In the

Supreme Court of the United States

MARGARET PAPACHRISTOU, et al.,

Petitioners,

vs.

CITY OF JACKSON VILLE,

Respondent,

No. 70-5030

Washington, D. C.
December 8, 1971

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MARGARET PAPACHRISTOU, et al., Petitioners, v. CITY OF JACKSONVILLE, Respondent.	No. 70-5030

Washington, D. C.,

Wednesday, December 8, 1971.

The above-entitled matter came on for argument at 11:10 o'clock, a.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:

SAMUEL S. JACOBSON, ESQ., Datz, Jacobson & Dusek, 320 Southeast First Bank Building, Jacksonville, Florida 32202, for the Petitioners.

T. EDWARD AUSTIN, JR., ESQ., State Attorney, Duval County Courthouse, Jacksonville, Florida 32202, for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 5030, Papachristou against Jacksonville.

Mr. Jacobson, you may proceed.

ORAL ARGUMENT OF SAMUEL S. JACOBSON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case involves the conviction of eight persons for vagrancy in the Municipal Court in the City of Jacksonville, Florida, under the Jacksonville vagrancy ordinance.

Petitioners, in the trial court and through the Florida appellate system, contended that the ordinance upon which they were convicted was facially invalid, and they are now here on a writ of certiorari to the First District Court of Appeals of the State of Florida, where they again offered the same contention.

Q It is -- in your brief you talk both of the ordinance and, for reasons that I think I understand, also of the State statute, --

MR. JACOBSON: Right, I just --

Q -- a very similar one, which is on assimilative --

MR. JACOBSON: Right. I just was going to mention that. We've treated that on the possibility that the City might attempt to fall back, after our brief was filed, on the

State statute. They've not done so, and I don't think the State statute is involved in this case.

Q So it's common ground now that what's at issue here is the ordinance and only the ordinance?

MR. JACOBSON: Yes, sir.

Q Right.

MR. JACOBSON: They are very similar, so that I don't think it makes very much difference.

Q All right.

MR. JACOBSON: But there's no question that the statute is not involved now.

The only contention that we do offer is that the City Ordinance is, on its face, unconstitutional and invalid.

We contend, at the same time, that the whole ordinance is unconstitutional.

We argue that the petitioners in this case were convicted generally of vagrancy, and, at the least, it cannot be said, at least with regard to seven of them, that they were convicted under any specific sub-part of the ordinance in question; and that, as a result, under this Court's previous rulings, that they are able to show that any part of the general legislation is unconstitutional, then they are entitled to a reversal and to acquittal.

Because our attack is limited to the facial validity of the ordinance, I do not propose to go into the statement of

facts that were set out by stipulation with the City in the petitioners' brief, unless there is some question about one particular case from any member of the Court.

Q Yes, I have one question.

MR. JACOBSON: Yes, sir.

Q One of the petitioners here is Brown.

MR. JACOBSON: Yes, sir.

Q Was Brown loitering?

MR. JACOBSON: The evidence was that Brown came out of a hotel, which was supposed to be of low repute, and that as he walked out of the hotel he was moving, it was late at night, and he had something which resembled money in his hand, and that two police officers who were there were suspicious of him, and that they then called him over, as he walked down the street.

Unless his movement down the street could be considered loitering, I don't know that there would be any evidence of loitering in the case.

Q Well, my impression is, and perhaps you can talk about it later, is that the Brown situation is considerably different from those of the others?

MR. JACOBSON: Brown's situation is added to round out the package of these cases, because we assume that the city would contend that there were circumstances in which something like a vagrancy statute or an ordinance would be required for true offenders or hard-core criminals; and we did want to bring

an instance of at least that sort of alleged situation before the Court.

Q Well, putting it another way, I think if Brown were here alone, his posture would be much more difficult, comparatively, anyway.

MR. JACOBSON: I think if Brown were here alone, the case would not be nearly so appealing as the other people, some of whom have suffered really blatant oppression.

Now, I don't think, however, that the grossness of Brown's character and the testimony against him would really affect the attack on the social validity of the ordinance.

Q Has a narcotics charge ever been brought against him?

MR. JACOBSON: Yes, sir, a narcotics charge was brought against him. It was subsequently dismissed because in the court of proper jurisdiction for that charge, it was found that the narcotics had been found by reason of an unreasonable search, because of his being stopped on the occasion and questioned.

Q Was this ordinance something adopted from one of the early Colonial ordinances, or from something in England?

MR. JACOBSON: It goes back farther than any of the earlier Colonial ordinances, Mr. Chief Justice. It is very strikingly similar to an ordinance of 1597 that brought together the old English legislation up to that date. It was

called the Statute of Elizabeth.

One of the commentators, in fact, pointed out the very striking similarity between this legislation and that.

Q When was it adopted in Jacksonville first?

MR. JACOBSON: I haven't been able to ascertain that. I tried to find out. But Jacksonville, like a lot of small towns, had a devastating fire at one time, and it burned down the courthouse. I've been.

Q Isn't there a lawyer in town with an old library?

MR. JACOBSON: I haven't been able to find it. I checked the City Attorney's office, and went back and reviewed all of the old records. I could find suggestions to it, I could say that it came into existence in the early part of the Century. But precisely when, we just were unable to ascertain.

Q It reads like 1597.

Q It was recently amended, wasn't it, modernized by eliminating the word "juggling"?

MR. JACOBSON: Yes, sir. That's correct.

Q But it left "rogues and vagabonds" in.

MR. JACOBSON: And considerably more.

