Piel.

ARGUMENT OF ELEANOR JACKSON PIEL, ESQ.

ON BEHALF OF PLAINTIFF-APPELLANT

MRS. PIEL: If it please the Court.

My client is one of the 15 persons indicted in this case and he has somewhat of a unique position because, although there are 48 counts to the indictment, he is charged with three counts of the substantive anarchy, one of the conspiracy to commit anarchy and one count which, by itself, does not seem very serious but is conspiracy to commit arson in the

third degree.

Now, this will become significant in terms of my argument, although it may not be as significant as to the other appellants in this case.

Q You said there is one count of conspiracy ---

A To commit arson in the third degree.

Q No, the one before that. Conspiracy, I think you said, to commit anarchy.

A Yes. There are four ---

Q I didn't know that anarchy was something you could commit. I thought that was a state of existence.

A I had such a long association with anarchy I finally decided that perhaps committing is the ---

Q Which count? Do you remember the number.

A Five.

Q Five.

A No, four is the conspiracy to commit anarchy and the fifth one is arson.

Interestingly enough, you will note that the overt acts that all through the anarchy counts you find the dissemination of ideas is by word, by distributing pamphlets, you find assemblage.

You find that kind of thing all the way through. I want to get back to what we claimed in this appeal. This is a double-barreled attack, not only on the anarchy statutes, but

also on the grand jury statutes in the State of New York. They go togehter very well here because you have black people, Negroes, accused of political crimes and they are indicted by a predominantly white, middle-class grand jury which is chosen by statutorily subjective standards.

I want to go back a little bit to the history with regard to this anarchy statute and what happened to it.

It was passed, as you know, in 1902. It came to glory, as it were, in 1920 when, in February, Mr. Gitlow was convicted of anarchy, even though, as you will all recall, he was a socialist.

It went through the New York Court of Appeals in 1922 when that Court gave a ringing opinion saying that the State had a right to protect, not only itself, but the government of the United States from subversion. It was approved by this Court in 1925 in an opinion which specifically excluded the concept of clear and present danger.

That statute was never invoked inthe State of New York again until the summer of 1964 when William Epton was indicted by a grand jury in August by the same white, middle-class, set up under the same statute that we are challenging here.

Then there is something that has not been argued in any of the briefs. In fact I really just came across it. In 1945, after Epton had been indicted, the legislature of the

State of New York met and amended the anarchy law, left out "force" with regard to the overthrow, simplified it a great deal and also said that the anarchy had to only be directed against the State of New York.

In the practiced commentary of the framers of the legislation they say this section substantially restates one phase of the former penal laws principal criminal anarchy provisions. It goes on to say they changed the law because of Pennsylvania against Nelson. In other words, the legislature decided that supercedure had taken place and that the legislature had a right to legislate about State sedition but not about national sedition.

Then the little notemaker says conceivably an offense of limited utility. Now, this happened in 1965 but this law was only going to be effective on September 1, 1967. So we aren't really dealing with this law except Judge Friendly did talk about it in his opinion, that even if -- that we shouldn't be worried about this particular action because the defendant could be -- there was a Constitutional statute now -- charged against -- could be charged against them.

I say that it is quite unusual that you have the legislature amending the statute and then the highest Court of the State, as it did in Epton in May of 1967, coming down with a decision saying that the statute which had been amended by the legislature was Constitutional before it was amended

even though the legislature didn't think it was amended.

I think there is again a taste of first impression before this Court with regard to the power of a Court to keep re-interpreting legislative enactment.

Q That is purely a State law questions; isn't it?

A I think it finally reaches -- and I am thinking of what Mr. Justice Jackson said this morning that perhaps due process is not wound up with fairness but I would think that at a certain point a legislature would not have -- it seems to me a legislature would not have the right to do two things. It would not have the right Constitutionally because it wouldn't be due process to read the plain meaning of language out of what the statute said. I think that would be due process.

We know, in the decisions of this Court, Winters being a leading one and it being very well established, that the gloss that a State legislature puts on a statute is to be re-examined by this Court by standards of whether or not the gloss is Constitutional and I think there is another aspect of due process ---

Q By the way, do you challenge here the Constitutionality of the gloss that the Court did put on the statute in Epton?

A I certainly do and I will very briefly tell you why. The gloss that the Court put on the Epton statute misses, in one respect which has already been mentioned, and that is

that it doesn't give fair warning to those persons before who committed acts before the Court told them what the statute said.

Q Well, how about people today though?

A All right, as to people today, it seems to me that it misses an important aspect that this Court said Dennis meant when it spoke in Yates. It said that one of the aspects of the clear and present danger of the overthrow of the government or the force and violence had to evolve a group or a person joining a group which was of sufficient strength to actually accomplish the end and that was never mentioned by the Court in Epton.

Q Do you raise that question up here -- the Constitutionality of the statute as narrowed in Epton?

A I don't know whether I did it adequately but I certainly am raising it here.

Q You didn't argue it in your brief, did you?

A I didn't argue it just that way.

Q Well, in any way?

A Yes, I said that this case was distinguished from Dennis. I think there are different principles applying to a Federal statute having to do with overthrow of the government and a State statute.

Furthermore, I think that something that Mr. Justice Warren said very clearly in the Nelson case, and that was that

the Smith Act and the whole area of the internal security legislation has proscribed the State from legislating in that area. That doesn't mean that they can't have laws saying that people can't go out and get guns together, but they can't talk about overthrow of the government of the State.

Actually, that is what the legislature of the State of New York thought to a degree, not completely, because they didn't think that a person could talk about overthrow of the government of the United States.

Q But, in any event, I gather the Constitutionality of the narrowed statute is raised squarely in the other cases, also, in the case that has just been argued.

A Well, yes. We are actually saying that the Supreme Court or the Court of Appeals of the State of New York cannot read all this new language into a statute it has once interpreted 40 years ago in order to make a prosecution hold against a number of black people who have politically unpopular ideas.

