In the

Supreme Court of the United States

RAYMOND SMITH AND MELVIN McCLAIN,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

No. 70-5055

Washington, D. C.
December 8, 1971

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Wednesday, December 8, 1971.

The above-entitled matter came on for argument at 1:12 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:

PHILLIP A. HUBBART, ESQ., Public Defender, Eleventh Judicial Circuit of Florida, 1351 Northwest 12th Street, Miami, Florida 33125, for the Petitioners.

NELSON E. BAILEY, ESQ., Assistant Attorney General of Florida, 225 Pan-American Building, West Palm Beach, Florida 33401, 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. 5055, Smith and McClain against Florida.

Mr. Hubbart.

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

I move that Nelson Bailey be permitted to argue pro hac vice on behalf of the respondent in this case. He is a member in good standing of the bar of the State of Florida, but he's been a member for less than three years.

MR. CHIEF JUSTICE BURGER: Your Motion will be granted.

ORAL ARGUMENT OF PHILLIP A. HUBBART, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HUBBART: This case is here on a petition for writ of certiorari to the Supreme Court of Florida to review a decision upholding the constitutionality of the "wandering" section of Florida's vagrancy statute against an attack made and considered by the Florida Supreme Court and rejected, that violated the due process clause of the Fourteenth Amendment for vagueness and overbreadth.

In this particular case, the petitioners were charged in the Criminal Court of Record in and for Dade County, Florida, by an Information filed by the State Attorney, charging the defendants, and tracking the exact language of the statute,

856.02, which is before this Court for review, charging that the petitioners were "vagrants by wandering and strolling around from place to place without any lawful purpose or object".

To this charge the petitioners entered a plea of not guilty, and waived trial by jury.

At the time of the trial the defense counsel made an oral motion to dismiss this particular charge on the grounds that the statute was void for vagueness, and consequently violated the due process clause of the Fourteenth Amendment.

That motion was denied and the trial judge made a specific finding that the statute in question was, quote, "crystal clear".

He furthermore entered a written order in which he found that the statute was "constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution".

A motion for new trial was filed in this case, attacking the statute not only on the grounds that it was too vague but also on the grounds of overbreadth; and that motion was denied, and again the trial court specifically ruled the statute was constitutional within the meaning of the due process clause.

The question has been raised as to whether or not the broadness issue was properly raised in the Florida courts. That was contended on the motion for new trial and specifically

rejected by the trial judge.

On appeal, the Supreme Court of Florida, in a 5-to-2 decision, upheld the constitutionality of the statute and specifically considered and rejected, in the opinion, the petitioners' dual contentions -- the dual contentions made before this Court -- that the statute was "so broad and vague in nature as to violate the Due Process Clause of the Fourteenth Amendment".

The court has granted certiorari on the question phrased in the petition for writ of certiorari; namely, whether the "wandering" section of the statute in question is so broad and vague in nature as to violate the due process clause of the Fourteenth Amendment.

Now, in resolving that issue, I think it's important to examine, first, the exact language of the statute, it's legislative history, and the construction given to it by the Florida courts. The statute provides --

Q What were the proofs?

MR. HUBBART: In this particular case, Your Honor, the State presented one witness, who was a guard employed by the Seaboard Coast Line Railroad, and he testified that he was patrolling this area in Dade County about 7:30, 8 o'clock at night. He saw a car -- or he was in a car, and he saw the two petitioners, along with a third party, walking along in the roadway, on the public street. He passed them. When he turned

around the corner he saw them go into a warehouse area, and he saw them go behind a boxcar which belonged to the Seaboard Coast Line Railroad. He went up to the boxcar. He didn't see them, but he heard some noises from behind the boxcar, and he saw one of the petitioners, Smith, running from that area. He went over and placed him under arrest -- well, first, he called for some help from the Hialeah Police Department. And the petitioners were then placed under arrest.

The petitioners testified in this case that they were never in the railroad yard, the warehouse yard, rather; that they never attempted to break and enter any railroad car; that they were walking along the street, going to see a friend.

Those were the proofs.

Q Mr. Hubbart, do you think that the State of Florida could validly legislate and make it an offense to wander around a railroad yard when one has no business taking him there?

MR. HUBBART: I think they have a -- certainly a legislative power to proscribe trespassing, Your Honor. And if the statute in question was a trespass statute, that is, going on the property of another party, a railroad company, without permission, I think it's pretty clear that they could make it a crime to do that.

Q In their claim that they were just out walking, did they concede that they were walking on railroad property?

MR. HUBBART: No. No. In fact there was -- their testimony explicitly was that they were on the public street at all times.

Q Then what's the argument that they were "without any lawful purpose or object"?

MR. HUBBART: Well, I'm really at a loss to answer that, Your Honor, because our whole contention is that the statute lacks an ascertainable standard of criminal conduct.

Q I just wondered what was the State's --

MR. HUBBART: The State's theory?

Q How the proof established that they were"without any lawful purpose or object".

MR. HUBBART: The State did not, really, offer any argument in the lower courts. The defense counsel offered an argument, but the State did not.

Now, in resolving the --

Q Well, counsel, weren't there two counts here?

MR. HUBBART: Yes. The second count was, charged with --

Q What was the first count?

MR. HUBBART: The first count was vagrancy; the second count was attempted breaking and entering a railroad car.

Q And we're talking about count one?

MR. HUBBART: That's correct.

Q Well, the State's proof certainly went to count

-- on count two certainly was rather explicit as to what they claimed an "unlawful purpose" was.

MR. HUBBART: Yes, sir. There's no question that the evidence was sufficient if believed by the trial judge, which it was, --

Q To prove an unlawful purpose.

MR. HUBBART: Not to prove an unlawful purpose, but to prove attempted breaking and entering a railroad car, which is subject --

Q You think that's something different?

MR. HUBBART: Well, it's a separate statute.

Q By the way, was there -- was there a sentence under count two?

MR. HUBBART: Yes.

Q For 36 months?

MR. HUBBART: For 36 days on count one, credit for time served; and the second count was six months in the county jail and one year's probation.

Q And to run concurrently?

MR. HUBBART: That's correct.

Q And has he been serving?

MR. HUBBART: He served his sentence; correct.

Q And so there were concurrent sentences?

MR. HUBBART: That's correct.

Q And you don't challenge count two?

