In the

Supreme Court of the United States

MILLARD GOODING, Warden,

Appellant,

vs. No. 70-26

JOHNNY C. WILSON,

Appellee.

Washington, D. C.
December 8, 1971

Pages 1 thru 42

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v.	:	No. 70-26
JOHNNY C. WILSON, Appellee.	:	

Washington, D. C.,

Wednesday, December 8, 1971.

The above-entitled matter came on for argument at 2:12 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

COURTNEY WILDER STANTON, ESQ., Assistant Attorney General of Georgia, 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334, for the Appellant.

MRS. ELIZABETH R. RINDSKOPF, Suite 1154, 75 Piedmont Avenue, N. E., Atlanta, Georgia 30303, for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 26, Gooding against Wilson.

Mr. Stanton, you may proceed whenever you're ready.

ORAL ARGUMENT OF COURTNEY WILDER STANTON, ESQ.,

ON BEHALF OF THE APPELLANT

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

This matter is before this Court on an appeal from the decision of the United States Court of Appeals for the Fifth Circuit, declaring to be unconstitutional upon its face a Georgia statute proscribing the unprovoked use to or of another, and in his presence, of opprobrious words or abusive language tending to a breach of the peace.

Unless the Court has some other direction it would like to give me, I would like to cover basically what I consider to be the points drawn in issue by the briefs submitted by the two sides.

First of all, the question of whether or not this case is controlled, adversely to our position, by the decision of this Court in Edwards v. South Carolina. I would seek permission from the Court to add one additional citation, what I consider to be a controlling State authority on the interpretation of an element of this particular offense, which I inadvertently omitted from my brief.

That case is the decision of Garvin v. Mayor --

Q How do you spell that?

MR. STANTON: G-a-r-v-i-n, Your Honor.

-- which is found at 15 Ga. Appeals Reports, at page 636, or in the regional system, in the First Series of South-eastern Reports, page 84 -- excuse me, Volume 84, page 91, decision from the year 1915.

Q 84 Southeast?

MR. STANTON: First series.

Q Yes. 91?

MR. STANTON: Page 91 is where the decision is covered, Your Honor.

Q And what's the appellee's name? Garvin against who, Mayor?

MR. STANTON: Mayor.

Q M-a-y-e-r?

MR. STANTON: M-a-y-o-r. That's the title of office, Your Honor.

Q M-a-y-o-r.

Q Incidentally, is a decision in your State of the Court of Appeals controlling throughout the State?

MR. STANTON: It's controlling unless it is reversed by a decision of the Supreme Court of Georgia, which would be in conflict with it. In other words, it would have the same effect on a trial court as a decision of a court of appeals

sitting in that circuit, upon a district within the circuit.

Q What about a trial court sitting in another circuit?

MR. STANTON: Well, our problem is we have only one Court of Appeals, Your Honor. It sits in Atlanta, and have Statewide jurisdiction.

Q Incidentally, are the facts acknowledged to be correct as stated in the Georgia Supreme Court opinion?

MR. STANTON: I'm not really all that familiar with the facts in this case. Because of the facial question that was presented, we did not go into a great detail on the record in the case. I feel that we can take the issues that were raised before the Supreme Court of Georgia as being the issues that were raised before the Supreme Court. In other words, these were the enumerations and the questions that were laid before the State court for determination.

The District Court found, for instance, that there had not been an exhaustion as to the bulk of the material that was encompassed within the application for a writ of habeas corpus, and refused to consider the bulk of the contentions that were brought forth by the applicant, the appellee here, at that point. It turned it only on the facial constitutionality and proceeded from there.

The holding in the case that I've just called the Court's attention to deals with the question of the broadness

of the concept of breach of the peace. And I think it's very important, because I think Georgia, at this point, departs from its neighboring State of South Carolina to a very significant extent.

The Court held there that one who commits a breach of peace, of the peace, is of course guilty of disorderly conduct; but then went on to say, but not all disorderly conduct is necessarily a breach of the peace.

That's where it is merely calculated to disturb or annoy.

And I would submit that this is a pretty sound analysis, long before we ever got into this area of severe constitutional questions, of what concerns the breaking of the peace.

Now, we tend, I think, in our decisions to take disruptions of the peace and actual breaches of the peace and mix them all together, and of course that is the vice I find in many of the ordinances and statutes and common-law offenses as defined in the State courts, that this Court has had to deal with.

In Edwards v. South Carolina, we have a case where the offense was tainted, to my mind, by the circumstances of the approved, State-approved application. And the court there noted the State could not make criminal the peaceful expression of unpopular views.

And that was the writ to which the breach of peace definition of the common law crime, adopted by the Supreme Court of South Carolina, took the situation.

The court went on to note, and I think rather significantly, that the record which it looked at in the South Carolina case was barren of "fighting words", as that term is used. And South Carolina had extended the concept of breach of peace to encompass all forms of disorderly conduct, including conduct which was merely calculated to disturb or annoy, and therein was the vice of this particular common-law offense.

