In the

Supreme Court of the United States

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

v.

FRANK M. DYSON, et al.,

Respondents.

No. 73-130 C3

Washington, D. C.
November 12, 1974

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TOM E. ELLIS and ROBERT D. LOVE, Petitioners,	:	
v.	:	No. 73-130
FRANK M. DYSON, et al., Respondents.	:	

Washington, D. C.

Tuesday, November 12, 1974

The above-entitled matter came on for argument at 10:45 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BURT NEUBORNE, ESQ., American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016 for the Petitioners.

DOUGLAS H. CONNER, ESQ., 501 Municipal Building, Dallas, Texas 75201 for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-130, Ellis against Dyson.

Mr. Neuborne, you may proceed whenever you are ready.

ORAL ARGUMENT OF BURT NEUBORNE

ON BEHALF OF THE PETITIONERS

MR. NEUBORNE: Mr. Chief Justice, and may it please the Court. My name is Burt Neuborne. I represent the petitioners herein, Tom Ellis, a white college student at Eastfield College in Dallas, Texas, and Robert Love, a black graduate student at the Southern Methodist University School of Music.

Petitioners were arrested at 2 a.m. on January 18, 1972, under a Dallas loitering ordinance while driving in Tom Ellis' car in a suburb of Dallas. At the time of the arrest the petitioners were attempting to determine which of several possible apartments that Mr. Love had looked at during the day would be most appropriate for Mr. Love to rent. Apart from their mere presence in an automobile at 2 o'clock in the morning in Dallas, Texas, there were no signs of criminal activity, and obviously petitioners' arrest and the vague and overbroad Dallas ordinance upon which it was based raise serious constitutional questions under this Court's decision in Papachristou v. Jacksonville.

Petitioners initially sought to raise the constitutional question posed by the Dallas ordinance in the Texas State courts. They first brought an application for discretionary Writ of Prohibition in the Texas Court of Criminal Appeals on February 14, 1972, and that application for discretionary writ was based on the facial unconstitutionality of the Dallas loitering ordinance.

QUESTION: And the purpose of that application was to prevent their being tried at all; was that it?

MR. NEUBORNE: The purpose was to provide the Texas courts with an opportunity to pass on the constitutional question.

QUESTION: Yes, this is pretrial.

MR. NEUBORNE: Pretrial, yes, sir.

QUESTION: And what they asked for was that they not be tried at all because the statute or the ordinance was unconstitutional.

MR. NEUBORNE: Was facially unconstitutional, yes, sir.

QUESTION: What was the form of the charge?

MR. NEUBORNE: The charge, I believe, was an information for loitering under the Dallas ordinance. The description of the arrest and the officer's description of the arrest are set forth in the appendix in the handwriting of the officers and is before the Court.

QUESTION: Mr. Neuborne, are the petitioners here still living in Dallas?

MR. NEUBORNE: Your Honor, we have been unable to ascertain at the present time the whereabouts of the petitioners. We have made preliminary attempts to trace them through their parents, and those preliminary attempts have thus far been unsuccessful, although I must represent to the Court that the attempts have been preliminary. We suggest to the Court that under any circumstances, whatever resolution of the issues posed by this appeal, that on remand to the district court, just as in Steffel v. Thompson, the passage of three years renders it imperative that additional facts be taken by the district court to determine whether or not a current case of controversy exists, for two reasons:

I frankly have no information concerning the current enforcement pattern of the Dallas ordinance, nor have I sufficient information to discuss with the Court the current status of the petitioners with respect to the ordinance. Of course, the arrest and conviction records remain, and that would, I take it, be unaffected by their present whereabouts.

QUESTION: But if they are not living there, the case certainly is moot as to any possible future arrest.

MR. NEUBORNE: I would think that is correct. I would think on remand, under the disposition that we think the preferred disposition of this case, would be a vacation of

the orders blow and a reconsideration in light of Steffel v. Thompson with a suggestion to the district court that they undertake the same type of investigation that this Court suggested the Georgia district court take in Steffel v. Thompson.