MR. HUBBART: No, we don't. I mean, they were convicted under a valid statute, no question about that. Breaking and entering a railroad car.

Q Well, why should we reach the constitutionality of the statute under which count one is --

MR. HUBBART: Well, I'm not -- I have not appealed count two at all; that's not before the Court. The only --

Q Well, I understand, but the sentences were concurrent. Do you think that your failure to -- your not appealing count two prevents us from following our concurrent-sentence rule?

MR. HUBBART: Well, Your Honor, as long as a person -- as I understand the law, as long as a person has a conviction against him he has standing to object to it. And there's a conviction in this case against the defendant for vagrancy.

Now, we did appeal the other portion to the District Court of Appeals, Third District, and they affirmed.

Q I understand that. But you don't see any problem here about concurrent sentences?

MR. HUBBART: No, I don't. As long as the petitioner had the conviction against him, it seems to me we have standing to object to it.

The statute provides "persons wandering or strolling around from place to place without any lawful purpose or object" shall be deemed vagrants. And punished according to

another statute, which provides a maximum punishment of a $200 fine and six months in the county jail.

The statute itself, of course, condemns 20 other varieties of vagrants, which are before the Court, I believe, in a comparable case of the Jacksonville ordinance just argued.

Professor Arthur Sherry of the University of California Law School, in a survey of State vagrancy laws, has referred to the Florida Act as "distinctly Elizabethan" and "seems to have been selected at random from the Statute of Elizabeth as it was enacted in 1597-98."

It is based on a long line of English vagrancy statutes dating back to the Fourteenth Century, which constituted some of the most oppressive pieces of class legislation ever enacted by the English Parliament.

In the words of Stephen, in his History of Criminal Law of England, these vagrancy laws constituted "the criminal aspect of the poor laws", the purpose of which was to confine the laboring population in England to stated places and fixed places of abode where they were required to work at fixed wages.

Furthermore, the legislation prohibited wandering around in England. And that was exclusively applied, of course, against the laboring classes in England.

Now, the Florida courts have given some construction to the statute, and in line with the decisions of this Court,

that the court is bound by the State Court in the construction of the statute, it's important to examine several cases.

The leading case is Hanks vs. State, Third District Court of Appeals decision. In that case the Third District Court interpreted the terms "persons wandering or strolling around from place to place" to mean by any mode of travel, whether on foot or in a vehicle. In that particular case the petitioner contended that he was not in violation of the statute because he was arrested in a staionary automobile, and the court held that the mode of travel was immaterial and that one could "wander and stroll" even in a stationary automobile.

On remand, in Johnson vs. State, after this Court reversed in Johnson vs. Florida, the Supreme Court of Florida reluctantly held that the statute had no application to a person sitting on a bus bench. That was not "wandering and strolling".

And finally the terms "without any lawful purpose or object" has been construed in the Hanks case to mean "without good or sufficient reason", which, we submit, is even vaguer than the statute itself: "without good or sufficient reason".

And, finally, the Supreme Court of Florida, in Headley v. Selkowitz, has held that this statute cannot be applied against any person unless they are "vagrants of their own volition and choice".

Now, --

Q Could I just ask you again, to make it clear, just to go back a little --

MR. HUBBART: Yes, sir.

Q Did you say he had served his sentence?

MR. HUBBART: Correct.

Q Six months?

MR. HUBBART: He served the 36 days for which he was sentenced in this case; correct.

Q And the six months on count two?

MR. HUBBART: That's right. He served both of them.

Q And are there any collateral consequences to his conviction on count one?

MR. HUBBART: Well, he has a conviction on his record. There will be, certainly, some employment consequences, or the consequences of -- not in terms of losing your right to vote or things of that nature.

Q I see.

MR. HUBBART: In the court below, the Supreme Court of Florida interpreted the statute and construed it as being derived from "the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able-bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support."

Now, we submit that this section of the statute, as

construed by the Florida courts, is unconstitutional on its face, in violation of the due process clause of the Fourteenth Amendment, for two reasons:

First, the statute is so vague that a person of common intelligence cannot know what is forbidden, thereby inviting arbitrary and discriminatory enforcement of the statute by State authorities.

And, secondly, the statute is so broad that it abridges rights protected by the United States Constitution, to wit: the right to be free from unreasonable searches and seizures and the right to travel.

The law in this area, of course, is pretty clear. It has been stated by this Court in the Connally case, that the "terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to this Court's penalties", and "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law".

In the Lanzetta case, this Court held that a vague criminal statute is void on its face, regardless of the facts of the case, and regardless of the details of the offense charged.

Now, the Supreme Court, in this particular case, has interpreted this statute to be a necessary regulation "to prevent crimes, to deter vagabondage, to prevent people from living off other people". Now, this construction of the statute, we submit, is a frank concession that the law does not even purport to prohibit specific acts of criminal conduct, but instead prohibits a vaguely defined way of life, which is thought in the future to lead to crime.

But it's clear that the construction of the statute is that it's not aimed at any specific acts of criminal conduct.

And Mr. Justice Frankfurter, who took a narrow view of the void-for-vagueness doctrine in the Winters case, pointed this out precisely when he said that these vagrancy "statutes are in a class by themselves, in view of the familiar abuses to which they are put."

"Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police or prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided."

And that is exactly how the Florida court has interpreted this statute, namely, it's designed to prevent crimes

and not to act on any specific acts of criminal conduct. And the Attorney General, with commendable candor in this case, has conceded that this statute is designed to prevent crime, not to punish crime but to prevent it before it even happens.

It's aimed at this vaguely defined way of life: vagabondage, and wandering around.

This Court, in Lanzetta vs. New Jersey, considered a statute which is rather similar to this case. It was an anti-gangster statute. The purpose of the statute, according to the Supreme Court of New Jersey and the Attorney General of New Jersey, was exactly the purpose as urged here in this statute; namely, it was designed to prevent crime before it happened. And in that particular case, there was a New Jersey statute which made it a crime for any person "not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons", and this Court held that the term "gang" was too vague to withstand any type of constitutional test.

Now, we contend that the term "without any lawful purpose or object", which means, according to the Florida court, "without good or sufficient reason" is too vague to withstand constitutional test.

Q Well, there isn't any question, though, is there, counsel, that someone was -- who, if you believed the police officer in this case, there was an attempt to break in a freight car. Now, no one would have any doubt but what "without lawful

purpose" would apply to this particular case.