I think we really get into a very similar situation in Cox and the Terminello v. Chicago, where we have an application my State courts approved, therefore becoming an authoritative interpretation of the ordinance or statute involved, which reaches out beyond the idea of breaching the peace, and goes to the disruption of the peace through disturbing or annoying antics, conditions or words.

And the court has held that that cannot necessarily be consistent with the First Amendment and made unlawful.

The decision of the court below, in effect, incorporates on this issue the decision of the District Court, and I was really somewhat surprised about this, because the first portion of the opinion in the Court of Appeals was not even argued. The first question was just submitted. We spent the

entire time arguing this question. They ruled on the first issue on the theory that the Supreme Court of the United States should have the benefit of the Court of Appeals' determination, and then, on the one issue that was really controlling in the case, didn't give us any real benefit of their determination.

They --

Q May I ask --

MR. STANTON: Yes, sir.

Q -- looking at the case, it has such an unusual history. Apparently he got a concurrent sentence on count four, didn't he?

MR. STANTON: Yes, sir, concurrent with count three.

Q And count three, is that also under this statute?

MR. STANTON: That's also under this statute.

Q And on that -- I see, so he's been bailed, he's still -- he got bail on August 11, '69. And then he still would be loose, he still has --

MR. STANTON: About a month and a half.

Q -- about a month and a half to serve. So there's no concurrent sentence problem here, then?

MR. STANTON: No, sir. His first two sentences have been served. Those were the assault and battery sentences. Service of those was completed before the application for writ was filed in the District Court. And it was filed on the basis

of the final two concurrent sentences, which were concurrent one with the other.

Q Consecutively is what you have here, though.

MR. STANTON: Well consecutive with the first two.

Q Well, the appellee's brief says that counts one, two and three were to be served consecutively, and count four was to be served concurrently with count one.

MR. STANTON: That would be correct. Count three would be consecutive to count two. That is, that's one of the counts that deals with this particular statute.

Q He got a year on each, didn't he? So that would actually -- his aggregate was three years? He got a year on each counts, one and two --

MR. STANTON: Three years.

Q -- and a year on count three, and on four; four was to be served concurrently with three?

MR. STANTON: Three; not one but three.

Q So that would be three years, wouldn't it?

MR. STANTON: Yes, sir.

Q And he started serving on April 15, '68, and was submitted to bail on August 11, '69, is that right?

MR. STANTON: Good time took care of the difference.

Q Yes, and he would still have some time to serve, if he's refused bail?

MR. STANTON: I think it's about a month and a half.

I have not computed it out. He has time left on this sentence; at the time the writ was granted, he was committed to bail.

The court below, the District Court, seemed to feel there was a great deal of confusion in the Georgia cases in this area, those areas that authoritatively construed the provision under attack.

I think there was a rather obvious mistake in relying upon what were really bare-bone style disposals of questions of procedure and evidentiary sufficiency in certain cases. This resulted from the fact that prior to 1902, when most of the authority in this case came out, we had a one-tier appellate court system in Georgia. And of course there was a tendency to take a decision, decide it on exactly what was brought before it, and just really enter what was in effect an order on the case.

Many of the decisions dealt with questions of the provocation element. And for some reason or other, there was a period of time when apparently the trial courts were instructing the jury that this was or was not provocation.

Well, of course, provocation is not a defense under this offense, or the lack of it; it's an element which the State must prove. And therefore, of course, it was wrong to withdraw this question from the jury and, in effect, shift the burden to the defendant of coming in and showing a certain set of facts was provocation.

He had no such burden, any evidence he brought into that case would simply go against the State's proof of law of provocation, which is an element it must prove under this offense.

So I think when we view the offense in that area, actually view the decision as opposed to the language -- don't get hung up on the language of these order type decisions -- we see that they are quite consistent.

In Fish v. State, which is one of the cases that they indicate they feel there is a conflict between the Wilson decision, some 63 years later, we have the language used in the charge "you swore to a lie". And the trial judge instructed the jury that this was opprobrious words and abusive language, and the court said, No, you can't do that. You cannot instruct the jury as to an element of the offense. Which I think seems pretty obvious, that you cannot tell the jury that this person had violated a statute. Not at least under our Georgia law; you can't even make, as a trial judge, a comment on the evidence, much less withdraw, in a criminal case, a portion of the charge of the offense from the consideration of the jury.

So I think when it's viewed against the backdrop of what's really involved in the case, the decision is quite clear.

And I think that the real difference in the quality of the language that was used in the Wilson case than that which was used in the Fish case.

There are certain words that quite obviously are going to be opprobrious or abusive, if used to another person, as the New Hampshire Supreme Court said, without a smile upon your face, so to speak, in Chaplinsky.

Q Well, what's the essence that is used here, the epithets or the "I'll choke you to death", "if you ever put your hands on me again, I'll cut you open"?

MR. STANTON: I think it's the use of the abusive language to the other person.

Q Well, is the epithet standing alone? Is that a violation?