I want to bring to the Court's attention to what the District Attorney said it was necessary to charge the defendants here with the crime of anarchy along with the other 42 counts of gun possession because the District Attorney had to show the element of intent and what did he say in the various press releases which are part of the papers in this case?

This is what the District Attorney in this prosecution

thinks the defendants were doing.

Ram, which is dedicated to the overthrow of the capitalist system in the United States by violence, if necessary. Mackell said the arrested Ram members are followers of Chinese Premier Mao Tse Tung and are associated with another Negro association called Black Americans, Unite or Perish. Their intent was to spur Negro militancy across the nation, police said, following recent ghetto rioting in Atlanta, Tampa, Dayton, Cincinnati, and Watts.

I submit that this statute here is being used in a way similar to what a commentator once said about using self-incrimination evidence, that it is a part of laziness. It is far easier to sit in the shade and rub red peper in some poor devil's eyes than to go out in the sun collecting evidence.

Q Could you take a minute to say what these people were charged with specifically?

A Well, my client was charged with,the first count was disseminating -- was talking about the overthrow of the government of the State of New York by force and violence.

The second count with writing pamphlets dedicated towards the same thing, with the use of guns.

The third count was assembling for that purpose and then the fourth count is conspiracy to do that with a number of overt acts, nine out of 14, I believe, having to do with, again, the dissemination of leaflets, pamphlets, meetings,

speech.

So that insofar as the anarchy aspect of the case, it has to do with the dissemination of ideas which are unpopular. I do not think that this Court can shut its eyes to the fact that the anarchy statute has not been used in New York for anything other, in the '60's, and not before that since the '20's, than to try to proscribe the conduct of black people in expressing ideas which are unpopular.

We are faced with a situation where the Court is acting like a super-legislature going along with the District Attorney so that it is more than a punishment fitting the crime, but the Court's in a sort of after-arranged approval of the conduct of the prosecution approving a crime to fit the so-called bad conduct.

Now, there has been a great deal of discussion in this Court about hard-core conduct as distinguished from other kind of conduct under the free-speech cases. Judge Friendly, in the Court below, said that these defendants don't have a prayer in his Court because their conduct was hard-core conduct.

I don't think you can talk about hard-core conduct where you have a challenge to a statute that is vague and this Court held 160 and 161 as fatally vague in the Keyishian case. You might have hard-core conduct in a situation where the statute is overbroad, where you say that certain things are enumerated which are bad and other things are mentioned which

are too vague or too broad and should not be upheld.

Here there is nothing that these defendants did with regard to the anarchy counts that, it seems to me, is not protected by the First Amendment.

Q These statutes, I gather from you and from Mr. Rabinowitz, were directly at issue in the Keyishian case. As you know, I did not join in that opinion.

A Yes, in fact there were not a lot of you together on that.

Q Some of us didn't, but were these statutes directly at issue in the Keyishian case?

A I can't answer that because I don't know what you mean by "directly". Basically it was the definition phrased by 160 and 161 and sedition was in the Education Act. Sedition was a word used in the Education Act.

Q I see. Supposedly incorporated these by reference.

A That is right. So that when you read it, it sounds as though this Court was squarely saying that the language as a whole is too vague.

Therefore, I think that the whole concept of hard-core cannot be fought because hard-core has to refer to a situation where a statute is partly Constitutional, if it applies to some kind of conduct that the legislature would have a right to proscribe.

Q May I ask you what the present status of the prosecution is? Has it been stayed?

A Yes, it has, pending this decision.

Q Do you have anything further to say with respect to the jurisdictional point, the Dombrowski point?

A Well, I believe you called it "hard medicine" or something to that effect in a dissent in Cameron.

Q Yes.

A I was quite impressed with the attention given to the issue by the A. L. I. where a number of jurists have gotten together and they have come up with the use of the injunctive remedy in a situation where the First Amendment is involved ---

Q You would then make no restriction as to the use of the injunction and declaratory remedy in any First Amendment prosecution?

A I don't think I have to say I wouldn't, if any. I am talking about this case and I think this case is appropriately a case where the remedy should issue.

Q Well, let us suppose -- I know it is not the fact -- that, for a moment, your client as well as some of the others here had been indicted, among other things, for the unlawful possession of weapons and their defense is that they possessed themselves of weapons in order to protect their First Amendment right. Do you think -- and let's suppose that

you wanted to test whether that statute is unconstitutional, maybe too broad or what-not -- would declaratory judgment or injunctive remedy be available to you?

A I think that raises another problem which was not raised here and that is perhaps a hearing to determine what the fact are in the Court below might ---

Q No, let's assume that everybody agrees that these people did possess themselves of rifles and pistols in violation of the State statute and that they did so because they thought that that was necessary in order to protect their First Amendment rights.

Do you believe that the District Court would be proceeding properly to entertain an action for declaratory judgment or an injunction, assuming that these people had been indicted under that statute?

A Well, without answering your question, I would say that it differs from the one here because there we are assuming that there is a valid State statute and that this prosecution -- that the defense of the defendant is that it was a First Amendment defense.

Q Well, assume that it is an invalid State statute, assume that it is too broad, or what-not, assume that.

A Well, if it is too broad, as this anarchy statute and couldn't be applied at all then I think it would be a very appropriate basis for ---

Q What I was getting at, in other words, as I understand your position, declaratory judgment and suit for injunction in a Federal Court lie with respect to any State statute and any indictment provided that it is asserted or that the defense says that the activity involved is within the broad First Amendment area.

A I don't want to be the author of that position. It seems to me that when they narrow the issue down quite a bit we have some interesting other factors in the case. We have the highest Court of the State having given a clearly erroneous, unconstitutional, in my opinion, interpretation of the statute.

It may be that the Federal Court would want to abstain until the State had an opportunity to take action.