Q Well, this man -- I've forgotten what his name is -- what is this "vagrancy - prowling by automobile"

MR. JACOBSON: We contend that there is no such thing as "vagrancy - prowling by auto". Really --

Q Well, how can you be vagrant if you own an automobile?

MR. JACOBSON: It doesn't make any difference in Florida. I imagine the President of the United States, in the City of Jacksonville, could be a vagrant, if -- assuming that there is any ascertainable standard in this ordinance, under certain circumstances.

Q How about "persons able to work but habitually living upon the earnings of their wives"?

MR. JACOBSON: That goes to our contention that the ordinance is just unconstitutionally vague.

Q That's not very vague -- (laughing) -- that's not very vague.

MR. JACOBSON: Well, who is "able to work" and what is "habitually living on the earnings of their wives or minor children"? That's what we contend -- we thoroughly contend that that invades a restricted area of privacy that the State is not entitled to go into.

When all is said and done, it's difficult to understand why this vagrancy concept has persisted for as long as it has, anyway. The plain fact of the matter is that it was born in the peculiar socio-economic needs of Feudal England and Elizabethan England, broadened over a period of some two or three hundred years, all going back four or five hundred years before now; and really has no application to the current

needs of our society, and, more than that, it's offensive to many of our settled and fundamental notions of democracy.

And, further than that, it's been criticized almost universally by the commentators that have treated it, and in recent years by the State Courts and lower Federal Courts who have had occasions to consider it on the merits.

Yet, even though the Florida ordinance and the Jacksonville -- the Florida statute and the Jacksonville ordinance, which is really derived from the Florida statute, are probably the most archaic of all of the State statutes. The Florida system has just tenaciously clung to it.

Q Well,it's not a -- it's far from a dead letter, though.

MR. JACOBSON: Not at all a dead letter.

Q Haven't I read somewhere in these papers that there are hundreds of arrests under this statute, under this ordinance, every year; are there not?

MR. JACOBSON: In the City of Jacksonville alone, in the first ten months of 1971, there were 986 arrests. I don't know how many there have been over the State. In the last figures published by the Federal Bureau of Investigation, the last crime statistics for the nation as a whole, and statistics covering approximately 140 million people, there were over 106,000 arrests. That was in 1969.

Q But under various statutes and ordinances?

MR. JACOBSON: Across the country, yes, sir.

Q But under this particular ordinance, which you tell us is so Archaic, it still seems to be a very actively utilized piece of legislation.

MR. JACOBSON: Very aggressively utilized. Not only are there arrests, there are also substantial convictions.

Q Yes.

MR. JACOBSON: With jail time imposed.

Q It's a Class D offense, what's the maximum -- oh, I see it now; 90 days.

Q And $500.

MR. JACOBSON: At the time of these cases. Since then, in order to avoid the Fifth Circuit's rulings with regard to the right to counsel in petty offenses, which was before the Court on Monday, the maximum has been limited to 75 days, with no right of aggregation, though; this is a flat 75-day maximum.

Q And $450?

MR. JACOBSON: Yes, sir.

That was because of some -- probable dictum in Fifth Circuit cases saying that a $500 fine activated the right to counsel.

We contend that the legislation is invalid on several constitutional bases. The first one and the easiest one is that it's fraught with vagueness.

This Court, going back as far as 50 years ago, in Connally vs. General Construction Company, said that legislation which required that a normal and ordinary person guess as to its meaning, about which reasonable men might differ, was unconstitutionally vague.

It would seem to us that the requirement that there be definiteness in a criminal statute or a statute of this sort, really is necessary for basically three functions: one, to provide modus to affected persons; two, to provide ascertainable standards of enforcement to people who are charged with enforcement; and, three, to provide a breathing space or to eliminate chill of people who wish to exercise preferred rights or constitutionally guaranteed rights.

The first question, that is, whether this legislation provides notice, almost answers itself. It's really impossible to read the legislation and be able to put any definite meaning on virtually any one of the various sub-parts.

To begin with, the initial provision, "rogues". I don't know who can define what a rogue is. And as you move through it, and even with the provision that Mr. Justice Brennan spoke of, dealing with able-bodied people who habitually live on the earnings of their wives or minor children, I don't know that anybody could put any precise definition on that language.

Certainly it's clear that the ordinance is a good deal more vague and elusive than the ordinance or the statute

that was struck down some 30 or 40 years ago by this Court in Lanzetta vs. New Jersey, dealing with people who associate themselves with gangs of more than -- three or more persons.

Q Are you asking us to strike it down without more, or just strike it down as it applies to these cases?

MR. JACOBSON: We're asking you to strike it down independently of the application in these cases.

Q Well, I mean no one was convicted of being a rogue or vagabond?

MR. JACOBSON: No, sir.

Q Yet you want us to strike that?

MR. JACOBSON: We contend that --

Q How do these folks come under the statute?

MR. JACOBSON: Well, in two ways. In the beginning, these people were charged flatly with vagrancy. It is our contention there is language which appears on the docket entry which forms the charging instrument in the Municipal Court.

Q And that, you suggest, is, in effect, to charge them with every one of these things?

MR. JACOBSON: No. We say that that doesn't limit it. That, for example, as Mr. Justice Marshall pointed out, there are some of these people who were charged with vagrancy - prowling by auto; we say that that's simply an explanatory statement by the arresting police officer, regarded as

surplusage by the court. Not legally limiting to the charge at all.

Q Well, there's no reference in the ordinance, is there, of prowling by auto?

MR. JACOBSON: That's right.

For which reason we contend that they were, in effect, charged with vagrancy generally.

Q Which means, then, everything that's in there.

MR. JACOBSON: Correct.