MR. STANTON: I think it would be a violation standing by itself, Your Honor.

Q Even if these other words hadn't been added?

MR. STANTON: Even without the other words in there. Of course, --

Q And what would be "you son of a gun"?

MR. STANTON: This, of course, is a question of common knowledge and understanding. Now, what is it when it's used under those circumstances? I would think it wouldn't tend to a breach of the peace under those circumstances?

Q That would or would not?

MR. STANTON: I would think it would not. I mean, it's a matter of common knowledge and understanding of a hypothetical reasonable man -- and I always put myself into the

position of being a hypothetical reasonable man; but I may not be. But my thought would be that "son of a gun" would not be, perhaps, words that would tend, under ordinary circumstances, naturally --

Q But if you say "bitch" instead of "gun", then it is.

MR. STANTON: It carries a much heavier connotation, I think. A higher degree of opprobrium, one may simply be offensive or not desirable or something you would rather not have said to you; the other one, of course, carries with it a degree of infamy, opprobriousness, or whatever it has.

Q Well, you might use a perfectly innocent word or name that by innuendo would create it. Suppose you called a man a Benedict Arnold, would you say that would be covered by this statute?

Or could be, under some certain circumstances?

MR. STANTON: I would certainly think that the crime of treason is an infamous crime, and of course the clearest thing I could say if I had to come in and try to equate synonyms, and I don't think you can ever take one word in the English language and say there's an equal for it. I mean, if did, we wouldn't need all the words we have.

But opprobrium probably comes closest to meaning scurrilous. It probably comes closest to being infamous. Of course treason is an infamous crime, at least in my mind it

is, and I think in the common knowledge and understanding of people treason would be an infamous crime; so, in effect, what you're saying to a person, you accuse him of being a Benedict Arnold, is "you are a traitor". And if that was used under such circumstances to a person that the backdrop of the circumstances were such that under ordinary conditions it would lead to a breach of the peace, a resentment by physical violence of the person to whom it's directed, then I think it definitely would be, yes.

Q At the least it would be, as I understand it, they would have to be in the "fighting words" category; is that right?

MR. STANTON: We feel that this statute has always been applied to exactly that kind of language.

Q "Fighting words"?

MR. STANTON: The "fighting words" idea. And if you view all the decisions, for instance this "you swore to a lie", well, of course, this came out of the backdrop of a criminal or civil procedure, anyway it was a witness to whom this was directed. This, of course, is charging, at least what was at that time infamy to perjure one's self, to swear to a lie.

I would think that would be an opprobrious word. And I think if it were used to a person, under the right circumstances, of course, it would likely invoke the person to resent by physical violence.

Q Are you suggesting that's the way your Georgia courts have limited the statutes, to argue it?

MR. STANTON: Your Honor, I think the real case on this, of course, is the Georgia Court of Appeals' case in Elmore, which was in 1951, and is set forth in our brief. This is really one of the few cases that really discusses this thing in the kind of length and so on an appellate court discusses it.

Dillard, which the Court rejected before, does, too. I think it's perfectly applicable. There are really the only two, what you might call, extensive discussions of the principles in this case.

And in Illinois they really emphasized that they termed, and I think what may be a real good terminology for this thing, the court talks about, I think "violent reaction", but in the case out of California, Cohen v. California, about words likely to produce a violent reaction.

They talk about physical resentment, and I think in the context of this statute that's probably the best terminology you could use to describe what you're talking about.

Q That's what -- is that Elmore v. State?

MR. STANTON: Yes, sir.

Q Back in nineteen --

MR. STANTON: '15; and the decision is --

Q No, it says nineteen -- wait a minute, it's the

Elmore case?

MR. STANTON: The Elmore case, it's set forth in our brief, Your Honor.

Q Yes.

MR. STANTON: They talk about language addressed to a prisoner. In other words, here's a person in a cell. Now, obviously, this person -- we're going back to our reasonable, ordinary circumstances -- this person doesn't physically, at that moment, have the capability to resent this by physical violence.

But he is protected from this kind of language, protected by the veil of this offense from being subjected to abusive and opprobrious language under these circumstances, and he's not rendered outside the pale of its protection, simply because at that moment he cannot, as they use the term, physically resent.

Well, this says two things: one, it says the necessity, you look towards physical resentment, the potential or likelihood of it, as determining whether or not there's been a violation of the statute. Obviously the man could ignore you, by yelling back at you, if he were in a cell; he could do many things that might be disturbing, but he can't do one thing, and that's get at you.

But he's still protected by it.

And they went on to talk about a person on the

opposite bank of an impassable torrent. They talked about one who is without power to respond immediately to such verbal insults by physical retaliation. And then they likened it, perhaps dramatically, to a paralytic, who is utterly unable to break the peace by any act of physical violence.

Well, this says two things: one, that they're looking toward the physical violence idea of breach of the peace; and, secondly, that you're looking toward an ordinary-circumstances situation, that you don't take and color the offense by the nature of the person against whom this particular offense is rendered.