MR. HUBBART: It didn't have it --

Q I mean anybody would understand that, wouldn't they? If it means anything, it means you shouldn't be around with the purpose of robbing a freight car.

MR. HUBBART: If Your Honor please, he certainly had notice that this activity violated the burglary statute.

Q And not notice --

MR. HUBBART: But he did not have notice --

Q Why?

MR. HUBBART: -- that it violated the vagrancy statute.

Q Why? "Without lawful purpose"?

MR. HUBBART: No.

Q Why?

MR. HUBBART: I mean, it's impossible for a person of common intelligence to know what this means.

Q To know that being on the street for the purpose of robbing a freight car is not covered by that statute? He wouldn't know that?

MR. HUBBART: No. No. I mean it's impossible for a person of common intelligence to -- now, of course, that type of activity might violate another statute.

Q Well, I understand that.

MR. HUBBART: But as the way it's interpreted by the

Florida courts is "without good and sufficient reason". Now, I submit there's no --

Q He knows it unlawful to rob a freight car, doesn't he?

MR. HUBBART: Yes.

Q He knows that.

MR. HUBBART: Attempting to.

Q Or to attempt it. And you suggest that he would not know that that statute that says he shouldn't be on the street with an unlawful purpose includes being on the street for the purpose of robbing a freight car?

MR. HUBBART: Well, if Your Honor please, our position is that the statute is vague on its face, that it's not necessary to get into the facts of the case at all. If the statute lacks an ascertainable standard of criminal conduct, as I understand the law, --

Q Well, I know, but --

MR.HUBBART: -- it's not necessary to even consider the facts of the case.

Q Why, I understand that. But here the facts are that -- you know, a lot of vague statutes are vague in some applications and not in others.

MR. HUBBART: Well, it's our position that there is no conceivable set of facts, --

Q That any intelligent person --

MR. HUBBART: -- that this statute could be constitutionally applied. Yes, sir.

A person of common intelligence is not placed on notice as to what a good or sufficient reason for wandering or strolling might be; what is a good and sufficient reason to one person may not appear so to another. The statute, for instance, gives no notice as to whether or not aimless wandering or strolling --

Q Well, what about robbing a freight car?

MR. HUBBART: Well, Your Honor, that is, we submit, too vague, to let a person know exactly what he is not supposed to do.

Now, there is no question that Your Honor is alluding to the fact that this man was violating a specific statute on the Florida books, which was the attempted burglary statute. Which I think illustrates the really non-essentialness of these -- of this type of legislation.

Q That isn't the question, what is essential; the question is whether it's constitutional.

MR. HUBBART: That's correct.

Q And in this case.

MR. HUBBART: Well, as I understand -- now, perhaps I'm misreading some of the cases in this area, but as I understand the law, it is that if the statute lacks an ascertainable standard of criminal conduct, that is, if we look at the

statute on its face, and we see no real ascertainable standard of criminal conduct, then the statute is unconstitutional, regardless of what the facts of the case may be.

In other words, the facts of the case do not save the statute.

The statute gives no notice, for instance, as to whether or not aimless wandering or strolling around from place to place is without good and sufficient reason. If so, I suppose most of Florida's tourists and retirees who have come to Florida and wander around, sort of aimlessly, in the resort areas and on the beaches of our State, and in shopping areas, arguably would be in violation of the statute.

A person of common intelligence is also not placed on notice as to whether or not he's to give a good or sufficient reason for his wandering and strolling when stopped by an inquiring police officer, or whether his silence on the subject would automatically mean he did not have a good and sufficient reason for wandering and strolling.

Also the statute gives no notice as to whether or not the inquiring police officer must be satisfied that the reason given by the person was good and sufficient reason for wandering and strolling.

Q What if it was 3 o'clock in the morning, would that make any difference as distinguished from, let us say, 3:00 in the afternoon?

MR. HUBBART: Your Honor, I think there's a difference between suspicious conduct and a violation of the statute. There's no question that if a police officer saw a man at 3 o'clock in the morning wandering around in a place, in a dark area, that he would be on inquiry to investigate that man. But I submit, as Mr. Justice Stewart pointed out in his concurring opinion in Palmer, that the government has no constitutional authority to make that suspicious circumstance a criminal offense.

Q What does the police officer do when he stops him at 3 o'clock in the morning and makes the inquiry? What inquiry does he make, constitutionally, in your view?

MR. HUBBART: In Terry vs. Ohio, I think it's pretty clear -- it's fairly clear as to what his constitutional authority is. If he has any facts to which he can point to, which are really less than probable cause, that the man is armed and dangerous and a threat to either him or people in the vicinity, he may conduct a carefully limited search of his outer clothing to determine whether or not he has any weapons.

Certainly there is no constitutional prohibition against any police officer asking one what he's doing in the area, without getting into the question of whether or not the person has to answer the question.

Q Are you then conceding that there is an obligation to give an account of yourself?

MR. HUBBART: No, I'm not.

Q Then what's the good in saying the policeman can ask him, if he --

MR. HUBBART: Because I think that may stop any potential criminal conduct. If the officer is there.

Q Do you want us to speculate that police inquiries will have a therapeutic effect on crime?

MR. HUBBART: No, I'm not at all. But I do think that --

Q Well, isn't it a little bit abstract to say that the police may inquire if, in the next sentence, you say that he need not answer?

MR. HUBBART: Well, without reaching that question; I don't know whether this Court has ever really resolved that issue, of whether or not it is possible for a person to be detained and require some answers.

But I am saying --

Q Well, the stop-and-frisk statutes have some relationship to this, do they not?

MR. HUBBART: Yes, I think they do. Certainly. And I think the Terry case, in the concurring opinion by Mr. Justice White, a suggestion was made that they should have the power of -- the police, in addition to stopping and frisking, also of inquiring.

Now, the vague and --

Q Excuse me.

MR. HUBBART: Yes, sir.

Q If this statute were worded the way the respondent would have us read it, and you can understand that this is on the basis of respondent's brief; we haven't heard him argue yet -- as though it said, as though it made it unlawful for a person to wander from place to place with a criminal purpose, with a criminal purpose; would you still think it would be unconstitutionally vague?

MR. HUBBART: I believe so.

