Supreme Court of the United States

In the Matter of:

Joseph Carroll, et al,

Petitioners

vs.

The President and Commissioners of Princess Anne, et al.

Respondents.

Docket No. 6

Place Washington, D. C.

Date October 21, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Joseph Carroll, et al. Petitioners vs. The President and Commissioners of Princess Anne, et al. Respondents	No. 6

Washington, D. C.
Monday, October 21, 1968

The above-entitled matter came on for argument.

BEFORE:

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

APPEARANCES:

ELEANOR HOLMES NORTON,
156 Fifth Avenue
New York, N.Y. 10010

WILLIAM H. ZINMAN,
500 Equitable Building
Baltimore 2, Maryland

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 6.

Joseph Carroll, et al., Petitioners, versus the President and Commissioners of Princess Anne, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mrs. Norton.

ARGUMENT OF MRS. NORTON

ON BEHALF OF PETITIONERS

MRS. NORTON: Mr. Chief Justice, and may it please the court.

Petitioners are members of the National States Rights Party, a political party, committed to white supremacy, to which they wish to win adherance through the democratic process.

Specifically the record shows the running candidates in the Democratic and Republican Parties as well as Independently. The amazing way of reaching the public is through political street rallies.

On August 6, 1966, in Princess Anne, a sparsely populated town of 1351 persons, petitioners held a rally. The facts break down roughly two ways. The circumstances surrounding the issuing of the temporary injunction, and the circumstances and facts of the rally as revealed at the hearing of August 17th, which led to the final injunctional in this case, the temporary injunction was gotten because at the end of the rally of August 6th, another rally for the next evening was announced, though no violence or even any need for police intervention to control the crowd in any way occurred at the August 6th rally, town and county officials got an ex parte temporary injunction for ten days.

Q Are you going to tell us what did occur at the August 6th rally?

A Yes, I am.

Q You are. Fine.

A Rule BB-72 forbids the granting of such an injunction without a showing of immediate, substantial and irreparable injury to the applicant before and adversary hearing can be had, it expressly grants the right to the judge to communicate informally with the person against whom the injunction is sought or his attorney.

No such measures were taken in this case. Such injunctions are indeed extremely rare in the State of Maryland. The temporary order and writ of injunction restrained any

"rally, gatherings, or meetings, anywhere in the county that would excite to riot or other illegal acts."

Though the writ of injunction itself addressed to the parties by name made clear that the court construed any gathering by this party as enjoined, not simply those that might excite to riot, et cetera, for it enjoined the use of any sound amplification equipment in the course of public mee tings, such equipment being necessary to hold such meetings.

A permanent injunction, the temporary order said, might issue upon hearing. Petitioners were not able to find representation in time to appear before the return date of August 17th, but at that time, they had secured counsel, and they filed an answer asking that the temporary injunction be rescinded.

Now to the facts and circumstances surrounding the August 6th rally.

They were given their first hearing at the August 17th hearing at the court. It is important to note that there was available to the court at the time of the issuance of this ex parte injunction the tape from the August 6th rally, but the court issued the injunction against furthe rallies without listening to that tape at that time.

The tape recording reveals a description of the party's aims, particularly repeal of 1965 Civil Rights Act, and other Civil Rights Acts then under consideration.

Their speech in caustic terms was a call to action, but in every case, a call explicitly to political action. Examples of this are rampant in the record.

They called, for example, for those who heard them to "Organize intelligently, fight intelligently."

They said, for example, that the National States Rights Party advocates every legal, legitimate and political inaudible word in the book to stop race mixing.

As to the specific political actions urged, to the whites, they said, for example, that they were phoned and button holed one James Bond to the end that the schools not be continued to be integrated in the county.

Their only remark that appeared to be addressed specifically to the 25 percent of the crowd that was Negro urged them to start taking reservations to Africa.

Since this remark appears to be among the more controversial in the record, it should be seen in its entirety in context. The petitioners said in the course of that remark, we don't need you, you are off, you are dead, get ready to leave this country, get ready to leave the country, you can leave in a lot of ways, you can leave on a boat, you can leave running, you can bicycle, or you can leave in a box.

This is a white man's country, Princess Anne is a white man's town, this is a white man's country.

A witness testified that following this exhortation,

both groups appeared interested.

Earlier, party officials ---

Q Well, now, don't you think, don't we have to accept that the thought of leaving in a box was a reference, at least, to violence?

A Yes, it was, indeed. It was a possible reference to their leaving as a result of some sort of violent act. But it is important to note that in advance of that exhortation, the Party officials had noted, and this is earlier, this is before this comment, that the Party's official position about Negroes was an adoption of the position of Abraham Lincoln, namely that this country should send Negroes back to Africa.

Moreover, the remark in question was not followed by any exhortation to the crowd to either start now or at some future date to seeing to it that Negroes leave in a box, or even to seeing to it that Negroes leave in any other way. Rather, immediately following this remark is a classic call to organize politically and nonviolently, to wit.

Let's organize, let's hear a great human cry come up from the people, and I guarantee you white folks out there you will win every single political objective.

And a few sentences later, another of several calls for specifically nonviolent political action, to wit, bring your friends back out here tomorrow. We want a shout to come out of this town. A nonviolent shout that every local politician

is going to hear.

We want McKelvey to hear it, Governor Tallos to hear it, Congressman Morton and all the LBJ's.

Q Mrs. Norton, I am not clear from what I have read as to whether there was in the community a state of tension at the time that this rally took place.

Had there been disorder? Was there trouble in the community?

A According to the record, Mr. Justice, the last disorders had been in February, 1964. It was then August, 1966. There was specific testimony that relations between the races in the town in advance of February, '64, had been congenial, and since then has been congenial.

It was on the political crescendo of everyone coming back tomorrow and raising a nonviolent shout to political leaders that the rally ended, as the audience was invited to come up and take out $8 memberships into the National States Rights Party.