Q Is that right?

MR. JACOBSON: Correct.

Q Do you contend that no one could ever be convicted lawfully, constitutionally, for any act under this ordinance?

MR. JACOBSON: Very definitely. We contend that no one could ever know what is to be prescribed by this ordinance --

Q I don't know what a "common drunkard" is as distinguished from an uncommon one, or a habitual one; but suppose a man's drunk on the street, and on the sidewalk, completely in a coma. Could he be arrested under this statute?

MR. JACOBSON: Ordinarily he's not. There's a specific --

Q Well, but could he be?

MR. JACOBSON: Presumably he could be. I'm not able to answer --

Q Would it be invalid as applied to him?

MR. JACOBSON: I would say so, because he has no way of knowing, before he gets himself in that state, what a common drunkard is, and whether he's going to be subject to the ordinance, if he puts himself in that position.

Q What about Jimmy Lee Smith and Milton Henry, according to this they were charged with "vagrancy - vagabonds".

MR. JACOBSON: Jimmy Lee Smith is the only one that's not in the category that I spoke of. He's charged with something that is specifically relatable to the ordinance.

Q Now, what about those charged with "vagrancy - common thief"? There's no "common thief" listed there, is there?

MR. JACOBSON: No, sir.

Q And how about "loitering", is that in there?

MR. JACOBSON: No, sir.

One man is charged with "disorderly loitering on the street", and there's something in there that relates to "disorderly people"; but there's nothing on loitering.

Q I know what "disorderly" is, but what's "disorderly loitering"?

MR. JACOBSON: I don't know. It has no basis in the ordinance. And that's why we contend that it's really surplusage. If it was legally limiting in any way, then our motion to dismiss at trial level would have been required to be

granted.

I will say this, at the time the legislation was begun, there was a category in Florida law known as "common thief", which persisted up until the early part of the century, providing that anybody who had been convicted of theft constituting a felony for two times and more became a "common thief" and was subject to 20 years' imprisonment.

That was in existence at the time this legislation was passed, and this legislation did not refer to "common thief".

Q Well, that was just -- that was a recidivist statute, wasn't it?

MR. JACOBSON: A crude one.

Q Beg pardon?

MR. JACOBSON: A crude one; a crude recidivist statute.

Q Yes, but you're not telling us that somebody who had been convicted and served whatever his punishment was, twice for theft, then could be arrested as a common thief, on that charge, are you?

MR. JACOBSON: At that time that was the case, yes, sir.

Q Well, you -- let's say he's been convicted and sentenced to five years' imprisonment, that he had served once for theft, and then he's guilty of theft again and served his

sentence of another five years. Then at any time he walked around Jacksonville he would be -- could be he be arrested as a "common thief" and charged with it and sent to prison again?

MR. JACOBSON: That was a State statute. Any time he walked around the State of Florida. That statute is no longer in effect. But we have the same thing being done, through a municipal ordinance, in this instance. He can only be sent to jail for 75 days, but if he has been guilty of some sort of theft, whether he's been convicted of it or not, it might be contended that he's in the "thief" category.

Q But your point is you don't have that here, because it's not that specific, you don't know what it means; it's too vague. That's what you're arguing, isn't it?

MR. JACOBSON: My point is that we don't know what "common thief" meant. Two of these individuals were charged with being common thieves; and that has no reference to the ordinance.

The ordinance does refer to thieves, and the ordinance would have the effect that you've spoken of for people who might be considered to be in the category of "thief", whatever that is. Vagrancy is a continuing offense. If somebody had committed a theft or had been convicted of a theft, or two or three, whether -- however long ago it had been, however minor it had been, or however much he had repented, he's still subject to continuing incarceration in Jacksonville.

Q Every day could he be arrested?

MR. JACOBSON: He can't walk the streets of Jacksonville without being subject to arrest. If this legislation is valid.

He can serve 75 days and, immediately on release, is subject to re-arrest.

Q I suppose, then, the more he gets arrested the easier it is to sustain the charge, because they can identify him?

MR. JACOBSON: The more confirmed it is, yes, sir.

Q That makes it "common" then, by repetition, I suppose, in effect; is that it?

MR. JACOBSON: I'm not able to say, Mr. Chief Justice. Nobody knows, and that's precisely where the --

Q I suppose in the archaic language used in this ordinance and in the statute that "common" must have meant, at the time it was originally written, "commonly known to be" that kind of a person.

MR. JACOBSON: No -- that's the point, there's no reference to "common" in this ordinance, in this legislation. In some prior legislation that was in existence --

Q Well, there's "common drunkards".

MR. JACOBSON: That's true. I'm speaking with regard to thieves only.

Q Oh.

MR. JACOBSON: That's true.

But there there was a legislative definition of what "common" was. I don't know.

Q I suppose what they called a "common drunkard" in that day is an alcoholic today, a man constantly getting drunk.

MR. JACOBSON: Well, we can only suppose; that's my point.

With regard to the vagueness point, we think that the matter was capsulized very well by Mr. Justice Frankfurter in his dissenting opinion in Winters vs. New York in 1940-something. He there pointed out that this legislation falls, or this type of legislation falls in a unique category; that it's purposely designed to be vague, and purposely designed to be open-ended.

And it's significant that Mr. Justice Frankfurter did that, and it's further significant that he did it in the circumstances in which he did, because he was there dissenting from a majority holding that the legislation was unconstitutionally vague, and he catalogued the reasons why a court should be very hesitant to declare legislation unconstitutionally vague, and he specified as an exception the area of vagrancy, which he said was in a unique category and stood by itself, and was egregiously bad.