Q As I understand it, one of the points that Judge Friendly made below is that you ought to wait until there is some judgment in the criminal action ---

A Well, may I tell you why I very personally would not like to wait?

Q I can imagine.

A Well, I am not sure that you can because there is a precise reason. My client, Fred Fernandez could very easily go to trial tomorrow, as William Epton did, on the anarchy charges and this arson in the third degree. The judge could do what Judge Markowitz did in the Epton case, very conscious

that these nine gentlemen were here and give a concurrent sentence on the arson charge in this case of one year which Your Honors here would say that since there is a valid State statute which supports the conviction, we will abstain, even though Mr. Justice Stewart thought if it came properly before you, you might like to reconsider the validity of the anarchy statute in the State of New York.

Q Well, I am interested that you are sure of that, that we would have abstained because of the concurrent sentence rule.

A Well, you have done it once before. Of course, that isn't necessarily a precedent.

Q Do I understand that you want us to give a declaratory judgment contrary to that which was reached by the -- of Constitutionality -- which was reached by the three-judge court?

A Yes.

Q I don't read -- I notice Mr. Rabinowitz' brief asks that we decree tha the petitioners there are entitled to enjoin the prosecution but that you do not.

A I have said in a footnote that I don't believe that an injunction is necessary, that if this Court were to declare the anarchy statute unconstitutional ---

Q --- that the New York Courts would respect that declaration and not attempt to prosecute?

A Right.

Q I wonder why Mr. Rabinowitz' brief doesn't seem to be quite as contrary as yours.

A It seems to me I just should ask for ---

Q --- what you can get.

A --- what I thought was inorder and an injunction does present some knotty problems and Your Honors have not yet faced that.

Q I suppose those are two different things. You may be entitled to declaratory judgment but not for an injunction.

A That is correct.

I just want to close with ---

Q And of course you had a declaratory judgment here now.

A Well, I had a declaratory judgment ---

Q --- of Constitutionality and all you are asking for us is that we reverse that declaration and hold with you on that issue.

A That is correct. It seems to me that we have got a decision law just like the ones we had back in the 18th Century and James Madison said that they were monsters whose parents can never get over them.

MR. CHIEF JUSTICE WARREN: Mr. Ludwig.

ARGUMENT OF FREDERICK J. LUDWIG, ESQ.

ON BEHALF OF DEFENDANTS-APPELLEES

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

This indictment is aimed, not at the discussion or dissemination of ideas on anarchy, Communism, or what-have-you, but on the accumulation of an arsenal of weapons and ammunition, and gasoline, and black powder to overthrow or paralyze, overthrow for a week or a month, however long, local government installation.

What is the evidence in this case on this unusual review in the high Court? The real evidence in this case consists of 6,524 rounds of ammunition, plus 32 boxes of ammunition, plus six cans of ammunition, enough ammunition, with a good marksman, to kill 9,000 people.

This ammunition was seized pursuant to an arrest warrant, plus a search warrant after the indictment of the appellants in this case.

In addition, we have 43 guns similarly seized pursuant to an arrest warrant after the indictment of these appellants, plus a search warrant, particularly describing what was to be seized.

Q How did that evidence get into this case? I thought this was an action for an injunction and a declaratory judgment in the Federal Court.

A This is part of the real evidence in this case. This evidence has been seized already.

Q Is that in the record?

A It is in the grand jury minutes from Page 1 to 45 and, if Your Honor wishes, I will hand them up for the consideration of this Court alone. I am not permitted to publish them in the record and give opposing counsel grand jury minutes. It is customary in the high Court of our State to hand up grand jury minutes to the high Court alone and let them consider whether or not there was sufficient evidence for a grand jury to hold someone in contempt without giving the other side the entire investigation.

Q I thought, Mr. Ludwig, this case was decided basically on the pleadings on a complaint to which was attached a copy of an indictment and then on an answer.

A Well, it might ---

Q And that there was no evidence as such introduced, certainly no real evidence.

A Except, Your Honor, the indictment talks about, in the first four counts, 19 overt acts specified in Count 5, about discussions and I thought it might be material in resolving a question of what constitutes free speech to have some inkling about the nature of these discussions and for that reason I still offer, if the Court wants to peruse them for whatever value they may have, the grand jury minutes consisting

of Page 1 to 151, given on -- the testimony given on June 20, 1967 and on January 15, 1968 for the superseding indictment relating to these weapons and describing them by serial number and caliber and so forth, Pages 1 to 145.

I happen to have with me a certified copy. If the Court wishes ---

Q The State of New York has statutes on unlawful possession of firearms and ammunition, I suppose?

A Your Honor, I happen to be the draftman of those 10 consecutive sections of the penal laws which were revised in 1963 and were continued without any change when the entire penal law was revised in 1965 to take effect September 1, 1967.

Q Were these people indicted under those sections?

A Yes, they were indicted under ---

Q But they were also indicted for the advocacy of something or other, anarchy, or overthrowing the government and they were indicted for some of the overt acts charged to them or holding meetings to discuss that and so on; is that right?

A Yes, Your Honor.

Now, this is something that neither counsel appear to understand because they have not read the weapons law. Section 1897 is the heart of the weapons law. It has been continued in the new penal law.

This law makes it criminal, without proof of anything

more, if you possess a handgun, a pistol, a revolver. Four counts in the indictment deal with handguns.

Q Is that true in the case of both of these appellants? Is it true in Fernandez' case?

A No.

Q I gathered from counsel that her client was not involved in this?

A No, she is not. It is not true, Your Honor. The other remaining 37 counts out of the 41 that deal with weapons deal with the shoulder guns, rifles, shotguns and carbines.

Now, it is not criminal in New York to possess one of these guns unless you prove intent to use the same unlawfully against others. Obviously there are many hunters and other people that have rifles.

The usual criminal prosecution for possession of a rifle or a shotgun or a carbine, the intent is to rob somebody, to assault him, or possibly to rape some woman. In this case, there is no such intent. The intent is merely to overthrow the local government.