The use of the word "Nigger" to denote Negro occurred throughout the rally, but it provoked neither the Negroes present nor the whites.

In the first place, no one was specifically called a Nigger. One of the Petitioners gave as a reason for the use of the word, every time you call a Nigger a colored person, you are apologizing to them because they are black.

There was clearly a political reason for the use of the word.

The county's evidence --

Q Well, now, there was also evidence that, wasn't there, that there had been two rapes in the locality, of white women, allegedly by Negro assailants?

A Mr. Justice, you mean two rapes recently? When this rally was held?

Q I thought recently that the speaker was asked not to refer to, and did not refer to, but instead of that, he talked about a 1933 incident, and about the lynching, the last lynching in Maryland, as I understand it, over here on the Eastern Shore?

A That is correct, and at that time, he said to the crowd, I want you to know that I am not advocating that kind of action, I am expounding a bit of history.

Q Yes, and then he also told them about the Chicago incident, where white people rose up, kicked hell out of the Niggers, burned 32 cars.

A That is right. He recounted -- he recounted incidents at which violence occurred, but throughout the record, we have these petitions, telling the crowd, "Look, don't involve yourself in violence; that has happened to us before. That is what they want to have happen here, and we exhort you against it."

The county put on evidence that at the rally were 200 people, that there was an ample police force, that the Negroes were clearly disturbed and angry, but they did not so much as even mingle with the whites.

There was evidence over the objection of counsel of 1964 Riots that had followed sit-in, not pure speech. There was evidence that there was racial peace before and since. There was also evidence of cooperation between petitioners and the authorities.

One of petitioners, for example, inquired about the use of a public address system, and about general sponsorship of a rally. Captain Randall, one of the officers present, did request that there be no mention of the cases, and as the Justice has pointed out, there was no mention, although there was mention of the 1933 case.

Q Was I right in understanding that that case had led to a lynching?

A That case indeed led to a lynching, and these petitioners noted that at that time, there was shame passed on Princess Anne, but that they didn't feel, but Princess Anne apparently didn't feel at that time that that was shameful conduct.

Q It was the opposite. They put stickers on their cars saying they were proud to be Easterners, right after the lynching.

A That is right.

These petitioners did relate to this audience by reminding them that they had participated in activity that might be also considered to be racist, although these petitioners did not in fact exhort them to participate in such activity at the present time.

The court refused to hand down an immediate opinion or even a ruling, because it wanted to see a transcript first. Twenty-three days later, a permanent 10-month injunction issued, effectively continuing in force the temporary injunction.

Since then, a sound equipment statute, arguedly bad under Sale versus New York, has been passed by the county. The Court of Appeals of Maryland disapproved neither injunction. However, it held that the 10-month injunction was too long.

Of the 10-day ex parte temporary injunction, the Court of Appeals said the court was correct in issuing its order, dated August 7, 1966.

If the Justices please, I would like to deal with the mootness questions first.

This court has kindly given some time to trial counsel, co-counsel here, Mr. Zinman in order that he might relate some of the factual circumstances that might clear up this issue somewhat more. He will take five minutes to do that, when I have finished.

We believe that this case is not moot. Because we

believe we come within two exceptions. One, a substantive exception, and the other a procedural exception.

This court has always recognized exceptions to the mootness requirements.

We cite a law review article by Diamond, generally, in our brief. In that, in the course of that article, there is a summary of one of the exceptions to mootness, which we feel we fall within.

It bears perhaps quoting here, it is short.

"Although the controlling fact situation may be so changed that the specific relief sought is no longer possible, if the situation is self-perpetuating, the parties are entitled to adjudication which will apply to the renewed phase of the controversy in existence. We believe that this controversy is clearly self-perpetuating. These petitioners have been informed that they will not be able to speak in Princess Anne County, Maryland, unless they censor their remarks."

We have cited in our brief the South Pacific Case, where Southern Pacific Case, excuse me, where this court said that short-term orders capable of repetition will not defeat a claim for mootness. We have cited two other cases in our brief, which we think point up the difference between moot claims and nonmoot claims.

One is oil workers, where the court found mootness to exist. The other is motor coach, where the court found no

mootness to exist. In both cases, the Governor's seizure of public utility was at issue, and the Governor had returned the property.

The difference was that the underlying factual dispute was present in one case, in motor coach, and not present in the other. That underlying factual dispute was a strike which had ended in the one case, and which continued in the other.

We think that the Sideburn Case, decided last term by this court, also points up a kind of exception this court will take to normal mootness claims.

There it is pointed up that failures in State procedure will not be allowed as a cause for mootness. That we think that there are specific failures of State procedure here which this court in Friedman versus Maryland has already analyzed and condemned.

There this court, looking at the censorship statute, noted that there was no prompt way to get judicial review in the State of Maryland. It compared Maryland procedure with New York procedure.

Under New York procedure -- under Maryland procedure, it found that the statute talked about prompt administrative determination, but it said that there was no assurance of prompt judicial review, and this court didn't really know how prompt administrative determination had to be.

In New York, on the other hand, there is clear, definite language about time limits, this court said. For example, a judge had to, in New York, hand down his opinion within two days after a matter was heard.

That kind of time limit saved the censorship statute in New York, and didn't save censorship in Maryland, and we submit that in this case we have that kind of situation.

Moreover, Walker versus Birmingham is procedurally relevant here, because the court there criticized petitioners for making no efforts to challenge the injunction there, and the court gave every indication that if petitioners had made efforts and if petitioners had met with delay, this court would have decided the case.

Yet I believe that that case could not have gotten to this court, either, before it became moot, for the demonstration was hoped to be held on an Easter Sunday, and the injunction was issued some two or three days beforehand, and even under Alabama procedure, they could not have gotten here, so I think there is an indication in the opinions that this court would have decided that ex parte temporary injunction case, because it related to free speech.