In other words, it's not a question of a person being highly susceptible to this, or another person not being susceptible, or a person being physically overpowering and thus a bully of types; I mean you just don't go on that basis. It's the ordinary circumstances, viewed from the reasonable man's hypothesis. And therefore, a paralytic,who could not, under any circumstances, resent this by physical violence, is still protected by this particular statute.

This is not a victimless crime, moral order types statute; it's protecting a particular individual. That is the person who's the victim of the offense, to whom this language is addressed under these circumstances.

Q From a verbal assault?

MR. STANTON: From what, in effect, I would describe

as a verbal assault.

Q At law school we learned in common law that words could not make an assault; they could unmake one. If this were not a size time, I'd run you through.

MR. STANTON: But -- and of course that's incorporated by statute, whereas, even in a battery situation in Georgia, the words can come in for the purpose of, perhaps in a little different light and connotation, for the purpose of perhaps being a justification if the other person does resent physical violence. That's a rather unusual quirk of Georgia law, but it's in there, nevertheless.

Q Do you think -- now that I've interrupted you -- that your -- and your answer to my brother Brennan's question -- that your case is right within the four corners, practically of Chaplinsky v. New Hampshire?

MR. STANTON: Your Honor, I don't see any way we could -- if we described and made unlawful "fighting words", somebody would be up here contending that that was not aequately defined.

There may be 200 ways you could sit down and describe "fighting words". The Court, I think in one of the last cases, said that they were personally abusive epitaphs which, when addressed to the ordinary citizen or as a matter of common knowledge, inherently likely to provoke violent reaction.

The Georgia Legislature, back during the reconstruction

-- really contemporaneously with the enactment of the Fourteenth Amendment, by which this particular statute is now tried, -- defined in terms of abusive language, opprobrious words, and went on to couple together the elements. There is no history that would indicate that this has ever been applied to anything except what would appear, from common knowledge and understanding, to be "fighting words" within Chaplinsky.

Q Well, then, your answer to my question is yes?

MR. STANTON: Yes, sir.

Q You think it's within Chaplinsky v. New Hampshire and that in order to affirm this judgment we would have to overrule Chaplinsky; is that right?

MR. STANTON: No, sir, I don't think we'd have to overrule Chaplinsky, because Chaplinsky in effect said that "fighting words" --

Q I said in order to affirm -- you want this judgment reversed, don't you?

MR. STANTON: Oh, I'm sorry, Your Honor. Yes. I'm so used to sitting on the other side.

I would like to have it reversed; and in order to affirm I think you would have to overrule Chaplinsky. Or at least make such an extensive exception to it that it would have no more validity.

Q Now, I don't quite understand that. Because there's no statute -- or there's no case in Florida, is there,

or Georgia, that says that this statute is confined to "fighting words"?

MR. STANTON: There's never been that determination, as such, in that language, Your Honor.

Q And even if what the -- what was said here, anyone would think were "fighting words". The theory that the District Court went on was that it was overbroad, it might mean "fighting words" if it also reached other things, if it was overbroad, hence it couldn't be used in this case, either. Is that the theory that you go on?

MR.STANTON: Well, the court went on, the District Court went on the theory, and it talks about the fact that this could be equated with "offensive" words, well, of course, obviously, opprobrious words, abusive language would be offensive. But not all offensive words would be opprobrious or abusive.

Q Well, I understand that, but even if this statute weren't vague as to what was -- even if anyone could understand that what was said here was covered by the statute, and so this person who spoke these words had notice that he had violated this statute, the District Court said it was, nevertheless, overbroad. It would cover a lot of other things, but no one could really tell what was covered by the statute.

MR. STANTON: This case, of course, has twisted and

turned, as has --

Q That hasn't anything to do with Chaplinsky or anything else.

MR. STANTON: Well, I have a little difficulty, Your Honor, in seeing how it would cover any conduct that would be otherwise protected.

We are talking about "fighting words" and --

Q No, we're not; the statute covers more than "fighting words".

MR. STANTON: Not -- as I say, I feel it's synonymous with "fighting words", in --

Q Well, that isn't what the District Court thought, and this is a District Court sitting in the State. Judge Smith didn't construe the State statute to be limited to "fighting words". He construed it precisely the reverse.

MR. STANTON: Look at the way in which Judge Smith went about it, though. He took the synonyms that were out of the dictionary, and he took "disgraceful, abusive, insulting, offensive".

Q Well, who would know more about what the Georgia law means, Judge Smith or this Court?

MR. STANTON: Well, I would suggest very strongly that Judge Smith was not on target in construing the Georgia law in this particular case. For instance, he got off on the Fisk case, and then we brought in the Dillard matter, but he

said, Oh, no, that deals with another section.

Yet the two sections are linked by the terminology, "and whosoever in like manner", meaning certain operable elements discussed in Dillard, but obviously bear upon this particular decision. And Dillard, of course, was the very first decision to indicate that this was confined not to areas that annoyed and not to areas that were disturbing, but to actual words that were likely to invoke a breach of the peace.