Now, the way this prosecution came about, because of statements made by counsel, might be of interest to this Court.

A large investment, in time and money, and not simply sitting under a shady tree rubbing red pepper into the eyes of

someone else was expended by the police. Several undercover detectives were assigned over a period of almost two years and they joined and infiltrated this organization. One of them got into the higher council of the organization, became a vice president of it, was in on all of the discussion.

This man, by the way, showed remarkable courage because in November, 1966, it was stated to him by the leader of the organization that they knew someone of their members was an enemy agent, a law enforcement agent.

In any event, from what the police told the District Attorney -- this infiltration started in October, 1965. In April of 1967 the police first came to the District Attorney. This is what they told them. They told about these discussions. They told what these discussions concerned -- how to make a bomb; whether you use a wine bottle with thin glass containing gasoline, or a soft drink bottle, a thicker glass; when you use one; when you use the other; how you make it; the problem of a fuse, which is difficult to get; how can you hand-make a fuse; one fuse is a pack of cigarettes -- pardon me -- a lighted cigarette on a pack of matches on top of the Molitov cocktail, the gasoline; another one is to get a rubber tube and fill it with black powder and insert one end into the Molitov cocktail and light the other; still another, when you pour gasoline in the street and you don't want to burn yourself, use a flaregun, not a match, because you will go up with the flame; how do you

manufacture a bazooka, which we used in World War II and the Korean War as an anti-tank gun, you use a shotgun and a Molitov cocktail and combine the both of them; how you use gasoline in the street to prevent police response; how you pour into communications manholes, into the publicly owned and operated subways, to burn down two lumber yards, to burn down a tire factory and how you similarly oil; how you disable responding public vehicles of local government, by slashing tires, by putting sugar into gas tanks, by sniper fire, 22-caliber sniper fire aimed at the windshield; how you disable electric power; how you differentiate high tension telephone wires from high tension electrical wires; how ---

Q When was this indictment returned?

A On June 20, 1967, the original indictment was returned after one day of testimony before the grand jury by these undercover police agents.

The warrants for the arrest of these appellants were issued the same day.

I wanted merely to go to the ---

Q May I ask why it has been pending for two years without prosecuting them for all these offenses you have talked about.

A Your Honor, it is because of so many motions that have been made in this case. Never before in the 70-year history of our county, which is the fifth largest in the United

States, have so many motions been made in a single case. We have weighed the papers on a scale. They weigh 20 pounds all told. Everybody made a motion and joined in someone else's motion. We did, however, based on the testimony given on Pages 1 to 151, these grand jury minutes which the Court may or may not accept, if it wishes, return another indictment for conspiracy to murder two civil rights leaders, Whitney Young and Roy Williams.

We tried that indictment and convicted before a jury two of the appellants here, Harris and Ferguson. That conviction is pending on appeal.

Q How long have you been in the Federal Courts?

A Since March 12, 1968 when application was first made by appellants to get a three-judge panel and the decision of the three-judge panel came down in June of 1968 and then application was made for this fourth review.

Q May I ask you whether the Federal Court proceedings have held this up, or would the proceedings have been delayed in any event?

A The delay from June 20, 1967 to March 12, 1968 has no connection with the Federal Courts. From March 12, 1968 until today, April 1, 1969, it is purely Federal delay.

Q Why is that?

A No, the District Attorney -- one of the assistant District Attorneys agreed that they would await the outcome of

proceedings and if this Court did not note probable jurisdiction it would have gone to trial the next day in the State Court.

Q So it was not because of a stay which was issued by the District Court or by this Court.

A No, Your Honor.

Now, I would like to say briefly that that is what is involved in this case. It is not advocacy of ideas or opinions. It is advocacy of minute, detailed action. I want to add one or two more types of actions here besides the assassination.

There are other personal type of instructions that I had never seen in any curriculum in my life. I had never known that there was a course in mayhem, for example; how you use the blunt end of a hatchet against a policeman and disable him by hitting him on the base of the spine. I had never heard of hikito, a Japanese combination of karate and judo, which operates on the principle of hitting you on a joint so as to break the distal ends of the bones.

This is some of the instruction that went on during the two-year period that these people were being observed.

Then, interestingly enough, and this is, finally, what caused the grand jury to act, they had a test run on June 16. This matter was presented to the grand jury on June 20. They had a test run involving two of these appellants where they went out in a car and tried out these tactics, firing shots

at store windows.

Now, under these circumstances, we thought it best after plans had been formulated, a time table made, that is, these minutes submitted to the Court, weapons had been accumulated and distributed and they were ready to go, that,now,if the harm and catastrophe was to be prevented, action had to be taken.

Now, I want to briefly make the point that under Subdivision 9 of Section 1897 you must prove intent if it is a shoulder gun. The intent that the District Attorney urges in this case is the intent to overthrow local government, not to rob anybody, not to assault anybody, not to do what 999 out of 1,000 rifle cases that we prosecute involve but the rather unusual intent, this magnificent protest gesture of overthrowing the local establishment.

Q Is that a crime in New York -- made a crime in that language?

A No. It merely says that anyone who possesses a dangerous weapon, and weapon is defined as rifle or shotgun; a firearm is di-ferent, that is a handgun, anyone who possesses a rifle or shotgun, in effect, with intent to use the same unlawfully against another is guilty of a misdemeanor. Now, we could not ---

Q Is it a crime with intent to overthrow the government?

A We maintain it is, yes.

Q In that language?

A No, not in that language, Your Honor. It says merely with intent to use the same unlawfully.

Q Use the same unlawfully?

A Unlawfully.

Q What law would it violate?

A The law that ---

Q Now, which one is that statute?

A Section 1897, Subdivision 9 of the formal penal law.

Q What does it say?

A It says "Anyone who has in his possession a dangerous weapon with intent to use the same unlawfully against another" ---

Q But I am talking about beyond that. Where is there anything that said that would be unlawful?