Q I don't think the indication was that the case could have gotten here in time, in the Walker against Birmingham, but rather if the petitioners had gone to the trial court in Alabama, and had been met with a rebuff or a delay, and then

proceeded to hold their parade, the case would have been presented here ultimately in quite a different posture.

A That is possible, your Honor, but another procedure would have been just as open to them would have been to somehow seek appeal here. They would have been uncertain as to whether or not to violate the injunction then or not.

It certainly is worth nothing that this court, in Walker and Birmingham, expressed considerable doubt as to the injunction and statute involved, even though it didn't have to decide that question, because it was a First Amendment case, and it had an ex parte injunction in it.

We believe that these procedural and substantive reasons which are applicable to cases generally apply here, but we believe this case has another important part to it, and that is that there is an ex parte injunction here in a First Amendment case, and we believe that the supremacy clause means that this court ought not let that ex parte injunction stand, as law and rule of the First Amendment.

Indeed, even when speech is not involved, equity will normally not enjoin the commission of a criminal act, but when speech is involved, it would seem all the more inappropriate.

The court below, it should be noted, expressly approved the ex parte injunction here, though it had run, by the time it got to the Court of Appeals, and we think this court can do the same.

We would like to spend a few minutes on the injunctions themselves.

Q Did your client make any effort to review the ex parte injunction?

A Yes, they did, although not before the answer date. We have submitted a reply brief, in which we have shown that the petitioners could not secure counsel in time to force hearing before they did.

Had they related to do so, they would have done so, as soon as they secured counsel, they did, in fact, file an answer.

We have asked this court to do two things with respect to these injunctions. No. 1, to disapprove the use of the injunctive process to control speech, and No. 2, we have argued that these injunctions, in any case, were improper, because the evidence as finally submitted did not show that an uncontrollable situation was bound to result from the next rally.

The disapproval of the injunctive process, we think, is necessary, and would only repeat what this court has done in the permit cases. We don't need to tell this court that a prior restraint is the essence of what the First Amendment bars, so much so that this court has rarely had before it a speech that has been enjoined.

Q There were no ordinances or statutes involved here, were there, involving permits for a meeting?

A That is right, your Honor, there was nothing in existence at the time.

Q There were none?

A That is right, at that time.

This court, in permit cases, has always looked to see whether or not the permit went beyond mere ministerial permission, ordering that mere ministerial permission be given to give speeches.

What we think that means is that this court has said in speech cases, there shall be no prior restraint. All we are asking this court to do is do the same thing in the context of an ex parte injunction.

We think there is another reason why this court should disapprove the use of the ex parte injunction, is because we believe this court has said, whenever it has used any free speech test, that the State must use a constitutional way to reach its legitimate end.

Now we certainly regard the end here as legitimate. Here the end is control of disorder. But disorder can be controlled without the menacing, without the broad, without the unusual ex parte temporary injunction.

This has been said in this court time immorial.

Q Mrs. Norton, I am a little troubled by the procedural aspects of this case. Actually, what happened here was that an ex parte injunction was issued, and then later on,

an ex parte injunction was issued to restrain the petitioners from holding a meeting in 10 days. Then later on, there was an interlocutory, some sort of an interlocutory order entered to restrain petitioners for ten months?

A That is right.

Q Now did that, now but you are arguing this case as if what we have before us is the ex parte order. The first order. Was the second order ex parte, also?

A No, the second order was not ex parte.

Q Why is it referred to in the papers that we have before us here as an interlocutory order? It went to the Maryland -- then an appeal was taken to the Maryland Court of Appeals, wasn't it?

A Yes, that is local terminology.

Q All right, but -- and you make no point of that, and your adversary makes no point of that?

A That is right.

Q So then there was an appeal taken to the Maryland Court of Appeals. Is that right?

A That is right, sir.

Q And didn't the Maryland Court of Appeals indicate in some way that the ex parte order was invalid?

A No, it did not. It expressly indicated that the ex parte order had been valid.

Q And how about the next order, the 10-month order?

A The 10-month order, it said, was invalud only because it was for too long a period of time.

Q Well now, so that what we have before us, in your submission, is only the ex parte order?

A Technically that is true, your Honor.

Q And that ex parte order enjoined a particular, enjoined defendants from holding a particular proposed meeting? Is that right?

A Not only a particular proposed meeting, but any meeting that might have been held for those 10 days, your Honor.

Q For 10 days only?

A Yes.

Q And we don't have before us the subsequent order which was a 10-month order?

A Technically we do not, because technically it was struck down, although the method, the injunction method was expressly approved.

Q Well, that eliminates the reason why I have considerable procedural difficulty with this case. Now, also, as I understand it, somewhere in these papers, the petitioners subsequently applied for a permit to hold a meeting, a meeting in Princess Anne County.

I don't recall the dates. The first time they were refused. They subsequantly applied, and permit was granted, but on conditions.

A That is right, your Honor.

Q Now what bearing, what is your view as to whether those events have a bearing upon our jurisdictional and procedural problems?

A Well, we believe that that subsequent application demonstrates that the effect of the ex parte injunction continues, although the 10 days have gone.

Q There are two applications, one denied, the other granted.

A That is right. The one that was granted was granted only if petitioners agreed not to give a speech of the kind they gave on August 6th.

Q Now is that before us? Is that in the record? Are the precise terms of that permit in the record, has it been litigated below?

A It has not been litigated below.

Q Is it before us in the record?

A It is not before us in the record as a cause of action. It is only there to demonstrate ---

Q But how is it there? What is the physical form?

A We brought it to this court's attention.

Q How?

A Only to show. In the form of letters, in the appendix of our petition for certiorari.

Q Is there a formal permit that is reprinted in

the appendix?

A In the reply brief there is a statute since passed, printed, which requires a permit, in order to use sound equipment.

Q That is all we have before us. But you don't have the specific text of the permit that you say was granted on conditions that you assert to be objectionable?