Now, just to show the way in which the District Court went off, it said, for instance, it could see no reason, constitutionally, for protecting the kind of conduct that was engaged in. But it went on to say: as construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute.

But the Louisiana statute was so construed that it applied to conduct on the application itself that ought to be protected.

Now, he cannot cite an instance in which this has been applied to conduct that ought to be protected, but he follows this circular pattern of reasoning down to conclude that this case is broader than Cox v. Louisiana, which I simply cannot follow the reasoning on.

In other words, he says the conduct isn't protected,

ought not to be protected, can be made unlawful in contrary situations where there's a certain protected type conduct involved. And the statute was construed to cover it.

And I certainly can't see how this statute, as construed, could even reach the conduct involved in Cox v. Louisiana, where the whole pattern of application, we've had the same civil disobedience situations in Georgia that occurred in Louisiana, and, to my knowledge, this is the only time that a statute has ever been involved in a case that arose in issue out of civil disobedience.

This was, as I understand the facts, was a demonstration addressed to an induction center of the United States Army. There were a number of demonstrators, and of all the demonstrators it was only Wilson who fell afoul of this particular statute. Surely, the demonstration annoyed the Army. Certainly it was of some disruption, I'm sure. It was certainly sufficient to bring the police department out to see what was occurring in the area. But only, to the best of my knowledge, Wilson has been involved in this particular type of offense.

It's not a dragnet of cutting down, stifling dissent.

Q What does this mean, in the footnote: "However, the higher courts have thus far failed to provide a precise standard themselves. Such expression is needed if the lower court are to be continually called upon to inquire into the validity of similar State statutes and local ordinances.

Cantwell v. Connecticut gives the most likely basis, insofar as it is still valid"?

MR. STANTON: I don't know, Your Honor.

Q It does not suggest that he thought that your courts have given this a broader reach then just the "fighting words".

MR. STANTON: Well, he of course took that view. But there's not a basis in any of the decisions to support his view.

In other words, there's no authority in Georgia that would apply this to anything other than this particular thing that I would call, as a matter of common knowledge, "fighting words".

If you note that in the Chaplinsky statute, you have this question raised, and they said they have supplied judicially to their statute one of the very same things that is in this statute, that was written into it, that's the idea of tending toward the breach of the peace.

We said that, Sure, you couldn't come out and say and outlaw all opprobrious words --

Q Was Judge Smith a Georgia practitioner before he came on the Circuit bench?

MR. STANTON: Yes, sir. And he was a Georgia Superior Court judge, also.

Q City judge?

MR. STANTON: Yes, sir.

Q I guess he knows a lot more about Georgia law than I do, then.

MR. STANTON: Your Honor, I can only say you can take the case, as they are, and read them.

Q Yes.

MR. STANTON: And decide upon them. I think Judge Smith made a gross error. We wouldn't have this case up here. I think he made a severe mistake on Georgia law. I don't think he adequately interpreted it.

Here again, obviously there's a conflict in this particular situation, but there just isn't the basis --

Q Who was on the panel in the Court of Appeals?

MR. STANTON: We had Judges Simpson, Morgan, and Ingraham --

Q Who's from Florida?

MR. STANTON: -- they were from Florida, Georgia, and --

Q Who was from Florida?

MR. STANTON: Judge Simpson, I believe, Your Honor.

Q Where is he from?

MR. STANTON: I believe he's from Jacksonville; I may be wrong.

Q And who was from Georgia?

MR. STANTON: Judge Lewis Morgan.

Q Morgan. Oh, it's Morgan that's from Georgia.

MR. STANTON: And we had one judge, and I believe he's from Texas, Judge Ingraham; but I'm not sure.

Q Now, he's not -- he specifically agreed with Judge Smith.

MR. STANTON: During the argument we submitted to the court, there wasn't any real consensus among the judges. There wasn't anything that would reflect that the opinion would be as right down the line with what Judge Smith wrote that --

Q No, but did you submit to the Court of Appeals that Judge Smith's understanding of Georgia law was in error?

MR. STANTON: We submitted it on the same basis, practically the same brief was presented.

Q And they specifically rejected you?

MR. STANTON: And they rejected us, yes.

Q Another Georgia judge?

Q And there's not a Georgia judge sitting here!

MR. STANTON: That's unfortunate, Your Honor, we were not consulted on that matter, at all.

(Laughter.)

I just feel that of course the Court is going to have to take the authoritative determinations made by the Georgia court and not read into them the issues that are, I think, brought in, outside by misinterpreting what the decisions were. I don't know how you can wipe out the Elmore case on

physical resentment. And if you cannot -- if you cannot -- constitutionally prohibit this kind of conduct, I think perhaps Judge Smith's real view was that we were prohibiting conduct that had fallen -- not so much that he was misunderstanding the Georgia law, but that he was misunderstanding the effect which this decision would have on the other decisions on this Court.

For instance, I don't believe this statute could ever reach the Cantwell conduct. I doubt very seriously it could ever reach Feiner's conduct in Feiner v. New York.