In addition to the problem of lack of notice to

affected persons, we have also the problem that's presented by lack of any sort of enforcement standards. There is no way any police officer or jury or municipal judge or anybody else can know what's intended. And this, in and of itself, invites standardless and discriminatory enforcement, especially when we have legislation of the open-ended sort we have here, that can be directed and applied to unconventional or unpopular or unestablished people, of a sort to invite abuse anyway, from people who are not willing to be broadminded or tolerant of them.

Finally, the legislation, because of its breadth and broadness, necessarily must restrict people in the attempted exercise or the desired exercise of rights that are preserved to them without question by the Constitution. Certainly the right of travel is drawn into question by the provision against wandering from place to place, for example; and we have enumerated others in our brief, with the suggestion how they might be similarly affected.

Apart from that contention, we also contend under a broad grouping that we call abuse of police power, that the ordinance is constitutionally invalid in other respects. We contend, first, that insofar as it relates to people who are in the category Mr. Justice Brennan spoke of, "living on the earnings of their wives" and so on, that it invades the zone of privacy that was sought to be secured by Griswold vs.

Connecticut.

Further, even in the part of the ordinance which deals with thieves and gamblers and what-have-you, which might be outside that area, the legislation is still over-broad, because the completeness of its application, the point that Mr. Justice Stewart was speaking of, where it can be applied recurringly over and over again against one individual, so that he becomes permanently an outcast and permanently subject to incarceration.

In this regard it's significant to note that the only justification ordered for that kind of -- offered for that kind of breadth and scope by the City of Jacksonville is crime control, and it's significant that there are ample crime control methods available to the City of Jacksonville or the State of Florida that can accomplish the same purposes that this legislation can accomplish without nearly the oppression to human and individual rights.

We say also as our third major point, and related to the abuse of police power, that really the legislation is no more than a legislative declaration that some people are suspicious, per se; that some people are tending to crime, per se; and that they must be suppressed at the outset independently of any act or commission on their part.

This is amply borne out by the history of the -- the social history of the legislation, by the contention that's made

by the City, expressed in its brief, and by the history of application, well-documented by boards such as the President's Commission on Law Enforcement, and the American Bar Association's Foundation for Criminal Justice, which have all found that the legislation is used primarily for the arrest of people on suspicion only, when police officers require a makeweight, and they can't find anything else to use as grounds for an arrest.

We say that this pattern and tradition of use has become an integral part of the statute and in fact it's resulted because it was built into the statute or into the ordinance in the first instance, and is only the inevitable result of it, and will continue unless the legislation is now struck down.

I'd like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jacobson.

Mr. Austin.

ORAL ARGUMENT OF T. EDWARD AUSTIN, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

The attack and assault upon the Jacksonville vagrancy ordinance, as it is defined, is not unique; it has been attacked and assaulted up through the Florida appellate structure. It has been -- similar ordinances from Miami have been declared unconstitutional by the Supreme Court of the

State of Florida. The Supreme Court of the State of Florida has laid down a standard, as specific as you can get in this type of a situation, as to when this particular type of ordinance or statute will be enforced. And has spelled out that it would be cautiously and sparingly used upon vagrants that are vagrants of their own volition. And this has been reaffirmed by the Supreme Court, after it was first pronounced in 1965.

This particular case -- and, incidentally, Your Honors, the Florida Supreme Court has on previous occasions stricken, or reversed the trial courts for the unconstitutional application of this particular ordinance.

Q Has it ever set aside any of these ordinances cast in archaic terms?

MR. AUSTIN: I know of none that they have stricken, per se, Your Honor. Justice Ervin, whom I consider a very enlightened jurist on our Supreme Court, has acknowledged that certain sections of the vagrancy statute, vagrancy ordinance have simply fallen into disuse, as has been the situation in hundreds of our State statutes which are now being studied and being revised by our Legislature at the present time.

He acknowledges in one of his opinions that gave us caution and guidance in this area, that if the facts did not support the conviction that the court should not hesitate to strike them down as being unconstitutionally applied.

Q Mr. Austin, what is "prowling by car"?

MR. AUSTIN: Your Honor, the -- I assume that it came in under the portion of the ordinance which goes to "wandering and strolling about from place to place without any lawful purpose or object". I think the idea of saying that a vagrant must be poor, or that this is applied just to poor people, Your Honor, is not the intention of the Legislature or the legislation.

Q Well, why is it called a vagrant statute?

MR. AUSTIN: Your Honor, I'm not so sure that --

Q Well, maybe you can help me. What's an "habitual loafer"? You and I know loafers, but what's an "habitual loafer"?

MR. AUSTIN: Your Honor, it is defined down through this -- let me say this, and I'm not evading your question. This language was in existence, in answer to a previous question, about a hundred years ago, in 1880's or so.

Q And this phrase "lascivious persons" goes back to 1500. I mean, --

MR. AUSTIN: Yes, sir, and it was in existence --

Q -- so I guess that's good, too.

MR. AUSTIN: Yes, it was in existence at the time --

Q You'd better read some recent opinions on it.

MR. AUSTIN: Well, I just don't know that just because something is old, Your Honor, that it's bad. The Constitution

of the United States is old, and we went through Black's Law Dictionary, we went through Webster's Dictionary, and on words and phrases, and we have no trouble defining who these people are, and we think that they are advised who they are.

Now, I thought --

Q How about people that go to their club, their private club, quote "where alcoholic beverages are sold and served", are they vagrants?

MR. AUSTIN: No, sir, Your Honor. It would be --

Q Why not?