A We have the letter in which permit is granted, ---

Q I see.

A Only if X, Y and Z are done.

Q That is the form in which the permit was granted?

A That is right, that is indeed the form, yes, sir.

Q By letter.

A Yes, sir.

Q I notice, Mrs. Norton, that you reserved some time for Mr. Zinman. You are going to have to stay within your half hour, so if you are going ahead, you have less than five minutes now, if you want to take it all, Mr. Zinman will have no time.

A All right, I will give him five minutes.

Q Very well.

A And thank you for calling that to my attention.

Q Very well, Mr. Zinman.

MR. ZINMAN: Mr. Chief Justice, may it please the

court, I will address my remarks specifically to some of the procedures to which Justice Fortas referred.

While within the context actually of the the Freedman Case in which we would urge a speedy determination from the lowest court, the Court of Appeals, Maryland.

The ex parte injunction was issued, of course, on the affidavit of Commissioner DuShield, who the record disclosed didn't actually observe the rally for more than five minutes' time, nor does the record indicate that the court actually hear the tape and the order, of course, continued for 10 days.

Now within that period of time, oh, and this order, this ex parte order, the record indicates, was not served upon Stoner, Brailsford, Norton, nor the National States Rights Party It was, however, served on three of the petitioners, so that actually there are three people that never even got served as a process.

Now ultimately when I got into the case, on the 15th of August, I did file a general answer, but, of course, the hearing was scheduled for the 17th, which actually gave us only two days.

Now under the Maryland rules of procedure, you do have two days within which to request a hearing for an ex parte order. However, in this particular case, we filed affidavits to the effect that the petitioners did attempt to contact two lawyers, and failing that, and also there is a letter in the

record which I sent as soon as I got into the case to the President of the Bar Association of Sommerset County, Mr. Jones, requesting that local counsel be assigned to assist us.

Because, No. 1, the distance from Baltimore, Maryland, from my office to Sommerset County is 150 miles, it takes a day to get up and back, and secondly, I wasn't altogether familiar with local practice.

Of course I got back a letter indicating that this was an unpopular cause, that half of the bar association, consisting of seven, were on the other side of the case, and that in any event, nobody wanted the case.

Consequently, there wasn't any real remedy that these petitioners had. And we had, for all intents and purposes, addressed ourselves to the permanent injunction, and the hearing which, of course, came later.

Now in connection with our argument under Freedman that we would like a prompt and expeditious determination, I would suggest that even though technically the interlocutory or permanent injunction is not before the court, from a practical standpoint, this injunction continued in effect from the date of its inception, the date of the ex parte order, which was on the 7th, until June the 7th, 1967, when the Court of Appeals finally rendered its decision.

During the interim period, I would like this court to understand that I made certainly every effort to, No. 1,

expedite the case according to the Maryland Rules of Procedure, by initially trying to shorten the time for transmission of the record, by filing a motion to shorten the time within which argument was to be held, and even by sending a letter to the Court of Appeals of Maryland, which is part of the record, requesting them to render an expeditious decision.

So from a practical standpoint, the defendants were enjoined for almost nine months, and I think that we would like a ruling to the effect that a determination of this kind, involving speech and involving assembly, should be handled in the same way that censorship cases are handled.

That is, they should be able to get from the Court of lowest instance, to the highest court in the State, in a short period of time.

Q I gather the 10-month period was chosen by the court because that would cover the academic year of Maryland State College. Is that right?

A Yes.

Q Which is a predominantly Negro institution, is it not?

A Yes, which school wasn't open at the time.

Q No, but it was going to open in September, and the academic year would last until the following June, is that right?

A Your Honor, I think that I would interpret that

by inference to mean that if the injunction had been for nine months, it would have been perfectly proper. Of course, that is my interpretation, because ---

Q Well, you are not -- no, I am sure I misunderstood you. You mean that the court would have held it to be perfectly proper.

A Yes, sir.

Q You are not representing it would have been perfectly proper?

A No, not at all. I don't think any injunction at all as proper under these circumstances.

Thank you, your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Rottman.

ORAL ARGUMENT OF S. LEONARD ROTTMAN, ESQ.

ON BEHALF OF RESPONDENTS

MR. ROTTMAN: Mr. Chief Justice, may it please the court. I would like to first point out that there are a great deal of matters which are in the Appendix in this case, and in the supplemental brief, which are not part of the record in this case.

They were matters involving the issuance of the subsequent petition, the attempt to obtain trial counsel, other such items. They are not properly before this court, we would submit.

Q Mr. Rottman, may I just suggest to you, before

you get into your argument, that we have done in this case what we don't usually do. We have acceded to the request of both sides to allow two lawyers to talk.

A Yes, sir.

Q And the reason we don't do that, normally, is because we run over, and don't keep our cases within the calendar, and I just suggest to you that if you want time for Mr. Jones, that you do what I suggested on the other side.

A I will do so, sir.

Q Keep within bounds.

A With that in mind, I would like to comment very briefly on the issue of mootness. And it would seem to us, and we submit, that any decision that this court may make in this particular case would be moot, and would operate purely in a vacuum.

And therefore, the case is moot, and should not be considered by the court upon the merits.

Q Now I would, speaking only for myself, would suppose that you might well argue that under all conventional and traditional and normal tests this case is moot. This was a 10-day injunction, more than two years ago.

A Yes, sir.

Q That the 10-days expired more than two years ago. And nobody is now hurt, so far as this record shows. Nobody was ever sent to prison, nor even fined, or anything like that.

But what does this allow the State to do? Suppose tonight a court enjoins Hubert Humphrey for holding a meeting in a community where he wants to hold a meeting tonight, for 10-days, and suppose he couldn't get that decided until after November 5th.

A I think this, your Honor: I think that under the Maryland rules, there is an absolute right to a hearing with two day's notice.