It might very well have reached the conduct of the man mentioned in Mr. Justice Douglas's concurring opinion, who was calling out epitaphs to Feiner while he was speaking. It might, under the circumstances. That would be a question we'd have to look at.

This is obviously intentional conduct. It's directed conduct. It directs to a specific victim. It's intended to take effect upon that victim. And it is intended, or likely to produce physical resentment from him. But this is in "fighting words" that I don't believe any Legislature in the country can define "fighting words" other than as "fighting words".

And there again we have the problem of what is the standard.

The final point I would make, Your Honors, I feel that the decisions of this Court approve exactly what the Georgia

court has done towards the decisions I've construed in this case.

I can only submit it to you on the view that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stanton.

Mrs. Rindskopf.

ORAL ARGUMENT OF MRS. ELIZABETH R. RINDSKOPF,

ON BEHALF OF THE APPELLEE

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

I'd like to open my remarks by adding a footnote as to the posture of this case. We've already discussed the fact that the appellee here has approximately two months left to serve in this sentence.

In addition to that fact, there is a three-judge court which has passed on the appropriateness of this statute as well, this would bear on the point we were just discussing as to how many Georgia judges have ruled on the constitutionality of the statute. In fact, Judge Morgan sat along with Circuit Judge Griffin Bell, and District Judge Alexander Lawrence.

When the statute was again attacked in a separate action, they accepted the opinion of the Fifth Circuit Court of Appeals; agreed with it; and again held --

Q They sat as a District Judge with the District

Court?

MRS. RINDSKOPF: Yes.

Q Didn't they have to?

MRS. RINDSKOPF: I beg pardon?

Q Would they not be bound by the Court of Appeals decision, sitting as the District Court? Did they have any choice but to follow?

MRS. RINDSKOPF: That's a very good point.

They would.

Q They'd have to follow it?

MRS. RINDSKOPF: Yes, yes, they would.

Q Mrs. Rindskopf, why did the appellant wait for almost a year to bring his habeas application, do you know?

MRS. RINDSKOPF: I did not handle this below. I believe the reason is because he was going through the Georgia courts. The record reflects that he appealed it through the Court of Appeals and also applied for certiorari in this Court, and I expect that would probably have taken him about a year's time. I believe he did promptly file his habeas in federal court.

To return to my opening point, the point I'd like to make is that not only do we have a three-judge court ruling, we have a Fifth Circuit ruling, we also have a new statute in this area, Georgia Code Annotated 26-2610. The new statute is, really, for all intents and purposes, the same one that

we're considering here, yet it continues to be applied.

Now, I think that may go to the question of what happens if this Court should overrule the Fifth Circuit Court of Appeals? What effect will that decision have? And it would appear that the Georgia courts seem to feel that the new statute is something different, and that a separate ruling is going to be required on that statute.

Naturally, we're arguing that this Court should affirm the Fifth Circuit decision, and I think this may support our argument, simply by the point that any decision that we get on this particular case is probably going to have little effect, both to our appellee and to others in like situations. There will be no others in like situations.

Q I'm having a little difficulty hearing you.

MRS. RINDSKOPF: I'm sorry. I have this problem.

My remarks, I think, can be brief. I think the discussion that's already gone heretofore indicates the signal fact here, and that's that no one knows what an opprobrious word is. The Georgia Supreme Court said that the words used by our appellee here were, per se, opprobrious; whatever that may or may not mean.

I think this is what caused Judge Smith to overrule the statute. He felt that if individual words can be stricken by a statute, that by that act, the First Amendment has been infringed upon.

Q Well, do you think anybody knows any better what "fighting words" are?

MRS. RINDSKOPF: I'm not certain, and I'm glad I don't have to ask that question.

Q Well, that was upheld constitutionally in Chaplinsky --

MRS. RINDSKOPF: Yes.

Q -- by, as I remember it, a unanimous court here, wasn't it, in 1942?

MRS. RINDSKOPF: I believe that's correct. I think there were some concurrences.

Q Well, what are you going to do -- what do you do about question in --

MRS. RINDSKOPF: Well, I simply say that in this situation we have a statute that goes much, much more broadly than simply "fighting words". The question as to whether the words uttered in this situation are "fighting" is another question.

I'd like to stress the fact that we do have here an assault and battery committed. Now, our appellee has already served time for that assault and battery. What we're left with is pure speech that --

Q Well, not very "pure" under the circumstances.

MRS. RINDSKOPF: Well, he's been punished for his conduct. In effect, what happened was: if he had used any

other words, in combination with the assault on the person involved, he would not have been subject to this statute.

Q Well, --

MRS. RINDSKOPF: We're really talking --

Q -- I have the same question in my mind that Mr. Justice Stewart was just pressing: Why isn't this a Chaplinsky case?

MRS. RINDSKOPF: Simply because I believe the statute, as drawn, does not make clear that it is "fighting words" that are proscribed.