MR. AUSTIN: I think that would be an unconstitutional application to statute, and I don't think the court would hesitate to strike it down.

Q I understand your total defense of this statute to be that a Supreme Court has told the law enforcement officials "to be careful how you use it". Is that your defense?

MR. AUSTIN: No, sir. No, sir.

Q What is your defense of this particular ordinance?

MR. AUSTIN: There are certain parts of this ordinance that have -- incidentally, Your Honor, our Supreme Court has told us that they consider it unconstitutional, a statute that made a person explain why they were at a place, which seems to be the model penal code's approach to it, as violative of

the Fifth Amendment. So we sort of don't know what to do, and the Supreme Court of the State of Florida has told us that the best thing we have is the vagrancy statute which has been upheld in a large number of States, and therefore, "why don't you use this, since it's been tried and tested?"

But it didn't delineate or pull out certain words that should have been omitted. I think that the Legislature and I would be the first, and candid with the Court, to say that the Legislature should delete some of these words.

Q Well, they did take out "juggling".

MR. AUSTIN: That was the City Council, Your Honor. And they should -- I will stipulate that some other words should come out of the ordinance. And I think legislatively they should come out. Whether or not the entire ordinance goes to the police power of the State, the very heart of the police power of the State and the city, is something else again. And I think that it does.

But let me, if I may, say how this case got here. We went to the -- we have a very fine judge on our Circuit Court bench that reviewed this case when it was brought over to him from the Municipal Court. The only thing that he was permitted to consider was the constitutionality of the statute on its face.

Then it went to the District Court of Appeals, and in the petitioner's brief the only thing he asked for was that

they consider the constitutionality of the statute on its face. At no place did the Florida Court get to look at these facts.

I will be candid with the Court, they have made allegations here that are not even under the ordinance and should have been reversed, and the first appellate step in the Florida appellate structure should have been permitted, and would have, in my opinion, directed the Municipal Court to straighten that out.

There were no prosecutors in this court at that time. And they go in, and it is an unfortunate situation that our Municipal Courts are run the way they do.

But Mr. Jacobson makes a big thing out of 900-and-some vagrancy arrests this year. We have 550,000 people in our community. That's approximately three a day. And let me point out that in the State of Florida you cannot make an arrest for many, many of the things that are mentioned in the statute, unless they are committed in the presence of the officer; only a felony. If it's a misdemeanor or the violation of a municipal ordinance, if the officer is thirty seconds late, he is required to go around to a magistrate and get a warrant.

So he does use this, and then the vagrancy ordinance, and then the charge is changed, as is often the case in the administration of criminal law justice.

So, out of approximately three arrests a day, many of them, on the docket sheet the next morning, would be changed;

although the arrest was vagrancy. Because he was thirty seconds late in getting to the scene where there's been a brawl. With the evidence obvious, and the people telling the -- giving the officer good grounds to make an arrest, except he just doesn't have time to go get a warrant.

And it's a very practical, necessary ordinance for the maintenance of public order in Jacksonville, Florida. Just because it's old -- stipulating that the Legislature should strike some of the verbiage, just because it's old would not necessarily seem to be grounds for reversing it.

Q Well, I think the suggestions about the age of the statute and the ordinance, Mr. Austin, are directed at the fact that it was using terms which today are labeled archaic in --

MR. AUSTIN: Yes, sir.

Q -- dictionaries, and in common understanding. I don't think anyone is concerned about its age, per se, but only that it uses language from another age.

MR. AUSTIN: Your Honor, if this Court opens the door to the Florida Legislative Redrafting sessions, which they are now going into, by simply taking it from the first court, no chance to look at the facts, the District Court of Appeals, no chance to look at the facts, and this Court starts looking into rewriting the Florida Code, we will find about 200 statutes that need to have their language updated. And

this is no exception.

I respectfully --

Q Well, that's true of the United States Constitution, isn't it?

MR. AUSTIN: I respectfully submit, Your Honor, that this is a proper function --

Q It was written in the 18th Century.

MR. AUSTIN: Yes, sir, Your Honor.

I respectfully submit that this is a proper function for the Legislature. They're getting to it. Amazingly, they're getting to it right now, while Mr. Jacobson is here. Toward redrafting and getting our Code, we've even obtained federal funds for our State Legislature to study our Criminal Code, and to bring it up to date, and to get rid of this archaic language.

But I submit that --

Q But what your Legislature is doing won't get rid of this Jacksonville Ordinance, though, will it?

MR. AUSTIN: Your Honor, I have absolutely no doubt, I'm General Counsel for the City, I have absolutely no doubt that once some guidance comes to us from some place that we will adopt proper language. I submit that in studying the model penal code, the draft of 1969, that some very fine scholars drafted, that it will probably fall from constitutionality because it permits a man to be detained for 20 minutes

just because he acts suspicious.

And so, I don't know --

Q Well, I'm just a little puzzled. Are you suggesting that the Florida Legislature -- and we've seen some of this in other cases argued within the last couple of weeks; apparently they've been very active working on your criminal code -- but that they do something with this provision in the statute doesn't mean necessarily that Jacksonville is going to do anything with the ordinance, does it?

What we have before us is only the ordinance, is it not?

MR. AUSTIN: Yes, Your Honor. And in those places where the archaic language appears, if it is the policy of this Court, I would stipulate to it being straightened. If that is the policy of this Court. I don't think it's before this Court, but if that's the policy of this Court, I'll stipulate to the archaic language being stricken.