These petitioners did not avail themselves of that. They say they had difficulty getting counsel, and yet one of their petitioners, Mr. Stoner, is an attorney, and had only the preceding week appeared in Baltimore for a similar case in which the National States Rights Party was enjoined.

He appeared and represented them in that case.

I would say there is an absolute right to a two-day hearing on the injunction. And under the decisions of this court, it seems to me that the test is, the quickness with which you get a judicial review.

The first instance of a court reviewing the right of the restraint on speech, and Maryland has specifically provided the two-day test, two-day hearing, they can have it on that.

Q Two-day notice of hearing.

A No, sir, they can have a hearing on not less than two day's notice. So, if they request a hearing, they must have it within two days. I believe that is the interpretation that

has consistently been given in Maryland, and that is the way the rule reads.

Q Do you have the Maryland cases cited in your brief, the authorities, because that is not the way I read it.

A No, I have no Maryland cases, your Honor; I have a reference to the Maryland rule. I know the application of that rule.

Q How does the rule read?

A The rule reads that a party has an absolute right to a hearing on two day's notice, on the issuance of an ex parte injunction, and the practice in Maryland, Miss Norton says that it is an unusual practice to issue a temporary injunction, I would submit that that is not so, your Honor.

I have only been at the bar some ten years now, but I have been involved, and I am not particularly do a great deal of trial work, but I have been involved in probably no less than five, in my own experience, ex parte injunction.

The Maryland courts uniformly grant a hearing on two day's notice, on application of one of the parties.

Q Were all these people served in time so they could have done that?

A They may not have been served, your Honor, but I would submit that if they were not served, they weren't subject to the hearing, they weren't subject to the injunction, then.

Again, under Maryland rules, you are not subject to the injunction until it is brought to your notice. Now they certainly came in and were aware of it as a practical matter, they were all very much aware of the injunction.

We believe that ---

Q Does Maryland contend here that the temporary ex parte injunction was not at issue?

A Absolutely.

Q And at least, your highest court said that it was a proper injunction?

A Yes, sir, they said that the existence of a clear and present danger of a riot in the streets of Princess Anne ---

Q So this is an interpretation by the Maryland courts, by the highest court in Maryland, as to what kind of conduct the meeting would justify an injunction, as a threat to the public order?

A I believe you could say that; yes, sir.

Q So there is an interpretation of the First Amendment, or the Maryland law, as being permissible to the First Amendment, which now obtains in Maryland, and which people who want to hold meetings must observe, unless they want to be subject to an injunction.

A I believe that is so, your Honor, but I don't think the Maryland Court of Appeals broke any new ground in

doing it, although they did ---

Q That is another. We are still talking on mootness.

A I see.

Q And that rule is one that obtains in Maryland now, and that this group which was enjoined is subject to like all other groups.

A That is right, your Honor.

Q Now why would you suggest that this case then is moot? Vis a vis this particular group, who is you don't suggest out of business, who doesn't want to have any more meetings, but it must now in Maryland observe this rule.

A Well this was a ---

Q Would you answer that after the luncheon recess, please.

A I shall try to.

(Whereupon, at 12 o'clock noon the Supreme Court recessed, to reconvene for further argument at 12:30 p.m. the same day.)

AFTERNOON SESSION

MR. CHIEF JUSTICE WARREN: Mr. Rottman, you may continue your argument.

ORAL ARGUMENT OF S. LEONARD ROTTMAN, ESQ.

ON BEHALF OF RESPONDENTS

(Resumed)

MR. ROTTMAN: Thank you, Mr. Chief Justice.

Justice White, in answer to your inquiry, I would say that the answer is that it is moot because the injunction was issued in the context of a specific factual situation, which may never exist again.

Q I know, but the ruling under the Maryland law, meetings may be stopped by an injunction, consistently with the First Amendment, is an ongoing, that is just the rule of law, now. And that is the way the First Amendment in Maryland law has been and will be interpreted. It isn't any different, I don't suppose, than if there were a statute in Maryland that says under certain circumstances, meetings may be enjoined, and people who want to hold meetings bring a declaratory judgment action, in challenging that statute, and the statute is upheld.

Q No one would suggest that the case is moot just because there weren't any meetings involved at the present time.

A Well, I would suggest that that law, as you pointed out, sir, is the law ever since Milk Wagon Drivers Union

versus Meadowmoor, in which this court recognized --

Q Now you are just arguing as to the correctness of the rules.

A Yes, sir.

Q Then as to mootness, I mean, we may agree with the Maryland court; we may, but that doesn't mean the issue is moot. It may be, and maybe the ruling is correct, but it isn't moot. I just suggest that to you.

A Well, it seems to me that if the issue is to come before this court on this injunction, and in this context, that the way to get it before the court is to allow the petitioners to violate the injunction, and subject themselves to the contempt penalties and bring it up in that factual situation, because if this court has to pronounce a rule, as to whether it will consider all cases not moot, and not follow its general principles of only considering live cases, as against --

Q If they violate the injunction, as this court said, that they can be imprisoned for it, if they should have gone into the courts to vindicate their rights, why would they violate it?

A I don't think that that is the pronouncement in Your Honor. I think this court went a good deal out of its way in Walker to point out that the petitioners in that case had taken no steps; they had taken no steps to contest the

issuance of the injunction, and the court made it very clear, I think, that they were clearly put on notice that they could not bypass orderly judicial review of the injunction before disobeying, and I think what that case does is recognize that you must first, in the initial instance, object to the issuance of the injunction. If it is then issued, and if you may then object to it, and if it may run out before you have time to follow through, all the way to this court, if you will, then you have the right to protest the issuance of the injunction, and if the injunction is wrongly issued, their conviction under it would be reversed.

Q Well, supposing on this temporary restraining order they had gone to the court within two days afterwards, and the lower court had decided against them. Could they then violate it, and come to this court?