After presenting the discretionary Writ of Prohibition to the Texas Court of Criminal Appeals and having it denied on February 21, petitioners then brought a motion at trial, a pretrial motion, in the Dallas Municipal Court, the Corporation Court of Dallas, in which they attacked the facial unconstitutionality of the statute.

QUESTION: Would it be entirely unreasonable to suggest that you are lawyers without clients at the moment?

MR. NEUBORNE: I think not, sir. I think there is a --

QUESTION: You don't know where they are, you don't know whether they live in Dallas, and you don't know whether they have disposed of this litigation.

MR. NEUBORNE: Your Honor, the contact which the Southern Methodist University Law Clinic had with the clients, the last contact, which would be a year ago, indicated that they wished to continue with the litigation, especially as it affects their arrest and conviction record. I suggest to the Court that at least as the arrest and conviction records of these young people, both of whom were college students and who

would be severely adversely prejudiced in their later lives by a conviction record such as this, that there is at least a live controversy and an obligation upon the attorneys to continue to try to clear the records of these individuals in this situation.

When the motion was dismissed in the Dallas Municipal Court, the motion attacking the facial unconstitutionality of the statute, petitioners' counsel in the Municipal Court then faced a critical procedural decision, a procedural decision which, your Honors, we suggest, shaped the subsequent course of this litigation. Petitioners' counsel at that point after the pretrial motion had been dismissed, had two courses of action open to him. First, he could have followed the more traditional course which would have been to press the unconstitutionality of the Dallas ordinance through the Texas courts. That course of action had three serious disabilities:

First, the Texas courts maintain a two-tier system of justice similar to the two-tier system of justice which this Court sustained in Colten v. Kentucky two years ago, so that the price of pressing the petitioners' claims through the Texas court system was the risk of a substantially increased sentence upon presentation in a trial de novo in the County Court. Indeed, it would have turned out that the potential risk would have been a 20-fold increase in the fine.

But secondly, and I think even more importantly, in

terms of the lawyer trying to do a good job for his client back in 1972, the procedural issue which counsel for the petitioners faced in the Dallas court was the problem of issue preclusion if he continued to voluntarily present the constitutionality of the Dallas ordinance to the Texas State courts. On a theory of issue preclusion, election of remedies, or res judicata, or some other type of theory, he might have indeed at that point, were he to continue to go to the merits and to reach a determination on the merits in the Dallas Municipal Court, he might have been barred from litigating the issue further in the Federal courts at some subsequent point.

And that is precisely, your Honors, what happened to counsel in Thistlethwaite v. New York, which was reported at 497 F.2d 339, where they followed the more traditional route and went up through the State court system challenging a park permit regulation on which there was only a $5 fine and for which, of course, habeas corpus would probably not lie in a subsequent proceeding, and when they had exhausted all their State judicial remedies and sought to raise the constitutionality of the New York City park permit statute as applied to prospective distributions of leaflets --

QUESTION: Why aren't you barred by the judgment of the Municipal Court?

MR. NEUBORNE: Yes, sir, I was coming to that. The

choice that petitioners' counsel made at that point was to exercise an element of the -- offer a compromise, which your Honor mentioned in Colten v. Kentucky, as a significant aspect of the two-tier system. What petitioners' counsel did at that point was offer to plead nolo contendere, which under Texas law has no collateral or res judicata effect, disposes of the --

QUESTION: It may not, but you only did that after you lost the motion to dismiss.

MR. NEUBORNE: Yes; there was a pretrial motion to dismiss, your Honor.

QUESTION: There was a final ruling on that motion.

MR. NEUBORNE: There was a ruling on the motion to --

QUESTION: By a Texas court.

MR. NEUBORNE: Yes.