I think the next case before you is very critical, the prowling and loitering without a lawful purpose, or, as our court has said, with an unlawful purpose. I think that the power to make the arrest in the places that they are most normally made -- and, incidentally, these are obviously,from the vast number of cases, the worst possible factual situations they could have gotten before this Court; and I submit that the Florida Court would never have let them get here; it would

have been reversed immediately by the District Court of Appeals, because they don't even charge under the ordinance. These -- they miss the ordinance.

And I think this is -- Mr. Jacobson -- the petitioner is asking you for the first time. And this Court in a Florida case reversed on the unconstitutional application in Johnson in 1967; reversed on the unconstitutional application of the Florida vagrancy statute, and had the constitutionality of the Florida vagrancy statute before it.

Now, we had the guidance of this Court, we had the guidance of the Florida Supreme Court, that the trial judges and the appellate judges would -- the appellate judges would reverse on the unconstitutional application of the statute. And it's on these cases, if they are properly before you, I will stipulate that they were unconstitutionally applied.

Q Well, I'm not sure I understood your observation about, that the Florida courts would have stricken this had they had the chance. Didn't the First District Court of Appeals --

MR. AUSTIN: No, sir. No, sir, Your Honor.

Q Well, how did this -- where did this case come from, to us?

MR. AUSTIN: From the District Court of Appeals, and in the petition the petitioner said the only issue before the Court is the constitutionality of the ordinance on its face.

He said that to the Circuit Judge, who sat in review of that in the Municipal Court; he has never asserted that these facts were unconstitutionally applied, which has been the law of this Court and of the Florida courts, in this area, in the last few years.

Q But of course that court -- did it have the option to reject that argument and say that it was unconstitution as it applies in this case?

MR. AUSTIN: No, sir, they were not asked to do that, Your Honor.

Q But did it have the option to do so?

Could it have done so?

MR. AUSTIN: You're asking if the judge would go beyond the requested relief by the lawyer when he goes in on appeal?

Q Well, this would be on the grounds. He granted the relief as to this particular person or persons before him, --

MR. AUSTIN: That's not --

Q -- then the man wouldn't have any constitutional claim left, would he?

MR. AUSTIN: Your Honor, our adversary system in Jacksonville -- and I don't think in most of the other sections of the country it works that way -- if a lawyer waives all the points except one, that's the only one the court will consider. That's been the policy of this Court; if you don't raise it, you

waive it.

And this was all that was submitted. And the opinion of the District Court of Appeals, from which certiorari is granted here, the only thing -- the court points out in that opinion, that the only thing before us, by the petition, which the petition says, the only thing before us is the unconstitutionality of the statute on its face.

Now, Your Honor, I submit that that is basically unfair to the Florida judiciary to not give them a chance to review the very thing that you're being asked to review; these cases on the merits.

Q Well, this shouldn't -- our writ should have run to the Circuit Court?

MR. AUSTIN: It should have, Your Honor. I would like to reserve that point. I am not trying to evade this Court considering this case, but I think I have a duty to raise it, that Justice Holmes said that if you didn't come in from the proper court, that you would be dismissed. This case came from the District Court of Appeals. Well, all the District Court of Appeals was doing was doing -- it was reviewing certiorari.

So if you're reviewing the judgment of the District Court of Appeals, which Mr. Jacobson has asked you to do, you're merely reviewing whether or not the very two limited --

Q But the Circuit Court did pass on the merits?

MR. AUSTIN: No, sir.

Q The Circuit Court?

MR. AUSTIN: The First District Court of Appeals, the Circuit Court did not pass on the merits; they simply took it, they gave a brief opinion that the statute was constitutional, but they did not, and were not permitted --

Q They did hear it.

MR. AUSTIN: Yes, sir. -- but they were not permitted to look at the facts.

Q But they reached the constitutional question?

MR. AUSTIN: Yes, sir. But they were not permitted to look at the facts.

Q So our writ should have run to them?

MR.AUSTIN: The writ should have gone back to the original court, Your Honor, to the Circuit Court, which was the court that, according to Justice Holmes, that the petitioner should have come up from. That was the court that entered the judgment.

The District Court of Appeals merely commented that the statute was constitutional. But denied certiorari. So that is not a judgment, in my judgment. And he should have gone from the -- he came from the wrong court.

And Justice Holmes says that that's fatal. And we've cited that in our brief.

I would like to submit to the Court, and I, in this

brief time, certainly can't go into a deep-rooted philosophical discussion, but as old as this statute is, as archaic as some of the language is, it is a very important law enforcement tool. It goes to the very heart of the police power of our municipality, and to the police power of the State of Florida.

And if it needs to be revised, this Court has, time after time, spoken of the fact that it will not strike a statute if it can be construed to be constitutional, that it must be, beyond any reasonable doubt, unconstitutional; and the fact that there's some archaic language in a statute doesn't make it unconstitutional in its total situation.

This Court has, in fact, held that it is the duty -- that it has the duty to uphold the police power measure if it bears some rational relationship to health, safety, morals, or general welfare, and the means employed reasonably accomplishes the desired results.

The means here were probably an unconstitutional application of that statute, but then this ordinance would, in its totality, must be considered -- and I earnestly submit to the Court, must be considered to be a valid exercise of the police power.

And the fact that it is inarticularly drawn is immaterial, if it goes to the relationship of health, safety, morals, and general welfare. And I respectfully submit that you can't read this without saying it goes to the general

welfare, the public safety.

I will give you -- I could give you a list of illustrations of the --

Q You are not suggesting the statute which says "it shall be a crime to commit any act which is injurious to the public welfare", period; that's all it says?

MR. AUSTIN: No, sir.

I think we have to go back --

Q That would be probably just as vague.