Q You'd have a weaker argument --

MR. HUBBART: I'd have a weaker argument, I think, yes.

Q -- on that.

MR. HUBBART: There is some case law interpreting mens rea, what mens rea means is criminal intent, but even that, that body of law refers to intent to do something. In other words, the concept of a criminal act, as I understand it, is a combination of intent and an act. The wandering is certainly not anti-social.

Q But wandering with a criminal purpose is.

MR. HUBBART: I deny that the government has the constitutional authority to punish a man for what he's thinking. And to walk around, thinking that you're going to commit a crime is one thing, but doing it is something else.

Q Certainly the crime of attempt has been upheld, and the crime of conspiracy has been upheld --

MR. HUBBART: That's right.

Q -- even though the object of conspiracy is never realized.

MR. HUBBART: That's correct, but the attempt law, as I understand it, is that mere preparation to commit an offense is not an attempt. There must be an overt act toward commission of that offense.

In other words, to think about committing the offense yourself, I mean not in conspiracy with anyone else, but to think about it, and even make some arrangements to commit it, is not an attempt to commit it. There must be an overt act toward -- designed to accomplish that.

So I would deny that the government has the constitutional authority to punish somebody for thinking about committing a crime.

Q Well, this is --

MR. HUBBART: The fellow was walking.

Q -- walking towards an apartment building --

MR. HUBBART: The fellow was walking.

Q -- in order to rob an apartment in that building.

MR. HUBBART: That's right. There's no question that is a suspicious circumstance, which a police officer may want to inquire about; but I don't think that that's sufficient

in itself to punish him for committing an offense.

Q Is the construction of this phrase "without any lawful purpose or object" contained in the case of Hanks v. State --

MR. HUBBART: That's correct.

Q -- the only one, the only judicial construction of those words --

MR. HUBBART: That's correct.

Q -- in Florida, in the Florida cases?

MR. HUBBART: That's correct. And the construction is "without good or sufficient reason".

Q Yes, I just read it.

Q What would you say to a man wandering around the streets, day or night, with the object in his mind that "if I see a car with keys in it, I'm going to steal it"?

MR. HUBBART: I don't think the government has the constitutional authority to prohibit that. If he is in the process of doing it, though, or commits an act towards accomplishing that, that's something else.

Q Well, what provision in the Constitution says the State can't do that?

I gather, what Justice Marshall suggested, to get a specific statute that you're wandering around with the purpose in mind of stealing a car if you find keys in it. I gather that's the phrasing of the statute.

Why is it -- what provision of the Constitution says the State can't make that a crime?

MR. HUBBART: Well, I would say the due process clause. I don't know if that fully answers Your Honor's question. The due process clause of the Fourteenth Amendment, I submit, limits the power of the State to punish certain types of acts of crimes.

I suppose this goes to --

Q I would think that's an independent ground that you could argue here, because this, the most this law says is you can't be on the streets with an unlawful purpose.

MR. HUBBART: But the "unlawful purpose" means "without good and sufficient reason".

Q Well, all right --

Q The same thing.

Q -- that's the same thing.

MR. HUBBART: Well, not really the same thing. It's got a little vagueness.

Q Well, why don't you make your due process argument, then, that the States -- the criminal law just may not be interposed in this system dealing with due process?

MR. HUBBART: That's right. That's my position, that it is a violation of the due process --

Q Which is substantive.

MR. HUBBART: Yes, I guess it does make it sub-

stantive due process.

Q That is not a vagueness concept.

MR. HUBBART: Well, that's correct, I think we are getting into a substantive argument.

The vagueness point, however, is still valid, it seems to me, if it does not apprize a person as to what an "unlawful purpose" is. I mean, it's one thing, as the respondent argues, that a person should know in his heart of hearts what's unlawful.

Well, it seems to me that's the function of a criminal statute, to say exactly what's unlawful. And it doesn't. It simply doesn't.

Q You'd have to be pretty subnormal, though, not to realize that robbing a freight car is unlawful.

MR. HUBBART: But, Your Honor, if there was a statute saying you shall not commit an unlawful act, and the evidence was that this man had broken and entered a railroad car, I don't think there'd be any question the statute would be struck down as void-for-vagueness.

Q Well, if a State may, constitutionally, make being on the street for an unlawful purpose a crime, the fellow is there for the purpose of robbing a freight car, I suggest that he knows he's violating that statute.

MR. HUBBART: Well, I don't agree. Because --

Q I know you don't!

(Laughter.)

Q May I ask, before you sit down --

MR. HUBBART: Yes, sir.

Q Getting back to what Justice White asked you earlier: This conviction under this statute, he got 36 days, you said. What might have been the punishment?

MR. HUBBART: Pardon me?

Q What might have been the -- what's the maximum?

MR. HUBBART: Six months.

Q Six months. Under Florida law, may that conviction be used in a recidivist situation, do you know?

MR. HUBBART: I don't believe so, no. The recidivist statutes are on felonies only.

Q Could it be used on impeachment, if he took the stand, --

MR. HUBBART: Yes, sir.

Q -- in some later case?

MR. HUBBART: Yes, sir, it could.

Q Either in civil or criminal process?

MR. HUBBART: Let me answer it this way: A violation of a State statute, whether it be felony or misdemeanor, may be used to impeach the man, the defendant, if he takes the stand as a witness. It's violative --

Q That's in either civil or criminal case?

MR. HUBBART: That's correct.

Q Yes.

MR. HUBBART: Now, if he violates a municipal ordinance, he can't be impeached for that.

Q Well now, is there any other disability from this conviction that might follow?

I mean it doesn't --

MR. HUBBART: Legal disabilities?

Q Yes. It doesn't affect his right to vote, you say?

MR. HUBBART: No, it does not affect his right to vote.

Q How about employment? In the State --

MR. HUBBART: Well, employment, certainly. It would prohibit him from being --

Q What do you mean? Do you mean an employer is liable to hold his record against him?

MR. HUBBART: A State employer, yes.

Q You mean the State wouldn't employ him?

MR. HUBBART: That's right.

Q Not with his record.

MR. HUBBART: That's true.

Q Well, they wouldn't, but there isn't any law that says they couldn't?

MR. HUBBART: No law?

Q There's no law disqualifying him from any kind

of position or employment?

MR. HUBBART: I really don't know, Your Honor. I'm inclined to think there are. But I couldn't -- I really can't cite you any statutes on that. I'm inclined to think there are, though.