A The criminal anarchy statutes of the formal penal law, Section 160 ---

Q What does it say?

A It says that "A person who advocates the overthrow of government by force or violence or unlawful means is guilty of criminal anarchy".

Q That is to advocate?

A That is right.

That is where the unlawful intent of possession of these weapons would come -- and 37 of the 41 counts that deal with this indictment.

Now, with respect to the ---

Q They have got these rifles and they are going to overthrow the government, is it an assumption that they are going to shoot somebody with them?

A I don't know because in this test run that I made reference to, Justice Marshall, they didn't shoot ---

Q I am not interested in any test run. I am not interested in anything but the indictment in this case, in the pleadings in this case.

A Right.

Q Couldn't you have indicted them for the possession of the carbines for the purpose of harming somebody?

A If we could prove whom they wanted to harm, not people generally. If I could prove that he was going to shoot his brother-in-law or that he intended to take two druggists on the corner, yes.

Q What you are really doing, you are using the criminal statute to enforce the possession statute?

A Yes, sir.

Q Certainly the criminal statute wasn't intended for that; right?

A Well, Your Honor, the intention of the draftsman

of the weapons statute in 1963 ---

Q That is what I am saying. You said you drafted them.

A I was only a draftsman on a committee.

Q Did you have that in mind?

A Yes, sir. Because we thought that ---

Q You had in mind combining the criminal statute?

A Not particularly the criminal ---

Q You mean not at all.

A Anything defined in the penal law as unlawful was what was meant by the word unlawful in Subdivion 9 of of 1897 ---

Q You mean ---

A And that included criminal anarchy and ---

Q I thought that you might have meant what you said a minute ago that it was specifically aimed at some specific person.

A No, Your Honor. It was just one of the provisions of the former penal law that were included when these weapons statutes were redrafted in 1963. That was ---

Q My only point is that what you need to prove in this case is one thing and what you put in the indictment is another and you admit that the only way to convict these people for the possession of these guns is by the criminal syndicalism statute; is that your position?

A Yes, Your Honor, in 37 counts, not four of the other weapons counts, 37.

Yes, Your Honor.

Q I understood you to say that on this same testimony on which these people were indicted, you have already convicted two of these people of attempt to commit murder.

A Conspiracy to commit murder of two civil rights leaders.

Q Why couldn't you have charged them with the possession of these guns with the intention of killing those people and tried your case and got it over with?

A Because that indictment inthat higher conspiracy to kill these two selected persons, only two of the group were involved. The others were not involved. Those two are two appellants in this case, too. They are charged.

Q Which two are they?

A They are Ferguson and Harris.

And they are charged with the possession of many of these weapons as well.

So, you see, Your Honor, our use of the criminal anarchy statute here is a highly concrete one. It is not in the area of ideas. It is in the context of where you have amassed an arsenal and we must have this proof of state of mind in order to establish the crime of possession of weapons in New York.

Q I still don't quite understand your answer to Justice Black's question. I do understand that your State law does not make possession of a rifle-type of gun illegal on its own, just possession alone and that there has to be possession for an unlawful purpose and you have told us that the Mine-Run case is for the purpose of murder or robbery or rape and that this is an unusual case in that the unlawful purpose was what? I don't understand what?

A To commit the crime of criminal anarchy as it is defined in 160 of the former penal law and subject to the narrowing construction that were mentioned.

Q I thought that was defined in terms of advocacy.

A Yes. By advocating you are disclosing what your state of mind is with respect to intent. Intent is to foresee certain consequences.

Q I know back in the old frontier days a gun was called a "persuader" but generally you don't use a weapon in terms of advocacy, do you?

A No. The advocacy is only by word of mouth or written pamphlet.

Q What unlawful purpose was alleged with respect to this possession of these shoulder arms?

A Well, we used a simplified indictment. We didn't allege, specifically, the purpose. The purpose we have in mind, in drafting this indictment, was the overthrow of government

by force or violence.

Q Is the overthrow made an offense? I thought it was the advocacy ---

A The advocacy of the overthrow was the offense. The unlawful purpose is part of the criminal anarchy statute, you are quite right.

Q That is what I have a hard time linking up, using a weapon for the purpose of advocacy. I didn't understand that that was a criminal offense in New York.

A It was, Your Honor, under Article 212 of the former penal law. It was called "Treason Against the State". That has been dropped in the revision. We dropped "Treason Against the State".

We had only one prosecution since 1777. In 1814, People against Lynch and it resulted in a dismissal. So revisers of the penal law, when it was generally revised, dropped that section entirely. The only thing we had generally for unlawful was overthrow of government.

Q Well, as I understood you to say -- your theory was that the possession was unlawful because the purpose of the possession was that the guns were going to be used to advocate.

A No, not to advocate with the guns but rather to overthrow by use of the guns. We extrapolate from Section 160 and 161 the purpose of the advocacy, not the advocacy, itself.

Q Your point about all of this, what you are aiming at is what has been called in cases abstract advocacy. That is what all this comes down to, isn't it?

A I would say that, Justice Harlan, yes, sir.

Q Would you also phrase that that these people had guns in order to kill people?

A Yes.

Q In order to kill policemen and kill officials.

A To kill ---

Q Now, the ultimate purpose was to overthrow the government. But did you or did you not say your indictment or statement of overt acts or what-not that they had these guns in order to kill policemen and officials of the State?

A Your Honor, you are quite right in delineating this in terms of remote and proximate ends of their conduct. Obviously the remote end is the overthrow and the proximate end of their conduct is to kill policemen in general, officials in general, or maim them, or disable them.

Q Did you charge that in any of these cases?

A Yes.

Q Which one charges that?

A We only use a short form indictment here, a simplified indictment.

Q Will you tell me which of these, looking at these several counts, charges that they had these guns to kill

policemen?