QUESTION: Why doesn't that preclude your --

MR. NEUBORNE: Your Honor, we suggest that the final judgment would not have attached until the Texas court reached the full merits of the determination as to guilt or innocence. In other words, there was an initial preliminary motion to dismiss. Once that motion --

QUESTION: Do you know whether under these circumstances a Texas court would have held you barred by this judgment from filing a civil suit, declaratory judgment suit, in the Texas court?

MR. NEUBORNE: My understanding, sir, is that the entry of a nolo contendere plea under Texas law -- and I am not an expert on Texas law -- my understanding of Texas law is that we would have not been barred. As a matter of fact, that is precisely the reason for the offer of a nolo contendere --

QUESTION: Maybe not barred by nolo contendere, but barred by the Court's decision on your motion to dismiss in which you presented the constitutional issue and it was finally resolved.

MR. NEUBORNE: The whole purpose of presenting the constitutional issue in Texas court was to provide them with the option, if they wished, to reach the issues, and if they chose not to reach the issues, to at least permit the petitioners to reserve their Federal rights for litigation at some future point. And that, as I understand it, was counsel's purpose in proceeding by nolo contendere under these circumstances. We believe, your Honor, under any circumstances, even without the nolo plea, that there would have been no res judicata preclusion here, and, of course, --

QUESTION: Why not?

MR. NEUBORNE: We think that there are five possible reasons why res judicata should not apply:

First, the considerations of nolo.

But, second, the considerations which your Honor adverted to in the dissent from certiorari in Mack?, and that

is that when 1983 actions are concerned, there is at least a question as to whether or not res judicata should be applied with its full vigor to such a determination, especially where here it is being used as the functional equivalent in some part of the role which is played by Federal habeas corpus in granting ultimate Federal review in issues of criminal jurisprudence raising constitutional questions.

Third, we believe that the existence of the Texas two-tier system which would have forced petitioners to risk a 20-fold increase in their sentence as the price of appealing from any adverse decision in the Texas Municipal Court cuts very heavily against precluding the petitioners from seeking remedy in Federal court. While Texas, under this Court's decision in Colten v. Kentucky, may condition access to the Texas courts undergoing a trial de novo with the possibility of an increased sentence, we suggest it's a far cry from that to condition access to the Federal courts under the Civil Rights Act of 1871 on the same requirement that you risk a substantially more severe sentence as the price for exercising the choice of forum rights which Congress determined to give to civil rights litigants.

QUESTION: You have me worried about nolo contendere in Texas. If you plead nolo contendere, you are then found guilty, are you not?

MR. NEUBORNE: Yes, sir, you are.

QUESTION: And then can be sent to prison, right?

MR. NEUBORNE: Yes, sir.

QUESTION: You say it doesn't have any effect.

MR. NEUBORNE: Sir, what I meant was that it doesn't have any collateral effect. It doesn't have any res judicata effect on subsequent proceedings in Texas. It is not an admission of guilt, for example, in a subsequent civic proceeding.

QUESTION: Is it different from a guilty plea?

MR. NEUBORNE: Yes, sir, very different from a guilty plea. A guilty plea is --

QUESTION: Give me a Texas case.

MR. NEUBORNE: Your Honor, I think Texas follows the traditional rule that would be followed in a Federal court. For example, if there is an --

QUESTION: You think.

MR. NEUBORNE: If there is an anti-trust --

QUESTION: You think.

MR. NEUBORNE: That is my understanding of the Texas law.

QUESTION: Well, you have shown me one there.

MR. NEUBORNE: Well, your Honor, if I could read you the Texas statute, which my colleague has pointed out --

QUESTION: That's all I am asking.

MR. NEUBORNE: Sorry. I should have gotten to it

much sooner.

The legal effect -- this is Texas Code of Criminal Procedure Annotated, Article 2702, subsection 6, 1965. The legal effect of such plea -- referring to a nolo contendere plea -- shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

QUESTION: But that is different than saying it doesn't have any collateral effect in the traditional sense because, you take the Federal anti-trust judgments, and certainly the Texas statute sounds like it's a counterpart of them, permit the use of a criminal judgment in a rather unusual way in a civil action if there has been a guilty plea. And it sounds to me like all they are saying is in Texas that a nolo plea won't have this broad an effect.