A I don't mean to say that they could violate it with impunity, but I think the way to get it before this court in a live issue, and not a moot issue, would be to violate it. If the balancing of the equities must be between the protection of the State, in holding safe its streets, by allowing them to issue injunctions, or if it is to force petitioners and those in their position to test injunctions in a live issue, by contesting it, and subjecting themselves to criminal penalties, I would say that the better rule would be to force them to take the burden of criminal punishment, rather than

to force the State to take the burden of allowing their streets to be the subject of rioting over any issue that speakers may wish to make.

Q Then I take it your position on mootness to be the same whether or not the Court of Appeals had disapproved the ten months injunction.

A Had approved?

Q Let's assume that it had approved both injunctions, the temporary injunction and the ten months injunction.

A Yes, it would basically be the same.

Q Your position would be the same, even though the Maryland court had made this kind of a ruling?

A Yes, sir, because it seems to us that the holding in Freedman was, and the thinking in Freedman, expressed by this court is that it is the initial judicial review that is important. It is not carrying all the way through, to the appellate reviews, as before this very court.

Q That may be so, as a procedural matter, but if we are just talking mootness, why, it is a different slant on it.

A Well, it is our position that this case, in this context, is moot. If you do want to consider this case, however, on the merits of it, and we will go on to discuss that, if you will, the principal issue before this court on the merits of the case, as we see it, is the right of a State to

ever act to prevent certain classes of speech.

Q Before you get into that, one more question on the mootness.

A Yes, sir.

Q Was the issue of mootness argued before the Maryland Court of Appeals?

A I believe not. Of course the ten-point injunction, what was called the interlocutory injunction, that was not moot.

Q That was still in effect.

A At the time, that was still in effect.

The reversal was passed by the Maryland Court of Appeals prior to the expiration of that interlocutory injunction.

Q I see.

A By the way, I may say that I think the term "interlocutory" is simply used to distinguish it from a personal injunction. There was no question about its being a final order, but it was a final temporary, in effect, that it expired within a given period of time. It was not an unlimited injunction.

Q Well, now, we don't have before us the 10-month injunction.

A I believe not, Your Honor.

Q And the 10-month injunction was set aside by the Maryland Court of Appeals.

A That is right.

Q On the grounds that it was extended for too long a period.

A That is right.

Q But the Maryland Court of Appeals did hold that the Ex Parte Order was properly issued.

A That is correct.

Q And in doing so, it seems to have addressed itself readily to the operation of the Ex Parte Order, with respect to the enjoining of the meeting that was to be held the night following the night on which these utterances were made.

A Yes, sir.

Q And it said that what happened here, according to the Maryland Court of Appeals, as I read it, was that on the first night, the stage was set for what the police regarded as an inflammatory or violent situation on the following night.

A That is correct.

Q And I don't see anything in here further along the lines that my brother Stewart said; I see nothing in the Maryland Court of Appeals opinion with respect to the mootness at this point. Is that right?

A That is right. They did not consider it.

We would suggest that the Maryland Court of Appeals affirmed this position on the issuance of the existence of a clear and present danger at the time the temporary 10-day

injunction was issued.

Q As of tomorrow if the same court issued the same injunction against the same petitioner?

A You say, if they would?

Q Could they?

A It would depend, I submit, on the background facts. Was there a context of violence in the background at the time they attempted to speak?

Q Do you suppose the tapes read almost exactly as they read in this case?

A I don't know that the tapes are particularly -- they are important, because they are the words that helped create the clear and present danger, but there was a background of violence which was also significant at the time of this particular incident. These petitioners had spoken but three or four days prior in Baltimore City, and their speeches in Baltimore City had created -- it is ironic that matter is before this court, on petition for their conviction for inciting the riot, right now. The State of Maryland is a reasonably small State. All three of the Baltimore City television stations are beamed into Princess Anne, and the three Baltimore City newspapers. The existence of that riot had been given wide coverage throughout Maryland and particularly in Princess Anne. Not particularly, but in Princess Anne. The first thing petitioner said when they came down was,"You heard

of us in Baltimore." They drew specific reference to their speeches in Baltimore. It was set in a background of violence. Now the tapes themselves would not justify the issuance of the injunction.

Q If you had the same information, if they went back to Baltimore, and was again what they said before, and you had the same set of facts as you have in this case, would the same court issue the same 10-day injunction against the same Petitioner?

A It would depend, I submit, not on what they said, but the result, what happened.

Q We are turning "would" and "could". I say "could".

A Could --

Q Could the same court issue the same temporary injunction, for the same 10-day period, against the same Petitioner?

A Could they?

Q Yes.

A Disregarding whether they felt there was a clear and present danger?

Q The answer is yes, I submit.

A Yes, they could do it.

Q And then how fast could they bring that issue back up to us?

of it.

Q No, it is Petitioners Reply Brief.

A Oh, the Reply Brief, yes.

Q Then is it your position that if it did expire in that ten days, it would then be moot?

A That if it expired within those ten days the case would be moot.

Q Without the court deciding it, it would be moot.

A Without the Circuit Court deciding the extension?

Q The respondent had to go to the court, to contest temporary restraining order.

A Yes, sir.

Q Within two days.

A Yes, sir.

Q And suppose within the remaining eight days, the court did not decide it? Would it then become moot?

A Yes, sir, we would believe it would be moot. There only alternative for contesting that injunction would be to violate it.

Q Would be what?

A Would be to violate it, to bring it here.

Q But you said at that time, it was functus officio.

A If within the ten days.

Q After the ten days.

A That is right.

Q How, then, could a person ever get a decision from one of your higher courts on a temporary restraining order of that kind? Would it be possible for him to get it in the eight days that he had available?

A No, sir, not a final decision.

Q Well, then, there is absolutely no way.

A I say no. There is no set procedure. The Maryland Court of Appeals on a number of instances has heard cases advanced on its docket, and it has heard them, I think -- I know of cases that have come up between trial and final order within five days.