A It doesn't say, Your Honor -- it merely charges the way our statute in Section 295, Subdivision (e) of the code of criminal procedure permits us to charge in a simplified indictment. We give the section of the law and that is it, but the law requires an intent and that is what we had in mind. In a bill of particulars that we put before the Court -- or demand was made -- this which defendants are entitled to ---

Q This is matters of proof?

A Yes.

Q What about 14-A of your appendix?

A You are referring to a subdivision of the criminal anarchy statute or the indictment?

Q On Page 14-A. I am ---

A This is in 580, the Samuels case. That is correct, Your Honor. That is in there, yes, in one of the first four counts. It appeared in there. That was one of the objects ---

Q You go rather far, to wit,"the use of rifles, shotguns, firearms, bombs, ignited gasoline against publicly owned and operated transportation facilities and other facilities and against executive officials of said State and various political subdivisions including peace officers, thereof, and by assassination of said executive officials" ---

A Yes, sir. It is in there. I had a temporary lapse at the moment you asked me. I was thinking only of the

weapons count from Counts 8 through 48 rather than the first four counts and that, I think, I will amend my answer to you, Justice Stewart.

Now, with respect to First Amendment rights and then I will try to go into 2283 and prohibition, if there is any, by act of Congress.

With respect to First Amendment rights, I think to a large extent you might view this case like an old case decided by this Court in 1886, I think, Presser against Illinois, which does not appear in my brief. Presser against Illinois is 116, U.S., at 615. I might hesitate to use such a venerable case but there was an excellent Court in those days and an excellent bench and a very progressive bench because in Presser against Illinois the Court took a view of the 14th Amendment that had long since been abandoned by this Court until it was revived by Justices Black and Douglas in the late '30's or early '40's.

They read the first opening clause of Section 1 of the 14th Amendment as the important clause in that Amendment, namely, the privileges and immunities clause.

In this case Herman Presser, who was the president of the Lier and Wier Variety, a German organization in Chicago, organized an armed group of uniformed persons and he rode on horseback carrying a sabre on his shoulder and the other fellows had rifles.

Illinois had no anti-weapons laws at that time and

even to this day has nothing against possession of rifles. But they did have a military organization law where they made it a crime to organize for purposes of parading and military drill without a permit from the governor of Illinois.

Herman Presser had no such permit. He was convicted, he was fined $10. He eventually came to the Supreme Court of the United States and that Court raised the question of his First Amendment right as that Amendment would be made applicable to the State by the privileges and immunities clause of Section 1 of the 14th Amendment, not due process.

They raised it and they said, of course, that he did have a right to assemble and that right to assemble would be protected, would be Federally protected, but that his particular assembly, with armed people, was not the kind of assembly specified in the First Amendment.

Q What was the citation?

A Presser is 116, U.S., 615, decided January 4, 1886.

Q I wonder if you can, during the lunch period, find that citation.

A I have a Xerox copy of it here, Your Honor. I will hand it out.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recess, to reconvene at 12:30 p.m. the same day.)

(The argument in the above-entitled matter resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARRFN: Mr. Ludwig, you may continue with your argument.

FURTHER ARGUMENT OF FREDERICK J. LUDWIG, ESQ.

ON BEHALF OF DEFENDANTS-APPELLEES

MR. LUDWIG: Mr. Justice Fortas made several inquiries about the power of a Federal tribunal to enjoin to grant a stay, grant an injunction staying State proceeding. I take the same position the Court did in the Peacock case in 1966 where it was said in the majority opinion that Congress could forbid Federal Courts from intervening prior to a final determination of the State tribunal in criminal proceedings or they could say all questions, all Federal questions in a State criminal proceeding should be transferred to a Federal tribunal for decision and keep the State judges out of the picture.

In this case, Congress, back in 1793, passed this anti-injunction act with three exceptions. It remained that way from 1793 up until 1875 when one exception was made by Congress in connection with bankruptcy proceedings and as far as Congress was concerned it remained unchanged until 1948 when they put the three exceptions now in the present law.

The exception we are concerned with is the one about "As expressly authorized by Act of Congress". Congress, nowhere to my knowledge, and I used to be a law clerk in a Federal Court,

has ever expressly authorized any exception by reference to 2283 by number. It has however, in many instances, made exceptions. It has done so in three or four different ways.

One formula is to say that the Federal Court can restrain State proceedings, like the Habeas Corpus Act, Title 28, Section 2251 or the Interpleader Act, the same title, Section 2361, or the Disbursed Party exception inthe same title, 2344-A.

Another formula is where the Congress has said any proceedings may be restrained, like the Bankruptcy Act; others or all claims and proceedings shall cease like limitation of liability act, Title 46, Section 185 and, finally, in the removal statute, the State Court shall proceed no further.

However, the 1983, claimed as an exception to 2283, merely says that you can maintain a suit in law or in equity. It doesn't talk about the restraint of any proceedings.

I think that we ought to let State Court judges, as expressed in Peacock, get acquainted with Federal issues and be governed by the decisions and opinions of this Court.

If we were to take away from them all determinations of First Amendment right issues they would soon atrophy so far as the Supreme law of this land is concerned.

Thank you.

MR. CHIEF JUSTICE MARSHALL: Mrs. Marcus.

ARGUMENT OF MARCIA L. MARCUS, ESQ.

ON BEHALF OF DEFENDANTS-APPELLEES

MRS. MARCUS: Mr. Chief Justice, and may it please the Court.

The purported basis for the Federal intervention in this case is that there will be a chilling effect on First Amendment rights by virtue of the existence of this advocacy of anarchy law. I think analysis will demonstrate that no such chilling effect can occur.

The Epton decision very clearly, on the basis of this Court's decision in Dennis, placed pure advocacy outside the ambit of the statute, placed advocacy of mere doctrine outside the ambit of the statute.

Now, this interpretation governs any prosecution, not only this prosecution, but any prosecution brought before as to conduct engaged in before the new penal code amendments. Of course, it also governs prosecutions based on the new penal code amendments.