Q Well, I'm just wondering why they -- why isn't the case moot?

MR. HUBBART: Well, I don't think the case is moot by virtue of the fact that he has a conviction on his record, and this is going to affect him --

Q Yes, but he served his time. And I think that sometimes has considerable effect, if there's no real disabilities that follow from --

MR. HUBBART: Well, I think Your Honor has already mentioned one. A legal one.

Q On impeachment --

MR. HUBBART: On impeachment.

Q -- that's the one you suggested.

MR. HUBBART: Well, I'm also suggesting a social disability would follow, I mean it's difficult, certainly; and I think the stigma which comes from conviction of any crime is a very heavy one in this society.

Q But what about the stigma of two,instead of one, convictions?

MR. HUBBART: That's correct, yes. You have two

convictions.

Q Why, do you think people measure that?

MR. HUBBART: I think they certainly do. The longer the record, the worse it becomes.

Q You're speculating, though, aren't you?

MR. HUBBART: No, I don't think I'm speculating at all, from what I've seen trial judges do; the longer the record, the bigger the sentence.

Q Well, if a person says, "I will not hire a man convicted of breaking into a boxcar, especially since he was also convicted of disorderly conduct", do you think that's normal?

MR. HUBBART: No. No -- (laughing) -- not the way you phrase it, no. There's no question about it. It wouldn't. But --

Q Well, isn't that pretty close to the situation you have here? Justice Marshall's hypothesis.

MR. HUBBART: I don't think so, because I think some employers might want to take a chance with somebody with just one conviction. If the second one is as a vagrant, they may consider him to be an irresponsible type of person, who just is not going to be able to be rehabilitated.

I don't know. I guess we're speculating, really, a lot of it, in this area. But it seems to me, as almost a given, that any conviction of any crime, of whatever variety it is, is

bound to hurt a person living in this country.

It certainly can't help him, that's for sure.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bailey.

ORAL ARGUMENT OF NELSON E. BAILEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BAILEY: Mr. Chief Justice, and may it please the members of the Court:

There's only one section of the Florida vagrancy statute that's at issue here, and that is the section which proscribes the act of "wandering or strolling around from place to place without any lawful purpose or object".

Q Mr. Bailey, may I ask, is it the practice in Florida to make -- what you have here is the same conduct, isn't it?

MR. BAILEY: That is correct.

Q And as to this -- two or one petitioners? Two. As to these two, the identical conduct is made the subject of two offenses.

MR. BAILEY: That is correct.

Q Is that a practice that you follow up in Florida?

MR. BAILEY: The State of Florida does not recognize the same-transaction concept of double jeopardy. That's what you're asking --

Q I don't mean this --

MR. BAILEY: Well, then, perhaps I misunderstand your question.

Q I'm asking whether -- what happened here was the identical conduct was made the subject of two different counts?

MR. BAILEY: That's correct.

Q And he was convicted on both?

MR. BAILEY: Different elements of the same incident, yes.

Q Different elements?

MR. BAILEY: Yes.

Q What? The essential element, I gather, was the unlawful purpose element of this statute, was satisfied by the attempt to break into the boxcar?

MR. BAILEY: That is correct.

Q That's what you relied on?

MR. BAILEY: That's correct.

Q And without that, would you have convicted him?

MR. BAILEY: We would have --

Q Without that proof? Under that statute?

MR. BAILEY: Not under this statute.

Q All right; so you made the same conduct, the identical conduct, attempting to break into the boxcar, the subject of two -- of prosecution for two offenses?

MR. BAILEY: Well, the being abroad for that purpose supports this conviction here. The actual attempt itself --

Q If you didn't have the proof that he attempted to break into the boxcar, you could never have convicted him.

MR. BAILEY: There would have been no case, yes.

Q That's right. So you did take attempting to break into the boxcar and made it the subject of two offenses. You gave him two convictions and two separate sentences.

MR. BAILEY: Well, let me put it this way: We could have arrested them before they got to it, and attempted to break in.

Q That's what you did. I'm talking about what happened in this case, if I understand it correctly.

MR. BAILEY: Yes, well, I don't understand what the nature of your question is, then.

Are you suggesting it's objectionable to charge him with two charges?

Q I asked you what the practice was in Florida; is that what you do?

MR. BAILEY: This is not a general practice, that I know of, no.

Now, there are other types of cases, where we do charge two or three charges, where, in other States, that would not be proper, because of their double jeopardy concepts, you see.

But in this --

Q I thought that was a federal question.

MR. BAILEY: Referring to what?

Q Double jeopardy.

MR. BAILEY: Yes. No, what I'm saying is that in some States our statute would not be used in many situations where it is used or could be used in the State of Florida. I believe the State of New York and under federal crimes, the single-transaction concept applies, so that in many instances it would not be proper to charge a man for being abroad for that purpose, if you charged him for actually attempting or doing the criminal act.

Q You're talking about federal law, though?

MR. BAILEY: Yes.

Q Not Florida law?

MR. BAILEY: No. What I'm saying is there is no federal law that I know of that prohibits, or that requires the State of Florida to recognize the single-transaction concept.

Q Now you are arguing the case that's about to be argued here later.

MR. BAILEY: Okay. But let me continue, then, because this does not cover every situation, that issue, anyway.

Q Mr. Bailey, let me follow through on Justice Brennan's question: Do you bring the two charges because you're not sure how far your evidence will take you?

MR. BAILEY: There are situations where you could feel, as a prosecuting officer, that you could have proved he

was abroad with that intent; but you might feel that you would not have sufficient evidence to prove that he actually perpetrated the act.

Q Well, you had no eyewitness here of the act, I take it?

MR. BAILEY: No. The only eyewitness saw him going to and coming from, and he heard the noises while they were at the boxcar. The seal of the boxcar was broken. The type noises that this officer heard were the type noises made in breaking a seal of the boxcar.

Q That made out the offense, didn't it?

MR. BAILEY: Yes, it is.

Q And you got the conviction. So you got the conviction for the lesser included offense and the --

MR. BAILEY: No, it's not a lesser included offense, it's an entirely separate act.

Q You don't think it's a lesser included offense?

MR. BAILEY: No, I don't believe so.

Q Do you agree that the same facts make or are essential to --

MR. BAILEY: -- support both convictions in this case?