Q In other words, what you're saying, I gather, is that even if, as to these very words, they fall within Chaplinsky, the overbreadth of the statute gives him standing with active -(inaudible)- that even though as applied to him it might not be constitutional?

MRS. RINDSKOPF: Well, I don't agree that as applied to him it is constitutional.

Q But I say even if it were.

MRS. RINDSKOPF: Even if it were. Correct.

Q Isn't that the doctrine that we applied in --

MRS. RINDSKOPF: I believe this is what we applied in Shuttlesworth -- or what you have applied.

Q Well, how can you argue that it isn't constitutional as applied to him?

Q In the light of Chaplinsky?

MRS. RINDSKOPF: Simply because I think, as interpreted by the Georgia Supreme Court, what they are saying is that these particular words fall within the statute. They are, per se, a violation of the statute. And I don't believe that a statute can say that.

And that's, in effect, the reading we have on this statute.

Q Well, per se, opprobrious words in any State in the Union?

MRS. RINDSKOPF: I beg your pardon?

Q Aren't they opprobrious terms in any State in the Union? Let's lay aside for the moment the Georgia statute. Then you see if you can distinguish the Georgia statute from the New Hampshire statute.

MRS. RINDSKOPF: Let me make certain I understand the thrust of your question.

Q Well, aren't these words, per se, offensive, opprobrious?

MRS. RINDSKOPF: I think the answer to that question, and I would say, to begin with, that I don't believe I am competent to make an answer; I think it depends on who says them. These are words that have been quite controversial. And I think, particularly in interracial contacts, the meaning may be different than what ordinarily we would assume the words to mean.

Q Is there any evidence to that effect, that they have a different meaning?

MRS. RINDSKOPF: Once again, I will have to beg your --

Q They were backed up with an assault, weren't they?

MRS. RINDSKOPF: They were part of an assault. Correct.

Q But this was an assault that mounted gradually, first verbal and then --

MRS. RINDSKOPF: No, no.

Q No?

MRS. RINDSKOPF: It was concurrent, instantaneous. In other words, --

Q You mean he was talking while he was acting?

MRS. RINDSKOPF: It was a reaction in anger, that's correct. As the confrontation occurred. These words were uttered. He lost his temper, I think is what we have to say.

Q Your client is a Negro?

MRS. RINDSKOPF: That's correct.

Q And he -- what -- how did he get into an altercation with a white man?

MRS. RINDSKOPF: The white man was an officer.

Q A police officer?

MRS. RINDSKOPF: That's correct.

Q Where was -- what were the circumstances?

MRS. RINDSKOPF: The circumstances were a picket before a draft board, and, I might add, that this occurred in 1966, prior to a number of decisions, for instance, Bond v. Floyd. It was clearly an emotionally charged situation.

Q Will you go back --

Q He was also prosecuted and convicted for a federal offense for this --

MRS. RINDSKOPF: Arising out of the same incidence, that's correct.

Q May I go back to the question I asked your opponent: Neither federal opinion here gives us any facts. Are the facts as stated in the Georgia Supreme Court opinion acceptable to both sides here? As being a correct statement.

MRS. RINDSKOPF: I believe they are correct.

Now, once again, I have to ask your indulgence, I did not handle this at the trial court level. So I'm not certain of that, but I believe the facts as stated are correct.

I have a few very brief things to point out about the statute as well.

One is that the statute would appear to have no intent or wilfulness requirement. It's simply an opprobrious word which tends to breach the peace. Our position would be that without any kind of wilfulness and with the only standard that of one tends to cause a breach of the peace, it's an unascertainable standard, and one which a person cannot be

expected to understand or comprehend, in order to gauge his action accordingly.

I think it's also worthy of note, the Court has heard a number of arguments today about victimless crimes. I think we have such a situation here. The appellee has already been punished for his assault. What's left are a few profanities that he uttered in anger, and I wonder that a statute can, in this day and age, be held by the highest court in the State to, per se, outlaw words that he uttered in such a situation.

We would feel, in conclusion, that this Court's opinion in Cohen v. California bears very heavily on the situation presented here. My reading of that opinion would be that it's improper for a State Court to outlaw individual words. And that's precisely what --

Q Well, have you read page 20 of the opinion?

MRS. RINDSKOPF: I beg your pardon? I hope I have.

Q Which seems -- I have it right in front of me -- explicitly to reaffirm Chaplinsky v. New Hampshire, as distinguished from --

MRS. RINDSKOPF: I'm assuming that Chaplinsky is good law. I have not assumed that that has been overruled.

Q It points out that in Cohen the words were not addressed to anybody; no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

MRS. RINDSKOPF: Well, but what the Supreme Court of Georgia said was that by the utterance of these words, he offended the statute.

Q Well, in the circumstances that were present. I mean, they certainly --

MRS. RINDSKOPF: But that's not what the court said.

Q I know, but they spoke in the context of the facts that they gave. You can't say that the Georgia court meant that any time you say these words in your basement, that you've violated the statute.

MRS. RINDSKOPF: No. But as I read that opinion, it refers to "at any time these words are said within the hearing of others" that is, per se, a violation of the statute.