So, the group we have left is a group which may have been deterred by the statute prior to the Epton decision, who cannot be prosecuted because Epton places pure advocacy outside the ambit of the statute. We cannot even identify this group. We don't know who they are and they cannot be prosecuted.

Therefore, the hypothetical rights of this hypothetical group, under this Court's decision in Goldman versus

Zwickler does not present any real case or controversy.

Mr. Justice Fortas asked about whether in every case where there is any claim as to the possible deterrent effect on First Amendment rights the Federal Court should intervene to protect these rights.

First, I think we have to be cognizant of the facts on which Dombrowski was based and the fact that Dombrowski was a very, very different situation from the one before this Court today. In Dombrowski this Court had a vague statute which, it was held, could not be reconstituted in a single adjudication.

Here we have a statute upon which the Smith Act was based and which has been authoritated or interpreted by the New York Court of Appeals according to the guidelines set out by this Court in the Dennis case.

In Dombrowski we had unlawful searches at gunpoint effectuated not with a hope of securing a valid conviction but as a technique of harassment. Here the search which uncovered the arsenal of weapons was conducted the day after the grand jury indicted the appellants and the fruits of this valid search obviously confirmed the evidence which had been given to the grand jury.

There can be no question that this is a prosecution seriously undertaken with the expectation of a valid conviction.

With respect to declaratory judgment here. Declaratory judgment would make no sense in the context of this case.

Q I thought that there was a declaratory judgment.

A Pardon?

Q I thought there was a declaratory judgment here.

A Yes, but our feeling is that, although we agree with the decision below on the merits, on the question of the propriety of declaratory judgment which would invalidate a State statute in this contest, declaratory judgment really looks to the future relations of the parties. In other words, where there is continuing interest in a legitimate activity, where there is a real threat to the continuation of this activity, then a declaration can be appropriate.

Q I am afraid I don't follow this. Are you suggesting, Mrs. Marcus, there should not have been a declaratory judgment?

A Well, we are grateful for the decision below because ---

Q What do you want us to do? Suppose we disagree with the decision below. Are you saying that we ought not so declare?

A I am saying, Your Honor, that before -- if this Court wants to consider this statute on the merits, oneof the questions which this Court may want to consider in which Mr. Justice Fortas has been asking about is the time, the context, the kind of case in which a Federal declaratory judgment is appropriate in striking down a State statute which in halting

thereby ---

Q I could understand this argument if the three-judge Court had refused to enter a declaratory judgment in this case. But it didn't. It has entered one and what is before us is whether their determination of the constitutionality of the statute, on the merits, is to be sustained?

A Well, perhaps I am really reacting to the questions by Mr. Justice Fortas, which appeared to go to the time when either injunctive or declaratory relief is appropriate.

Q Well, Judge Friendly did address himself to the merits of the statute but then he also said that even if the District Court were wrong then the District Court would still consider the grant of such relief inappropriate under the special circumstances here presented, that such relief, meaning declaratory or injunctive relief, so that he did, in that way, address himself to the non-availability, as he saw it, of declaratory or injunctive relief along the lines which you are now arguing.

A Well, I would just make one further comment, if I may, on this question.

It seems to me that the course of conduct which appellants here claim that they wish to continue in is not at all the course of conduct which is being prosecuted here.

Now, appellant Samuels, in his affidavit, says that he wishes to speak on subjects of great national importance.

Now, that -- he is not being prosecuted for speaking on subjects of great national importance. He also refers to the valuable civic and community work which he is engaging in and that he wishes to continue in this work.

This is not what is being prosecuted in this indictment. Certainly, as to any desire of his to get a declaratory judgment to continue such activities is no real case or controversy, under this Court's decision in Golden versus Zwickler, simply because there is no threat to these legitimate activities.

The activities which are being prosecuted ---

Q Is the State really raising any question about the appropriateness of declaratory judgment here, insofar as a challenge to the face of the statute is concerned?

A In this context, as I say, I am really answering questions which ---

Q Well, answer this one, is it or isn't it? Yes or no.

A Is declaratory judgment here ---

Q --- appropriate as to the validity of the Constitutionality of the statute on its face?

A Well, it would seem that where the activities which the complaint challenging the statute, where these activities are not the same as those included in the prosecution, the question would arise as to whether there were a case or controversy in connection with these activities.

Q Well, so your answer is, yes, the State does say that the District Court should not have entered a declaratory judgment?

A No, I can't say that I am grateful for the ---

Q Well, I know, but if it had come out the other way and you would argue this way and if you were right, why, it also would come out that the Court shouldn't have entered declaratory judgment either, in this case.

But you are not?

A If the Court had struck down the statute, certainly the question would be more prominent in our argument.

Q You have briefed the point that injunctive or declaratory relief is not appropriate because this does not come within Dombrowski and Zwickler. You briefed that in argument.

Q Are you,in effect, asking us to do what we did in Golden? In Golden, of course, the declaration below was of the unconstitutionality of the New York statute and we said that judgment should not have been reached since there was no case or controversy and, therefore, we set the case back. We vacated the judgment to dismiss the complaint.

Now, here, the State has a judgment that, on its face, at least, the statute is Constitutional. Are you now asking us to set that declaration aside and send it back with directions to dismiss the complaint?

A No, no, I am not.

Q I didn't think you would be.

A What I am saying is that in any consideration of the broad question of when a declaratory judgment is appropriate, a question which, in a sense, was raised, as Mr. Justice Fortas is saying, in a note in the opinion below, that it ought to be pointed out -- and I think it relates also ---

Q Did that note refer to the Constitutionality ofthe statute on its face or the rather separate issue of the Constitutionality of the statute as applied?

A Yes, sir.

Q Well, that is quite different.

Q That is a much different question and I didn't know that this Court had ever addressed itself to getting into the application of the statute on declaratory judgment.