Q Yes.

MR. BAILEY: We could have convicted him on -- we could have convicted these two petitioners, conceivably, for

being abroad with the unlawful purpose, without them ever actually having gotten there and committed the act.

Does that answer your question?

Q How could you prove their intent?

MR. BAILEY: Well, that's a problem of circumstantial proof. Suppose they had lived in Tampa, Florida, and they had told 15 friends of theirs that they were going to go over --

Q That's not this case.

MR. BAILEY: No, but I'm saying you could prove intent before they actually got there and committed the act. And you could arrest them in the process of going abroad for the purpose of committing that crime.

Q Here the only way you can prove the intent was the observation of the officers of the coming-and-going, and hearing the noises; isn't that right?

MR. BAILEY: In this particular case, that was the circumstantial evidence that supported proof of their intent, yes.

Q And that supported the other offense, too, did it not?

MR. BAILEY: That is correct.

Q Mr. Bailey, do I understand you, that if a man says to 15 people -- I think was your number -- that he is going over to rob a boxcar, and he goes down the street and goes to church, he can get convicted?

MR. BAILEY: It's a problem of circumstantial proof. You could have the testimony of those 15 people, plus his acts of going abroad. If he was going abroad in the direction of the boxcar, if he was walking down the railroad property --

Q But you don't know what was on his mind when he was walking down the street, and you can't prove what was on his mind as he was walking down the street.

MR. BAILEY: If you can't prove it, you have no case against the man.

Q That's right.

MR. BAILEY: There are circumstances --

Q So how can you convict him?

How can you convict him?

MR. BAILEY: Well, in that example --

Q How can you convict him on what's in his mind?

MR. BAILEY: The same way you can --

Q Well, let me put it this way: How do you get it out of his mind and into the record?

MR. BAILEY: By circumstantial evidence, the same way you convict a man for --

Q Just a minute. Now, we've got circumstantial evidence on top of an ambiguous statute. Where will that lead us?

MR. BAILEY: Well, there's nothing ambiguous about this statute, Your Honor, that would be our position. And as far as

proving a man's intent, we would --

Q How do you know, when you see a man walking down the street, that he's violating the statute?

MR. BAILEY: You have to have some reason, some circumstantial evidence, or some statements by him, or other reasons for having probable cause to believe that he is violating the statute.

Q Find a lot of help in the old cases on constructive treason.

Q My second point is: when the concurrent sentence came up, you knew he was going to get a concurrent sentence, didn't you?

Didn't you?

MR. BAILEY: Well, that was rather --

Q Why didn't you drop count one? Why did you leave it in there?

MR. BAILEY: Why should we drop it, Your Honor? He was guilty of that crime. It is a crime in the State of Florida, and we proved it and we convicted him on it.

Q Well, why do you need to have his conviction? For what purpose?

MR. BAILEY: Well, as a practical matter, to be honest with you, this would be a secondary charge if you failed to prove the actual perpetration of the attempt. It's not a lesser included offense, it's a separate act.

Q But, even after that, why did you insist on leaving both charges in at the end?

It was because you wanted him to be -- have some effect on his future, didn't you?

MR. BAILEY: Your Honor, I didn't prosecute the case, I rather imagine the only reason --

Q Well, you represent the State of Florida, that's -- the State of Florida prosecuted, didn't it?

MR. BAILEY: Yes, the State of Florida prosecuted. I have not talked to the people who made the decision on why to prosecute these particular charges.

Q And isn't it the reason that you wanted him to have two strikes on him?

MR. BAILEY: I rather doubt that that's the case at all, Your Honor. It would seem rather apparent to me that the objective was, if they failed to prove the actual perpetration of an act towards accomplishing this intent on the boxcar itself, an actual attempt to -- attempt to break and enter, then they would still convict him for being abroad with that intent.

Because he went there with that purpose, and the evidence established that.

Q What evidence?

MR. BAILEY: The evidence of his acts, in this case.

Q That's what I'm talking about.

MR. BAILEY: Right. Well, in other cases you could have the evidence from the police at point of action.

Q Well, we're talking about this one.

MR. BAILEY: I see the problem you're getting to.

Q Don't you see how he suffers by having these two convictions, more than he would by one conviction? And I get the impression, up to now, that you want him to have two for some reason. And you haven't satisfied me that there isn't some reason for having the two.

MR. BAILEY: Well, if there is, I'm not aware of it. But even if there is a reason, it would be my position to state that Florida has the authority under this statute to do so.

Q Because that's the law of Florida? The law of Florida. But what is the federal law on that?

MR. BAILEY: Federal law --

Q Double jeopardy.

MR. BAILEY: Because of the nature of the evidence in this case, I suppose if the man had not been convicted, if he had been acquitted of an attempt, and there was no other evidence other than his attempt to establish his intent, then there would have been no evidence to support this charge.

Q Which? Two or one?

Count two or count one?

MR. BAILEY: There would have been no evidence to support count one, the vagrancy charge.

Q But, as it was, your point is that under Florida law he was guilty, found guilty of two separate offenses.

MR. BAILEY: Right.

Q It's not an offense and a lesser included offense; it's two separate offenses.

MR. BAILEY: That is exactly right.

Q Going on the same basic transaction. That's a perfectly rational and legitimate position to take, it seems to me.

Q Do you also have a trespass statute?

MR. BAILEY: Yes. Yes, we do have a trespass statute.

Q Why didn't you charge him with that, too, while you were at it?

MR. BAILEY: Well, I don't know why the reason is --

Q Well, is it possible under Florida law you could have got him convicted on all three counts?

MR. BAILEY: I presume it would be, yes.

Q And you see nothing wrong with that?

MR. BAILEY: No, I do not. They are all separate acts. Separate crimes.

Q You mean they are called separate crimes?

MR. BAILEY: He could have committed any one of those crimes without committing the other two, let's put it that way.

Now --

Q May I ask: does the State have a reason not to urge on us that we ought not reach the constitutional question here on concurrent sentences?

MR. BAILEY: Because of the mootness issue, also?

Q On concurrent sentences.

MR. BAILEY: No, Your --

Q And he served the one.

MR. BAILEY: Yes. No,Your Honor, if I had a good argument there, it would be basically just that I missed it.

I also am inclined to urge this Court to go ahead and decide the case.