MR. AUSTIN: Yes, sir. The --

Q You don't think this helps?

MR. AUSTIN: The Civil Rights Act, as sustained back in '64, was pretty vague. We talk in terms of vagueness, Your Honor, I don't mean to appear to be flippant, but -- and I'm not, certainly not; I have the deepest respect -- but the guidelines laid down in Roth, for example, and cited in our brief, the reasonable speed, many words that just defy strict definition. And as Justice Frankfurter pointed out on a number of occasions, that this balance between the maintenance of public order and criminal conduct, and drawing rules and language broad enough to protect the public, and narrow enough to protect the individual is what it's all about.

And it is really -- the original handbook on legislative drafting, that this will be constitutional and this will be not. This is a tremendously complex, difficult area.

And so I will simply submit it on the fact that it is not unconstitutionally vague in view of the many words that this Court has held to be constitutional -- not constitutionally vague.

Our brief cites many illustrations of that.

There must be a place on reasonable application of the -- of this particular ordinance and phases and phrases within this ordinance where it would be held to be constitutional; therefore, it cannot be stricken on its face, under the laws and under the rules laid down by this Court.

Because in many provisions of it, which say that; and it is vital to the protection of the public and the corporate city, of the consolidated government of the City of Jacksonville.

I would like to point out that we -- I have read most of the commentaries that Mr. Jacobson, my brother, has cited to the Court. I find very little that is written about the police. I would like to point out that the police departments today, in the metropolitan areas such as Jacksonville, Florida, are watched by the media, television and newspapers; they're watched by the prosecutor; they're watched by the human relations committees; they're watched by the Civil Liberties Union; they're watched by the sheriff himself, because he's an elected official, we have all of our -- we have one police department in our government. They're watched by the executive arm of the government; they're watched by the courts. If they come in with

bad evidence, if they make an illegal search, the evidence is suppressed.

And the idea that there is hanging over Jacksonville -- I notice that these cases were very selectively brought to your attention -- that there is hanging over Jacksonville some threat of the police power taking over the -- or being abused is manifestly not fair to the functions of the police department. We have the powers. Obviously we're going to get some bad apples.

If you'll pardon the personal reference, up until a week ago, I was a prosecutor and I prosecuted a bad apple.

But to say that they are all bad, or that they are abusing the authority perpetually under this particular ordinance is manifestly unfair.

Three arrests today in a city of 550,000 people cannot be a wide, broad use of the statute, when you consider that it is being applied in order that some arrests can be made that could not otherwise be made, to protect the public interest.

I respectfully submit, Your Honors, that the crime rate of the United States has gone up, according to the authority cited by Mr. Jacobson, 400 percent in the last 25 years, and the population has gone up 50 percent. We have not been able to keep abreast of it in our communities. 43 percent, according to Mr. Jacobson, of our people, in his authorities, are afraid to walk down the street at night alone in our

communities.

We need to modernize our ordinances and our statutes, to do something to help us, and to get the balance back in the administration of criminal justice. We need to modernize this ordinance.

I don't know the answer. I would assume that the people of Florida will elect people who can make those decisions. With the advice of the courts, that they will make the decisions of whether or not they can make this type of conduct illegal. And that those people that they elect will make the appropriate decisions.

And then, that if they unconstitutionally step over the bounds of the first Ten Amendments, which Justice Black spoke so eloquently about, then they are stricken down. But if they don't, and I submit that there's not a single thing here that steps over the bounds of the first Ten Amendments to the Constitution of the United States, or of the Fourteenth Amendment.

Q But, Mr. Austin, when a case like this comes here, we have rather limited choices, and of course we can't give declaratory judgments or advisory opinions to --

MR. AUSTIN: Mr. Chief Justice, you're being asked to in this case. Because our courts did not have an opportunity to get to the heart of this matter. And this --

Q I thought we were being asked to rule as to

whether or not this ordinance was unconstitutional on its face.

MR. AUSTIN: Yes, sir.

Q In toto.

MR. AUSTIN: Yes, sir.

Q That's all we're being asked to do.

MR. AUSTIN: Yes, sir.

Q You suggest we rewrite it.

MR. AUSTIN: I suggest that the long line of cases of this Court are that you would not strike any portion of a statute that is constitutional on its face, and you would only strike those provisions which are unconstitutional on their face; so, yes, sir, I'm asking you if you're going to do something with it, to rewrite it. I would welcome it.

It's giving me, and the people who undertook to draft these things, a headache. The model penal code, which I would refer you to, whose comment for how arrests should be made is -- I don't see how it could be interpreted any differently than the -- where the vagrancy statute is applied. The police officer must have some discretion. And this is the place that he has some.

And if you change the wording, he's still going to have some discretion; and he is, as I said, watched night and day by all of the authorities on it.

I would like to thank the Court for considering the position of the City of Jacksonville, and earnestly solicit that

you dismiss this writ as improvidently granted, since it came from the improper court; and, further, to construe those portions of the statute, if you construe it at all, which are constitutional, to be constitutional.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Let's see, Mr. Austin, you had just finished.

Mr. Jacobson has four minutes -- no, you have eight minutes.

REBUTTAL ARGUMENT OF SAMUEL S. JACOBSON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JACOBSON: I would like, first of all, to respond to some of the explicit statements made by Mr. Austin.

The contention that we're out of court, because the writ has been misdirected, we submit is no more than a quibble that really is not entitled to any standing.

We treated this question at some length in our reply brief. The matter was also litigated in connection with the application for a writ of certiorari.

If, in fact, the City is correct, that the writ was misdirected, then the simple answer would be for the review that this Court makes to be of the Circuit Court order, which can well be done, and that's the proper remedy.