Q But as a matter of fact, then almost always the court could grant a 10-day restraining order, and it would become moot before there was any decision in the case?

A In most instances it could, yes.

Q Beg pardon?

A In most intances it could, yes.

Q So there is no way that a man could protect his constitutional right, except by violating the injunction.

A That is correct. I would submit that that is correct, sir.

Q And as you said a little while ago, you thought that was the way for him to do it.

A I think that if you must balance the right of the State to protect its streets and make it safe for its citizens, so that their constitutional rights may be protected by preventing violent speech, and forcing the people who wish to stretch the limits of their right to violating an injunction which they consider to be wrong, I think the burden must lie on those who wish to stretch their right of free speech, because I think you must recognize, Your Honors, that if you say that a State may not by injunctive action prevent speech, even speech which will create a clear and present danger, which will create an absolute riot, as these petitioners did in Baltimore City, that you are of necessity saying that you are going to deprive other citizens of their constitutional rights, of being safe and secure in their person and property. Because this court has pronounced on many occasions that there is speech which creates violence. Speech sets off the motor equipment that is violence, and when that violence is set loose, then other citizens are denied their rights.

Witness the incidents that happened in Baltimore City whenevter these petitioners spoke, before they were enjoined in Baltimore City, an innocent 12-year-old boy was walking down the street near Patterson Park, with his dog, a Negro boy, had nothing to do with the rallies, he was three blocks from the reallying and the crowd from the rallies just swept up and beat him, they put a rope around his neck, and if it hadn't

been for prompt police action, he would have been deprived of his ultimate civil liberty.

Now if you are not going to permit the State courts to enjoin this kind of speech, which will set off that, then you have not to recognize that you are granting someone else the right to exercise or abuse his constitutional privilege at the expense of denying this to other citizens.

Q You are just addressing that to the merits, I tuust.

A I beg pardon?

Q You are just making that speech in terms of the merits, aren't you?

A Yes, it goes to the merits of the issue.

Q Because in terms of the procedural problem that is bothering some of us, I don't see that it has got much to do with it. The procedural problem that bothers me here is that the Maryland Court of Appeals reversed the 10-month order, and then without talking about mootness, it addressed itself to a 10-day order, which was in practical effect a 1-day order, and then the question is, has the Maryland Court of Appeals now made some decision, effective decision which has a First Amendment effect of which we can take cognizance within our constitutional limitations? That's the problem, s I see it.

Well, it has taken cognizance of the fact that the lower courts in Maryland can issue injunctions, as they have

done, we would submit that that is correct, on the mootness isuue.

Q Then you take it that that is an issue in this case? I didn't know that anybody was doubting whether they could issue an injunction. The question is, have you reached the merits? The question is, are these circumstances such that the injunction is a valid injunction?

A My understanding from listening to Mrs. Norton, and in their brief, that that was the very issue they raise, is, should a State court ever have the right to issue an injunction, and we have addressed ourselves to that somewhat extensively.

Q They make a Freedman argument by analogy to Freedman, as I understand them, which is that the procedure in Maryland for challenging the Ex Parte Order is not adequate to protect the constitutional right, but I didn't understand that they say that they can't issue an Ex Parte injunction. At least in appropriate circumstances.

A Freedman didn't deal with an injunction at all. Freedman dealt with the ensorship law in Maryland.

Q I understand that.

A By the way, we would point out that Freedman made it clear that what is required is some procedural requirement of appropriate judicial hearing, and we submit that under the Maryland rule, BB-72, there is that availability.

Your Honors, I have, I believe, taken up most of my time, and I want to leave a few minutes for Mr. Jones to tell you, and address you on the question of the existence of the clear and present danger in this particular instance. He was on the scene at the time, and I think he can address himself best to that.

MR. CHIEF JUSTICE WARREN: Very well.

Mr. Jones.

ORAL ARGUMENT OF ALEXANDER G. JONES, ESQ.

ON BEHALF OF RESPONDENTS

MR. JONES: Mr. Chief Justice, may it please the Court: The ironies inherent in this case, Your Honors, are too numerous and too striking to bear further comment. I would like to restrict my remarks to the clear and present danger as it existed in Princess Anne in August of 1966. This was summarized by Judge Finan, who wrote the Unanimous Opinion of the Court of Appeals in Maryland in this case, at page 122 of the Appendix.

Q What clear and present danger test do you want to talk about?

A The fact that the atmosphere in this community--

Q No, but which one? There have been several formulations of it by this court. One by Holmes, one by Vinson in the Dennis case.

A The Schenk Case, Mr. Justice. The firing of --

Q You don't think that the Dennis Case changed that?

A No, sir. Not under these circumstances.

Q Would you explain that, as you go along?

A Yes, sir, I will try.

Judge Finan, in his opinion, said "The speeches delivered by the appellants must not be judged as they abstractly read or sound in the sequestered atmosphere of judicial chambers, but with the realization that they were in the nature of a harangue, delivered in the humidity of a torrid August night from the Court House steps of the County Seat, whose people were not strangers to racial violence."

We urge that this rally, held on August 6th, must be viewed in the light of existing circumstances, and that the appellants, by their own words, must be regarded as highly dangerous, racial and religious bigots, deliberately operating in the atmosphere of ignorance and prejudice, for the purpose of inciting hatred, strife, and disorder. My little town of Princess Anne, to its eternal shame, first gained notoriety as the scene of Maryland's last lynching in 1933, a fact which was not lost upon the appellants.

The town next achieved national prominence as the locale of serious racial disturbances in February of 1964. The implication that this had since changed, and all has become sweetness and light, was news to me this morning, because I

happened to have served as chairman of the Biracial Commission in this community, during this time.

We submit that it was not mere chance that brought the appellants to Princess Anne, andAugust 6, '66, but rather that this small town, of the many in Maryland that they may have visited, afforded the best opportunity for the spread of their gospel of hatred. They recently arrived from what they must have considered a triumphant appearance in Baltimore City -- an appearance which resulted in an injunction against their return, and convictions on several criminal counts.