Q Well, --

MR. BAILEY: We're not going to rely on mootness, if we have the position, because the State of Florida is in the process, and has been for a while, of redrafting its vagrancy statutes. We know other States also are in the process. There is some confusion among State Legislatures because of recent opinions by this Court, and they need some guidelines. And this is the time when they're redrafting the vagrancy statutes.

Q How can we decide it and avoid the constitutional question?

MR. BAILEY: I'm not sure I understand your question. The constitutional question is the only one that's --

Q Well, apparently, if the concurrent-sentence

doctrine applies here, we can avoid decision on the constitutional question. You'd rather we not avoid it, but decide it even if you could have urged concurrent sentences?

MR. BAILEY: Yes. I mean if you're going to turn around and say that the single-transaction concept is required by constitutional law, in those States --

Q I didn't say that. You have concurrent sentences here, don't you?

MR. BAILEY: Yes.

Q And he served one of them --

Q Both of them.

MR. BAILEY: Both of them, yes.

Q Oh, both of them, he served both of them?

MR. BAILEY: Both are completed, that's correct.

Q All right.

MR. BAILEY: I'm not prepared to urge upon you that there are no consequences upon this man that do not give him standing to raise it. As I understand State law, there are certain positions in State Government he probably could not obtain because of his conviction. A police officer, for example.

Q Well, you mean even on count one?

MR. BAILEY: On count one, well, I'm not sure.

Q That's the only one we're talking about.

MR. BAILEY: Yes. That's true.

Q Well, are you sure or not?

MR. BAILEY: I'm not positive, no, Your Honor.

Q In other words, doesn't whatever disqualification he has flow from count two, and nothing more from count one?

MR. BAILEY: I do not know, to be honest, Your Honor.

Let's go back to the wording of the statute, the statutory provision at bar.

The Florida statutory provision, the one under consideration, on its face refers only to the "lawful" versus the "unlawful" nature of one's purpose or object for being abroad.

It cannot be stated that there is no ascertainable standard of conduct right on the face of the statute, because, honestly, there is. It refers only to the lawfulness or unlawfulness of the purpose or object for being abroad.

The question was raised whether or not a person would be required in Florida to give a satisfactory response to police officers upon inquiry, under suspicious circumstances. In Headley v. Selkowitz, I believe '65 or '67 opinion of the Florida Supreme Court, they held unconstitutional a Miami City ordinance that required a reasonable explanation for suspicious circumstances to be given to a police officer.

So, under Florida law, there is no requirement that you explain the circumstances to a police officer, and there can be no such requirement.

Now, Chief Justice, or rather Justice Ervin of the Florida Supreme Court, in Johnson v. State, at 202 So. 2d, stated: The statute does not purport to make it an offense for a person merely to stroll or loiter about without being able to explain to the satisfaction of an arresting officer, or a judge, or a jury, why he was strolling or loitering.

Now, this is the measure of the Florida law. The police officer must have probable cause to believe that a person is abroad with an unlawful purpose; with a criminal intent, in other words.

Q Well, that's not the way that language has been construed by the only court that has construed it, as we're told, in the intermediate appellate court in Hanks v. State, which said that "without any lawful purpose or object" simply meant "without good or sufficient reason". That's quite different from saying "an unlawful purpose".

MR. BAILEY: Yes, that is a substantial difference. That --

Q That is, it's not what we take or have to take, we have no choice but to take the construction of a State statute given to it by the State courts, as the authoritative construction.

MR. BAILEY: Your Honor, the term used there by the Third District is, in itself, vague. If the statute said that, I'd be in a very bad position before this Court. But

the --

Q Well, the point is --

MR. BAILEY: -- statute on its face --

Q -- but that's what the statute does say, you see.

MR. BAILEY: Do they explain what they're talking about?

Q They do.

MR. BAILEY: Well, the statute does.

Q They tell us that's what the statute says.

MR. BAILEY: Well, if you're going to take that as the meaning of the statute, and the only meaning, then I would be in a very rough position here.

I'm telling you that the statute, right on the face of it, refers only to the lawful versus the unlawful nature of the conduct.

Look also at Chief Justice Ervin's concurring opinion in the Florida Supreme Court --

Q In Johnson?

MR. BAILEY: Right, in Johnson v. State, and I think you'll find a clear indication there that that is not a correct interpretation.

Also in the instant case, the Florida Supreme Court referred to Justice Ervin's concurring opinion, and said that it was a well-considered concurring opinion. I think this

further indicates that the position taken by Chief Justice Ervin is the position of the Florida Supreme Court with respect to this law.

That it relates only to unlawful intent for being abroad.

Now, referring again briefly to proving one's intent. A man can be convicted for what the state of his mind is, when he is committing a certain act. You can convict a man of breaking and entering with an intent to commit rape. And his state of mind at the time of breaking and entering is a condition on the basis of his intent.

Q And there are all sorts of federal criminal laws, are there not, where the criminality depends upon a man's purpose when he travels interstate?

MR. BAILEY: That is correct, Your Honor. That is correct; very correct. His intent at the time of crossing State lines, and so forth.

Q Right, yes.

MR. BAILEY: And it's strictly the state of a man's mind what he is thinking, his purpose which supports criminal conviction.

Q Right, his purpose or intent.

MR. BAILEY: That is correct.

Q Mr. Bailey, do you know of any case that's made it a crime for someone to have a mens rea, period?

MR. BAILEY: No. In every case, including this one, it takes some act in perpetration, actually, of that mens rea.

Q I see. And the act here is walking?

MR. BAILEY: Going abroad, moving from place to place, that is correct, sir.

Q Well, you agree that's walking?

MR. BAILEY: Among other things, yes.

Q And certainly a person has the right to walk?

MR. BAILEY: That is true.

Q And so the crime is really what's in his mind?

MR. BAILEY: That is correct.

Q And you see nothing wrong with that?

MR. BAILEY: I see nothing wrong with that. If you can convict him of breaking and entering a house with an intent to rape, then you also can convict him for walking towards that house, with that intent, if you can prove your case.

Q Well, I would submit that committing the crime of rape is in a different legal status from right to walk down the street.

MR. BAILEY: Clearly the crime of rape is in a different legal status from breaking and entering, also.

Q And those are both different from walking down the street. Which this man is convicted of.

MR. BAILEY: He's convicted of walking down the street with criminal intent. There's a difference. I can walk

down the street with intent other than criminal, and I'm doing nothing of danger to society.