MR. NEUBORNE: Your Honor, as I understood it -- and I think your Honor's suggestion that the Texas statute is the same as the Federal anti-trust practice is correct -- but under Federal anti-trust practice, the entrance of a nolo plea by a defendant cannot be used against him in subsequent civil proceeding to determine that the underlying legal issues in the initial criminal proceeding were to be resolved adversely to him.

QUESTION: That certainly makes sense, but it seems

to me that falls far short of saying that he is not bound by the judgment entered in this case.

MR. NEUBORNE: Your Honor, all petitioners -- well, perhaps I should clarify what petitioners seek precisely in this case. Petitioners are not attempting in this case to collaterally attack the Texas judgment.

QUESTION: But you are asking that it be expunged, aren't you?

MR. NEUBORNE: Your Honor, petitioners seek three causes of action, and because the case below was disposed of under Becker v. Thompson, no court below found it necessary to analyze the three causes of action separately. But I suggest that the separate analysis of the causes of action is critical in a proper resolution.

Petitioners' first cause of action and their primary cause of action is a cause of action seeking a declaratory judgment identical to the Steffel declaratory judgment protecting them against the threat of future prosecution.

Petitioners' second cause of action was a determination not that the conviction be voided, but simply that Texas be restrained in some way from disseminating records of the conviction in the future. In other words, the fine, the punishment, whatever Texas did to petitioners was an appropriate imposition of sentence under a nolo contendere plea and --

QUESTION: What is the Federal basis for that second cause of action?

MR. NEUBORNE: That, as far as I know, is a novel cause of action, one which the district court never reached, your Honor, because it felt that it could not even entertain the first cause of action. I suggest on remand that these are questions, if this Court were disposed to remand, that these are questions which obviously must be grappled with.

QUESTION: Well, your first cause of action, I guess, you said is moot.

MR. NEUBORNE: No, sir. I say that we must determine whether it is moot on remand. It may well be on remand that it is moot.

QUESTION: I thought you said that any prospective -- this case was dead as far as any prospective significance was concerned.

MR. NEUBORNE: No, sir.

QUESTION: In terms of the enforcement of the ordinance against these petitioners.

MR. NEUBORNE: No. What I suggested was that under Steffel it would be appropriate on remand to the district court to take fresh evidence of that fact. But this case is now three years old, your Honor. It was filed in March --

QUESTION: Suppose you had appealed and you had a

trial de novo and you had judgment entered against you in the same way and found guilty, and then you decided that you should go to the Federal court rather than appeal to the Texas -- go up through the Texas appellate system.

MR.NEUBORNE: Yes, sir.

QUESTION: Now, would you suppose the 1983 course is open to you then?

MR. NEUBORNE: No, sir.

QUESTION: Why wouldn't it be?

MR. NEUBORNE: We don't suggest, your Honor --

QUESTION: Why wouldn't it be?

MR. NEUBORNE: Because of the absence of a two-tier problem in a direct appeal situation.

QUESTION: I know, but affirmatively what would bar you? Res judicata or what?

MR. NEUBORNE: Oh, I see. I understand. Probably res judicata.

QUESTION: What about Younger?

MR. NEUBORNE: It's not res judicata Younger v. Harris, the notion that the criminal proceeding continues on to the very end.

QUESTION: But let's assume that at the time you filed your Federal suit, the time to appeal had expired so there was no criminal case pending. You would still say that Younger would bar you in the sense that you could always

then short-circuit Younger just by letting the appellate --

MR. NEUBORNE: Your Honor, I would suggest that then the issue would turn on what the cause of action was. If the cause of action were a collateral attack on the conviction itself --

QUESTION: It is.