In connection with the application for certiorari, we responded to the City's response by saying that we would be very pleased for the writ to be directed to the Circuit Court instead of to the First District, if that was the appropriate choice. And we think that if it makes a difference,

it's a difference without a distinction for purposes of these proceedings.

I'm at a loss to understand the City's recurrent citation of the Headley vs. Selkowitz language by the Florida Supreme Court, that the vagrancy statute is not to be used very liberally by Florida law enforcement officers. I don't see how that provides any comfort to the City. It seems to me that this is no more -- or no less than an expressed statement that law enforcement officers are not to make an even-handed application of the statute, but that they are given license and freedom to decide for themselves what the standards of an arrest are going to be; which, to us, seems to point up the very vice of the statute that we complain about.

Mr. Austin says that it was not intended to apply just to poor people, and in its application has not had that effect. I submit that, while it may not be applied to poor people alone, that, by and large, the application is to people who are small people, people who are in no position to protest or to make their protest heard.

The keeper of the largest gambling place in Florida, I believe, is the president of Hialeah Race Track. I've never known of him to be arrested for vagrancy as a keeper of gambling devices.

The --

Q Is that in Jacksonville?

MR. JACOBSON: No, sire; that's not, but the Florida statute --

Q So that it isn't subject to this ordinance, then?

MR. JACOBSON: No, sir. But the largest gambling place in the City of Jacksonville is the dog track, and I've never heard --

Q That is in the city, though?

MR. JACOBSON: Yes, sir.

And I've never heard of either the president of the board of directors there, or any employees in connection with it, being arrested under this ordinance.

The argument that the only vice to the statute is archiac language, this is a serious point. It's not that the statute or the ordinance contains language which is archaic. If Mr. Austin struck the archaic language, I don't know what he would choose to take and what he would choose to leave.

What would he do, for example, with "persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children"? Or of the language "habitual loafers"? Or "persons wandering or strolling from place to place without any lawful purpose or object"? There's nothing archaic about that language, and it's not that the language of the ordinance is

archaic, it's that the thrust, the concept which the ordinance represents that's archaic, and is outside the boundaries of what's considered minimal due process or minimal decency by our current standards.

Further, it's not simply, and I want to make this point as emphatically as I can, it's not simply vagueness that we complain about; as much as that, we complain about the extent and sweep of the statute. Not only is it difficult to understand who's within it, but when somebody is determined to be within it, they are subject to this recurring and constant sort of classification; and our basic complaint is that it's unconstitutional to deal with these matters by status proscriptions of the sort that are had here, even if some way were found to make the ordinance sufficiently definite to pass the vagueness test.

Mr. Austin complains that the City has been brought here without any review on the facts by the Florida system, and he says that there was no way that the Florida system could have granted him such review.

On the contrary, the Florida courts could have, if they had wanted to, go beyond the relief or the theory of what the petitioner sought down there, the same way that this Court did in Johnson vs. Florida, three years ago, on a similar vagrancy case. But the Florida courts chose not to, and I submit that the reason that they chose not to is that they are

not opposed to it, that they approve the application of the vagrancy concept; and the cruelest manifestation of that is the way in which the Florida Supreme Court responded when this Court's order in the Johnson case was sent back to them. The peevish, grudging and sort of sarcastic and resentful language of the Florida Supreme Court's opinion reflects the attitude of the Florida courts on these questions. And unless relief comes from this Court, there's going to be no relief.

Q Is that the case cited in the brief, on the remand of Johnson?

MR. JACOBSON: Yes, sir; yes, it is.

Q In your brief or reply brief?

MR. JACOBSON: In both.

Q Captioned the same, captioned Johnson?

MR. JACOBSON: Johnson vs. State, in Florida.

Q 216 So. 2d?

MR. JACOBSON: Right.

Finally, I found myself taken aback and a little bit aghast at two of Mr. Austin's contentions. First, the contention that this doesn't make much difference because only three people a day, about a thousand people are year, in Jacksonville are subjected to arrest under this statute. If it's unconstitutional for one person a year, it is too many. But, regardless of that, the plain fact of the matter is that three people a day, more than a thousand persons a year, is an

horrendous number to be subjected to the sort of abuse that's handed out, and --

Q Well, I didn't understand Mr. Austin to be arguing that it was less important because of the numbers, but merely making the point that there was no wide dragnet that was dragging in thousands of people. I don't think he has a different view --

MR. JACOBSON: Well, I hope he didn't now; I hope he didn't.

Q -- in the abstract than you do.

MR. JACOBSON: Finally, I'm taken back just as much by his statement that the vagrancy concept is so important to law enforcement. That it goes to the heart of law enforcement.

Just two days ago this Court heard someone from the Attorney General's office stand here and say that these victimless crimes are no longer regarded as necessary by Florida law enforcement, and are going to be taken out in the new revision of the Florida Criminal Code.

We've heard the President of the United States say that it's time to do away with victimless crimes of this sort, that they are not necessary to law enforcement.

In any event, if by some stretch they are useful, and by some stretch they are helpful, I submit that we come to a poor pass when it's contended in this Court that the law has to be enforced by violating the Constitution; and I certainly hope

that this Court is not going to lend any support to any such contention.

We submit that the vagrancy ordinance that is before the Court now is a horrible and egregious example of legislative excess. We submit that there will be continued abuse, and that the only proper relief that can be had is for the Court at this time to proceed to strike down the ordinance.

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

Thank you, Mr. Austin.

The case is submitted.

(Whereupon, at 1:11 p.m., the case was submitted.)