A That is one of the things that the complaint asks for -- a declaratory judgment on activities outside the ambit of this prosecution, and I think it is clear from the argument made this morning that there is an attempt to confuse what is being prosecuted with the rights that these appellants say that they wish to continue and no one is attempting to restrict their right to speak on subjects on great national importance, to engage in abstract advocacy of doctrine.

But that is not what is being prosecuted here. Another point which was raised this morning ---

Q Can they make a speech advocating the overthrow of the government of the State of New York?

A Well, the question would have to -- in other words, any subsequent prosecution under Epton would have to show that the speech had the intent of causing the immediate overthrow and, of course, if there was a clear and present danger in the facts ---

Q But they are free to make a speech advocating the overthrow of the government of New York?

A If there is no clear and present danger, if there is no intent, then they are free to do so under the Epton decision. They are not free to do so where there is an intent to cause such overthrow and where there is a clear and present danger of that actually happening. Now ---

Q Well, they are not free, then, are they?

A They are free to do so except in certain contexts, Your Honor. I think the context, as you pointed out in the Dennis decision, is crucial and it is not a question which can be determined outside of the particular contest because of the context which is going to supply the clear and present danger.

This, in fact, illustrates oneof the reasons for the importance of a record in a State Court because it is this record, in addition to the indictment, which is going to show whether there was such a clear and present danger and whether this prosecution will be brought into the ambit of the statute

as interpreted by Epton.

The Keyishian case was brought up earlier and Mr. Justice Stewart asked what effect it had on Gitlow and on the New York statute. This Courtpointed out several points in Keyishian that the statute had not had the benefit of any interpretation by the New York Court of Appeals since its consideration in Gitlow and that it was not clear whether intent and clear and present danger were to be read into the statute as they were read in in Dennis and there were several other distinctions made on the basis of this Court's decision in Dennis comparing it with the interpretation in Gitlow.

I think thatin view of the fact that several months later after the keyishian decision the Court in Epton did supply the gloss that was missing, that this answers some of the doubts that this Court had about the meaning of these provisions, the meaning of the provisions had not been made clear by virtue of the decision in Epton.

It was brought up this morning to what extent the possibility of success of an attempt on the government, the size of the group, what relations these factors have to the ultimate decision here. I think this Court made clear in the Yates case that -- and in Dennis also -- the actual overthrow need not be demonstrated.

This Court, in Dennis, said, "The damage which such attempts create, both physically and politically to a nation,

make it impossible to measure the validity in terms of probability of success."

These words are particularly meaningful in the light ofthe indictment here. In a city, such as New York, the cutting off of electrical power by sabotage, arson on the subways, the paralysis of transportation lines, would affect an injury which is difficult to even keep to the mere fact of such paralysis.

It would create the kind of chaos which would break down the possibility of the government rendering the services which it is supposed to render. I think that that fact and the record that we have, although it is incomplete because the indictment was not allowed to proceed, satisfies the test that this Court set up in Dennis and Yates.

I think there has been a great emphasis by Mrs. Piel this morning that the acts of appellants are purely speech and that they were only discussion and that, therefore, the State's criminal law should not be applied to these activities. I think Mr. Ludwig has shown that the acts went far beyond pure speech.

However, even if they were unmixed with the kind of conduct which we have here, I think that this Court has indicated in a number of cases that the touchstone is the danger the speech creates, not merely the fact that it is speech which is an aspect of the conduct being considered.

As an attorney, were he to insult this Court today,

he might be held in contempt of Court on the basis of the words which he spoke and in Wood versus Georgia, this Court held -- we start with the premise that the right of Courts to conduct their business in an untrembled way, lies at the foundation of our system of government. Court's must necessarily have the possibility of punishing for contempt.

I think when an act of speech threatens to immobilize any branch of the government, the fact that it is pure speech does not necessarily mean that that branch should be without power to punish. I think the test must be not whether it is pure speech but whether that actually creates a clear and present danger.

Q I can't find any judgment at all. All I can find is an opinion beginning on Page 58 of the appendix, ending on Page 69,with 3 blanks where three judges were supposed to sign it.

A I think it was not an opinion rendered under the Federal declaratory judgments act, which is the kind of declaratory judgment which the complaint asked for but was a declaration as this Court in Murdock supplied.

Q Is there a ---

A The difference between a declaration like this Court in Murdock issued a declaration but did not issue a decision under the Federal declaratory judgments act. It merely reversed a State Court decision below and declared that

that decision was reversed, that the convictions were reversed.

This is, I think, quite another thing from issuing a decision under the Federal declaratory judgments act.

Q Well, there is a judgment in the case somewhere, isn't there?

A Yes, sir.

Q Where is it in the appendix?

A It is inthe last paragraph. Since the complaints present no case for Federal relief, the clerk is directed to enter a judgment of dismissal as prayed by the State.

That is the final paragraph of the decision.

Q Now, did the clerk do that?

MR. RABINOWITZ: In Case 580, at the very bottom of Page 76-A, in the appendix.

MRS. MARCUS: In other words, there is obviously a question of how a decision below should be treated by this Court. In Murdock this Court reversed the decision below. But under the Federal declaratory judgments act it is required that a real case of controversy be presented as to the kind of conduct which appellants say they want to engage and this is another question from merely having a case before this Court, which this Court is in a position of either affirming or reversing.

MR. RABINOWITZ: May I have 30 seconds or even less to point outjjust one small matter and I think this goes to ---

MR. CHIEF JUSTICE MARSHALL: No longer than that, though, please; we have got to get on to another case. You take that 30 seconds if you want.

MR. RABINOWITZ: I just want to point out that there were 15 persons named in the indictment that were gun charges as against 10. As to the other five the indictment charged only the criminal anarchy clause.

MR. CHIEF JUSTICE MARSHALL: Thank you.

MR. LUDWIG: I would like to add that that is incorrect and that you read the indictment.

(Whereupon, at 12:55 p.m. the argument in the above-entitled matter was concluded.)