MR. NEUBORNE: -- I think that Younger would bar us. If the cause of action were prospective --

QUESTION: Either res judicata or Younger would bar you.

MR. NEUBORNE: In those circumstances. But I think the critical distinction and the distinction which I am trying to articulate is the difference between a cause of action which was retrospective in nature and looks backward to attempt to impeach the judgment itself and a judgment which is declaratory and prospective in nature under the Steffel rule --

QUESTION: Now, your expunction argument looks backward, doesn't it?

MR. NEUBORNE: It falls between two stools, I am afraid. I have not in my own mind --

QUESTION: I know, but to get rid of the record you have to get rid of the conviction.

MR. NEUBORNE: Sir, I think it might be possible to postulate an argument that said that the conviction when

made was proper and having pleaded nolo one cannot then go back and attempt to directly impeach the conviction, but that the conviction was based on an unconstitutional statute which has subsequently been found to be unconstitutional, and that it would be inappropriate to continue to punish the petitioners on a daily basis by the daily dissemination of their arrest and conviction records prospectively. In other words, I think the expunction cause of action has some elements of a prospective application, although I agree with the Court that there is at least, as to the expunction aspects of the case --

QUESTION: What good will that do these petitioners? Assuming that if you win this case, assume it doesn't get on the front page of every newspaper in this country, how will they ever know about it?

MR. NEUBORNE: Your Honor, first their arrest and conviction records would be expunged and --

QUESTION: How will they know about it?

MR. NEUBORNE: Well, in terms of the ordinary and normal dissemination of the arrest and conviction records which go on in everyday life, at least that will stop for the petitioners.

QUESTION: But how will they know about it?

MR. NEUBORNE: Your Honor, we will make every effort to notify them personally.

QUESTION: And if they are alive, you might find

them.

MR. NEUBORNE: Yes, sir. We will make every effort to find them and to notify them personally.

Your Honor, I don't -- yes, sir.

QUESTION: When did you all last hear from the petitioners?

MR. NEUBORNE: Your Honor, as I understand it, approximately a year ago.

QUESTION: Did you as counsel hear from them, or was this some indirect communication?

MR. NEUBORNE: Your Honor, I am counsel in New York. May I have a moment to check with my co-counsel on that point?

QUESTION: Have you ever heard from them?

MR. NEUBORNE: Have I ever personally heard from them?

QUESTION: Yes.

MR. NEUBORNE: No, sir. I came into this case --

QUESTION: Has any counsel in this room ever heard from them?

MR. NEUBORNE: Oh, yes, sir.

QUESTION: Which one?

MR. NEUBORNE: Did you say in this room?

QUESTION: Yes.

MR. NEUBORNE: Your Honor, counsel who has dealt personally with them is Professor Walter Steele at Southern

Methodist University.

QUESTION: Is he present?

MR. NEUBORNE: No, sir.

QUESTION: Do you know when he last heard from them?

MR. NEUBORNE: Approximately one year ago, Mr. Kennedy tells me.

QUESTION: Was that in writing, or how was the communication conveyed?

MR. NEUBORNE: Professor Kennedy tells me the original authorization was in writing, but he doesn't know whether the last contact of a year ago was in writing or not.

QUESTION: And you can't tell this Court what they want right now.

MR. NEUBORNE: Yes, sir, what they want right now.

QUESTION: How can you do it? If you have never seen them and nobody else has seen them for over a year.

MR. NEUBORNE: What they want right now, your Honor --

QUESTION: How can you say it?

MR. NEUBORNE: Well, based on the authorization which they gave to counsel when the case was originally begun.

QUESTION: People change, don't they?

MR. NEUBORNE: It's possible that they don't care about their arrest and conviction records any more, but I

suggest to the Court that's not likely.

QUESTION: How do we know we've got a case in controversy here?

MR. NEUBORNE: I don't know that you have.

QUESTION: You don't.