The words used by the court were, in and of themselves, "are opprobrious".

Q Well, that may be, but that isn't -- we have the -- we know the facts in which, the circumstances under which these words were spoken. Don't we?

MRS. RINDSKOPF: Yes, we do.

In conclusion, I would simply stress the fact that to reverse the Fifth Circuit Court of Appeals decision is, in all probability, going to affect no one. We feel that the statute as presently drawn is overbroad, that it presents a standard that our appellee could not have hoped to have understood or to have foreseen, at the time he began his picketing

in this situation, and that consequently the Fifth Circuit Court of Appeals opinion should be upheld in this instance.

Q But he did know about it when he started fighting?

MRS. RINDSKOPF: I beg pardon?

Q He did know about it when he started to fight, didnt' he?

MRS. RINDSKOPF: He did know about it?

Q Yes.

MRS. RINDSKOPF: What I'm saying, Mr. Justice Marshall, is that if he knew of the statute he certainly could not know what would be offensive to it, because of the interpretations of the Georgia Supreme Court.

Q Well, what respect did he give the statute against assault and battery?

He didn't know about that one, either?

MRS. RINDSKOPF: Well, he's been punished for that. We don't question the situation under assault and battery.

Q Well, I see something of these two being so close together that, according to you, you don't even know which was first.

MRS. RINDSKOPF: They were -- they occurred concurrently.

Q Yes?

MRS. RINDSKOPF: I don't think there's any question. I have grave questions as to whether he can be punished twice

for what was, in effect, one offense. But that is presently the law in Georgia.

And we don't raise that here.

It seems to me that what they're saying is that the fact of his utterance of these words, by that fact, then also rendered him subject to the statute that we attack here, the opprobrious words statute.

Q Mrs. Rindskopf, did you say earlier in your argument, -- it was at a time when I wasn't able to hear you very clearly --

MRS. RINDSKOPF: Yes?

Q -- that there's a new statute, an amended statute?

MRS. RINDSKOPF: There is a new statute, and the cite to that is 26 -- Georgia Code Annotated 2610.

Now, the point I make is that that statute reads almost identically to the one that we consider here. I think what's relevant about the presence of that new statute is that the Georgia courts have continued to apply the new statute. It would --

Q That was enacted in response to the holding of unconstitutionality of the old one?

MRS. RINDSKOPF: No, it was enacted in '68, effective July 1, 1969.

Q Is there reference to it in your brief, some-

where?

MRS. RINDSKOPF: I believe there is. Yes. It appears, I believe, in the Statement of Facts, and I think the three-judge court opinion is also cited there.

I point that out simply to stress the fact that I believe that any decision overruling the Fifth Circuit Court of Appeals in this case is going to be of little effect, because I believe that the position will be, in the Georgia courts, that they have a new statute. Apparently that's how they're operating now. They do --

Q And that's -- I don't -- 26 Georgia Code Annotated, Section 2610?

MRS. RINDSKOPF: That's correct.

Basically what happened there was that they reordered the old opprobrious words statute; they put some sub-headings in it, and added provision regarding use of the telephone.

Q But it's basically the same?

MRS. RINDSKOPF: Yes.

Q In substance, you say.

MRS. RINDSKOPF: Yes, it is.

But, as I say, I don't know whether --

Q It's being treated as though it's different?

MRS. RINDSKOPF: As if it's new.

Q Yes.

MRS. RINDSKOPF: That's correct.

Q I see. Thank you.

MRS. RINDSKOPF: Thank you.

MRS. CHIEF JUSTICE BURGER: Mr. Stanton, you have a minute left, if you wish to use it.

REBUTTAL ARGUMENT OF COURTNEY WILDER STANTON, ESQ., ON BEHALF OF THE APPELLANT

MR. STANTON: Well, just to clarify one thing.

The reason why they're continuing to utilize sections under the statute is because, in light of the nature of this case and the way in which it came to this Court, we do not feel the decision of the Fifth Circuit precludes prosecutions under the statute, until this Court has spoken, one way or the other.

I may be wrong, but people have called me and asked me that, and I've given them my opinion to that effect. This was not an injunctive type of procedure; it was directed only to this particular habeas corpus applicant. And it only involves that case, until we have a broader overview.

The new statute you will find in the white pamphlet. This is a result of a recodification of the Georgia law, and it bears the same numbers as the old area, but the new 26.2610, which Mrs. Rindskopf referred to, will be found in the white pamphlet.

Q What white pamphlet?

MR. STANTON: It's the one that accompanies the Georgia Code, Annotated Supplement.

Q Right. Nothing that has been filed in this case here, though?

MR. STANTON: No, sir; it would be in your library in a white pamphlet. If you go pull the green one down, you are going to find an old 2610; that has nothing at all to do with this. And 6303 was simply moved to that area.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stanton.

Thank you, Mrs. Rindskopf.

The case is submitted.

(Whereupon, at 2:56 p.m., the case was submitted.)