Q Yes, but some other people can't. And it's up to the policeman as to whether he lets you go or arrests the other person, in the hope that later he can prove what was in his mind.

MR. BAILEY: Your Honor --

Q When he arrests him, he doesn't know what's in his mind, do you agree on that?

MR. BAILEY: Your Honor, there is nothing in our statutes that authorizes arrest on less than probable cause. Other vagrancy statutes, which you have either stricken down or determined inapplicable in certain situations, authorize arrest on less than probable cause. And that was part of the problem with the statutes.

Now, the police officer here must have probable cause to believe that person is abroad with a criminal intent.

In the Palmer case, Palmer v. City of Euclid, you had a statute which required explanation, reasonable explanation, to be given to the police officer. Now, we don't have that here.

In Headley v. Selkowitz, the Florida Supreme Court specifically said that standard cannot be applied in the State of Florida. You cannot require, by statute or ordinance, that a person give a reasonable explanation to a police officer.

So we don't have that problem.

There must be probable cause to support the police officer's believing they are abroad with a criminal intent.

It should be noted that the Florida statute does not relate to loitering in an unusual manner, or it does not authorize an arrest under unusual circumstances; neither does it require one to dispel a policeman's suspicion, even though his suspicions may be based upon a reasonable suspicion under the circumstances.

The Florida vagrancy statute does not allow arrest on anything less than probable cause, and neither does it make arousing a policeman's suspicions a crime.

Much of the problem with the vagrancy statute is a fear by many people and many judges that a law enforcement officer, when he can't think of anything to charge a man with, is just going to say, "You're under arrest for vagrancy."

And there is a fear by many that this will be abused. It will authorize arrests where there is no proper grounds for arrest.

Looking at the provision under consideration, not the rest of the vagrancy statute, but the very provision under consideration, there is nothing in the wording of that that authorizes a police officer to arrest you simply because he can't think of anything to charge you with. There's nothing there that authorizes an arrest on anything less than probable

cause, to believe you are abroad with a criminal intent, and he must have knowledge of circumstantial evidence to that effect.

Unless there are any further questions from the Court, I --

Q On your -- perhaps I missed it. Do you think your State has the constitutional power to prohibit a person to be on the street with a -- for the wrong reason, or to be on the street with, say, a criminal intent?

MR. BAILEY: My position is that this is all the wording of this statute authorizes, is an arrest when they are on the street, going from place to place, with a criminal intent, --

Q Well, let's --

MR. BAILEY: -- and the State does have that power.

Q Now, even though he hasn't committed any crime yet, he hasn't attempted to commit any crime yet --

MR. BAILEY: That's correct.

Q -- but he intends to. Do you think that's enough?

MR. BAILEY: I think that's enough. It's a very difficult problem of proof, in many cases, naturally.

Q Well, I understand that, but what about -- do you think the State's police power reaches back that far into the incubation of a crime?

MR. BAILEY: When a person sets out with the purpose of committing the crime, yes.

What could be a more appropriate crime prevention statute? I used an example in my brief. A police officer is informed that John Smith, let's say, is going to rob a liquor store. He's going to rob it. He's going to armed when he robs it tomorrow night. Tonight he's going to go there and "case the joint". He's not going to do anything, he's just going to case it, to see how the customers come in and out, and set up his robbery.

What is there in constitutional law that should stop the officer from arresting the man tonight, when he's unarmed, or wandering and strolling around with an unlawful purpose, rather than waiting until the man comes armed tomorrow night and either try to stop him before he gets in, or stop him when he's in perpetration of the act?

Q Well, this challenge hasn't been made to this statute, anyway, has it? In this case?

MR. BAILEY: Well, that issue is not raised in the petitioners' position.

Q Yes.

MR. BAILEY: I'm saying there are many positions, many situations when this is a perfectly proper crime prevention statute.

Q The only challenge to the statute that's been

made in this case is vagueness, is that right?

Q And overbreadth.

Q And overbreadth.

MR. BAILEY: Well, my position is that he only raised the vagueness issue and preserved it for this Court.

Now, starting at page 3 of the Appendix to this case, his oral motion in court refers only to the vagueness of the statute, not to its overbreadth. And the trial court made a written order attempting to put on record this oral motion and his denial of it.

And it's from there that this case comes before this Court.

Now, it's my position that only the vagueness and not the overbreadth is involved.

Q But, in that case you just gave, your hypothetical, is a man about to rob a bank the next day.

MR. BAILEY: Yes, sir.

Q Terry v. Ohio says you could arrest him, but they didn't say you could convict him from being out on the street.

MR. BAILEY: What would you arrest him for?

Q For what he was arrest in Terry, for carrying a gun.

MR. BAILEY: No, no, no. The night before he is there casing the joint, unarmed.

Q Well, he has a right to question him.

MR. BAILEY: That's all he has a right to do.

Q Pat him down, then.

MR. BAILEY: And if that police officer is sitting there, knowing that man is walking around with an intent to commit that crime --

Q Well, if you say it's a great prevention of crime, why not lock up all those people? And don't give them trials or anything. That would prevent it, too, wouldn't it?

MR. BAILEY: Your Honor, --

Q Put them in a camp some place.

MR. BAILEY: Your Honor, --

Q I don't think you have to go that far to win your point; that's my view. I don't think you have to go that far.

MR. BAILEY: At what point --

Q Your point is that in this statute if the State can prove that you had the intent, you can get convicted. That's all you have to argue.

MR. BAILEY: Well, actually, there are two elements: they have to prove that he was abroad, going from place to place, with that intent.

Q Well, how could he get arrested unless he was abroad? The police are not going to go in his house and look for him.

MR. BAILEY: No. Well, my point is, if he's sitting in his house just thinking about it, that's no crime under Florida statutes.

Q Well, all right, he has to prove he's abroad. Your argument is if you can prove his intent, then he's violated the statute? Under your position.

MR. BAILEY: That's correct.

Q You don't say you just pick him up on general principles.

MR. BAILEY: No, no.

Q You're not arguing that, I hope.

MR. BAILEY: No, and you can't pick him up just because of unusual circumstances, either.

Q That's all I'm saying.

MR. BAILEY: Okay. Thank you.

That shall conclude, then.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:11 p.m., the case was submitted.)