We submit further that in these days of mass communications, with the press, radio, and the TV, there is no suchtthing as an isolated racial incident. The riot in Baltimore, Selma, Watts, Jackson, or Rochester fans and revices the flames of racial hatred throughout the land, particularly in a community such as Princess Anne, and Somerset County, which have previously experienced similar cases of civil disorder, endangering life and property, and against this background of Princess Anne, must be placed the appearance of these hate-mongers on August 6th.

Their objectives were set forth clearly enough by them and the cumulative effect of these statements was not lost on the Court of Appeals of Maryland. Nor was it lost on their audience on the night of August 6th.

For these people to come to Princess Anne in the

atmosphere which then existed was, "Fire!" in a crowded theater. It was a match in a gunpowder plant.

There is direct testimony in the record, from Colonel Davidson and Captain Randall that only the presence of the police in large numbers on that night actually prevented a riot. Testimony of one of the town commissioners was that the atmosphere was tense, that it was on the tether, and that it could have gone off at any moment.

The court, the lower court, Judge Dewar, did in fact hear this tape before he signed the original injunction. It was played for him in his livingroom in his home, and after he heard the tape, he signed the order granting the original injunction.

It was a mixed crowd, in roughly the same proportion as the population of our county and town is mixed. It was an ugly crowd. The situation was ripe for violence, and that is precisely why the petitioners were in Princess Anne at that time and on that date. Of all the small towns in Maryland they could have chosen, they picked this one as the one best suited to their objectives.

We submit that there was a clear and present danger, and that the presence of the police on the scene followed immediately by the injunction issued by the Cirt Court was the only thing that prevented this town from going up in flames.

Q This was August of 1966?

A Yes, sir. There have been racial incidents since that time.

In answer to your question, Mr. Justice Marshall, as the town attorney for this community, if these people appeared tomorrow, I would seek a similar injunction for exactly the same reasons.

Q And under the rule established by the Maryland Court of Appeals, you ought to get it.

A Yes, sir, I hope so.

Thank you, Mr. Chief Justice.

Q Was the proceeding based on any statute?

A No, sir. There was no ordinance in the community, and no state law involved.

Q What was the threat?

A The threat was at any moment, that whole town and county could blow up, as it had done in the past.

Q Well, I suppose there is a statute against it in that town.

A Yes, sir, but it would have been a bit late.

Q I understand that. I just say, though, there was a statute against it.

A Against malicious destruction.

Q Were the people violating any law by holding the meeting?

A They had not violated any town ordinance, as such,

Mr. Justice. We had no requirements as to loudspeakers or assemblies, or anything of that nature.

Q What about your streets?

A At this particular location, both of the streets happened to be State highways, at this corner, and the police--the Maryland State Police -- are charged with the supervision of those streets. Presumably, that is one reason they were there.

Q Is there any State law against congregating, meeting on it?

A There are motor vehicle laws against blocking of streets, yes, sir. And this had happened in the past. It happened in the 1964 demonstrations. This was when the police were called to clear the streets.

Q But your injunction was not based on the blocking of the streets?

A No, sir. The injunction was based upon the fact that to this mixed audience, in this community at this time, and in this place, a riot could well have developed, that it was imminent.

Q Were there any local ordinances or statutes directly involved?

A No, Your Honor.

Q To form the basis for this?

A No.

Q This was a judicially fashioned remedy, in a particular situation?

A Yes, sir, the town commissioners and the county commissioners approached the court with a hastily drawn petition, signing an injunction.

Q But under no ordinance or statute?

A No, simply that it constituted a threat to the general welfare, health and safety of the inhabitants of the town.

Q I gather the officers had no difficulty in preventing violence?

A Their physical presence, sir, in considerable numbers, according to Captain Randall, was the only thing that prevented the riots.

Q The statement is that that prejudiced their right to hold a meeting the following night?

A The situation by that time, Mr. Justice, could have become so polarized and so inflamed that there were not enough State Police in the State of Maryland to control it, and that is Colonel Davidson's testimony as well.

Q I notice that your permanent injunction, or your 10-month injunction is considerably narrower than the temporary, the Ex Parte Restraining Order.

A Yes, sir, the 10-month injunction as Mr. Justice Stewart indicated, coincided with the school term of Maryland

State College.

Q But it was narrower in the kind of meeting that it prevented?

A Yes, sir.

Q I suppose this party could have gone on and had meetings under this 10-month injunction?

A The second injunction, as you indicate, wass narrower in that it restrained them from carrying on meetings of such a nature which would tend to invite racial strife.

Q What is your justification for the temporary restraining order, where it enjoined all meetings, whether they would incite racial violence or not?

A Simply because the situation was so inflammatory at the time that almost any assembly of persons immediately set off rumors, counterrumors, and drew others to the scene.

The ten months injunction, in fact, was not requested by us. This was entered by the court on its own initiative. The request for ten months was never asked --

Q I am still puzzled why you don't discuss the Dennis Case, which is a much easier burden for the prosecution, for the State. You don't even mention it in the brief.

Do you think it is just a communis doctrine, rather than --

A The reason I didn't discuss it, Mr. Justice, was I am not familiar with it.

Q Well, I thought you promised me you were going to discuss it. I am sorry.

A No, sir. The brief here, and in the Court of Appeals, relied primarily on the original Schenk Case, and the cases --

Q What is that?

A Schenk, sir. And the cases since then, Chaplinsky, Cantwell, Harris, and others.

Q But Dennis, you don't have to go as far, as I read it, to shout "fire!" in a crowded theater.

A That would be far enough, in this community, sir. That would have been far enough, in this community.

MR. CHIEF JUSTICE WARREN: Very well, Mr. Jones.

MR. JONES: Thank you, sir.

(Whereupon, the above-entitled argument was concluded.)