MR. NEUBORNE: We suggested to the Court, and I think appropriately so, that a problem with this case is that it would be appropriate to go forward with the prospective causes of action under generalized notions of Federal, that there was at the time it was presented to the district court in 1972 a live case or controversy. Unfortunately, the district court believing itself bound by Becker v. Thompson failed to reach that case or controversy. Three years have now passed since that occurrence. I would be the last person to suggest to the Court that the Court should blindly proceed in the face of the passage of three years' time without adducing fresh facts. It was for that reason that we suggested to the Court that the preferred disposition of this case is a vacation of the decisions below in light of Steffel v. Thompson and a remand to the district court for determination as to whether or not there is anything viable before the court. We seek no more than that in this proceeding. We believe that --

QUESTION: Don't we need a case or controversy to do that?

MR. NEUBORNE: My understanding is that you can if you wish vacate a decision of the court below on the grounds that it either has become moot or that the case or controversy no longer exists and remand to that court below for the taking of evidence.

QUESTION: Are you suggesting mootness?

MR. NEUBORNE: I am suggesting that there is possibility of it, yes. Your Honors --

QUESTION: What do you want us to do -- write an essay?

MR. NEUBORNE: Your Honor, what we suggested that you do is write a one-line vacation of the district court's dismissal and a remand to the district court to simply determine whether under the principles that this Court laid out last year in Steffel v. Thompson --

QUESTION: I thought you said it was moot.

MR. NEUBORNE: Well, your Honor, mootness and lack of standing in a case like this seems to come in a full circle. If the petitioners no longer have a live case or controversy, whether one calls it lack of standing or one calls it mootness, that is something which ought to be determined on remand in the district court, and we suggest the appropriateness of that as a disposition of this matter. We do not suggest this case is an appropriate vehicle for major consideration of the issue. Our primary point in our

brief was a suggestion that since both lower courts have disposed of this case without analysis, properly so because they found them barred by Becker v. Thompson from considering the difficult question the case raises, that the appropriate way to dispose of this case is to vacate those decisions, remand to the district court, see whether there is a live case or controversy and start all over again in the light of post-Steffel jurisprudence.

This Court is being asked to rule on very difficult issues on a difficult record in which there has been no analysis by the courts below.

QUESTION: What's your reference to Younger?

MR. NEUBORNE: I'm sorry, sir.

QUESTION: Why doesn't Younger rather than --

MR. NEUBORNE: Younger doesn't apply because the pending prosecution was over a full month before the proceeding began. And the pending prosecution was over, your Honor, with the consent of the State of Texas. A nolo plea need not be accepted under Texas law. It was accepted by the judge as a speedy way to dispose of that particular proceeding and not to dispose of the underlying legal issues which that proceeding raised.

I suggest to your Honor that a nolo plea under the facts of this case is the functional equivalent in a criminal case of an .. reserve in a civil case in that you

are present involuntarily in a State forum. You urge the State forum, all right, you have me in the State forum, you can convict me under a nolo plea, but I would like to reserve my right to litigate the underlying Federal issues until some subsequent point.

QUESTION: Do you and the State agree that that is the effect of a nolo plea in Texas ?

MR. NEUBORNE: I have not discussed the matter with the State, but from the statute, that was the understanding of counsel when he offered the nolo plea, that is the understanding of counsel today when we present it to the Court --

QUESTION: But it certainly didn't bar you from appealing up through the State system.

MR. NEUBORNE: No, sir.

QUESTION: Or it didn't bar you from raising your Federal claims further in the State system.

MR. NEUBORNE: Except under those circumstances had we done so, I feel that we would have been --

QUESTION: I understand that, but there was no bar.

MR. NEUBORNE: Oh, no, sir, except for the bar that's raised by the danger of a 20-fold increase in sentence in a two-tier system of justice which Texas maintains, which, Your Honor, can be a substantial impediment to proceeding. Petitioners were fined $10, and the potential maximum that they could have received on a trial de novo was $200 fine.

QUESTION: But they could have relitigated these issues in the higher court, could they not?

MR. NEUBORNE: No question about it, your Honor. No question about it.

QUESTION: Returning to questions of Mr. Justice Marshall a few minutes ago, you had a petition for certiorari filed in this Court nearly a year and a half ago and during that year-and-a-half period we don't know whether there is a case or controversy still here. The whole machinery of the Court has been involved in dealing with this case which we are not sure, and you can't assure us, is a case.

MR. NEUBORNE: Your Honor, when we learned of the problems in locating the petitioners, that's when we for the first time in our brief on the merits suggested to the Court the appropriateness of a remand in this case and not a plenary consideration on the merits.

QUESTION: I suggest to you that it's hardly the kind of a case that ought to engage the attention of this Court with all else it has to do to wait until the case has been here for a year and a half to find out whether there is any case at all. I'm not scolding you personally; you are doing your nob as counsel.

MR. NEUBORNE: I take it as a personal criticism and I apologize to the Court.

QUESTION: No, I don't intend --

MR. NEUBORNE: I think you were right, I should have notified you earlier.

QUESTION: I don't intend it personally. You are performing your function as counsel. But I am speaking to the question of the role of this Court and how our time should be consumed and applied.

MR. NEUBORNE: Yes, sir. I understand that, and I agree with it completely.

QUESTION: I suppose your suggestion of a simple remand . . . following the Steffel procedure of determining whether there is a live case or controversy represented a recognition on your part --

MR. NEUBORNE: Yes, sir, I think that's why we did it. But I think the Chief Justice is absolutely correct, we should have been more explicit as to why we were saying it. We thought that it came across clearly enough in the papers, but we should have been more explicit as to why we thought a Steffel remand was appropriate.

Thank you, your Honors.

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

Mr. Conner.

ORAL ARGUMENT OF DOUGLAS H. CONNER

ON BEHALF OF THE RESPONDENTS

MR. CONNER: Mr. Chief Justice, and may it please the Court: I represent five named respondents in this present

litigation, Frank M. Dyson, the former Chief of Police for the City of Dallas; N. Alex Bickley, the present City Attorney of Dallas; Scott McDonald, former City Manager for the City of Dallas; Hugh Jones, former Clerk of the Municipal Court; and Wes Wise, the present incumbent Mayor who soon is subject to going through the election and campaign for his re-election.

The facts in this case briefly, the petitioners were arrested on January 8, 1972, at 2 a.m. I differ with counsel as to their version of the facts. The facts are set out, or at least our version of the facts, are set out in the arrest report that's made a part of the appendix of this file.

QUESTION: What page? Do you have the page?

MR. CONNER: I don't. It's the arrest report which refers to the petitioner Love. It is indexed in the appendix, I believe page 46, 47, and I think the next page also, your Honor.

The petitioners' theory of the case is that they were looking for an apartment. The arrest report indicates that it was in an area where new homes were being constructed. It was in the area of North Dallas residential area. That shortly subsequent to the arrest there was a report of burglaries in the area. There had been burglaries at night in this particular area. It was 2 a.m. on a week night. There was a protective agency in the area and these were the only vehicles apparently, or the only persons in that area

shortly after the call.

It was upon this information that the police officers arrested the petitioners.

QUESTION: What is an alais ticket?

MR. CONNER: Sir, one of the petitioners had a ticket which he did not dispose of. He did not -- it was alais, he didn't pay his fine, nor did he -- he did take a plea on the case but didn't pay his fine.

QUESTION: Both of them had --

MR. CONNER: I believe it's one of them.

QUESTION: Both 45 which has to do with Ellis and 46 which has to do with Mr. Love, each one says also arrested for loitering and alais tickets, suspect also found to have alais tickets. What did you say an alais ticket is? Each one of them had it.

MR. CONNER: An alais ticket is one that hasn't been disposed of by payment of a fine.

QUESTION: What is one what that hasn't been disposed of.

MR. CONNER: It's a ticket or citation, usually a minor misdemeanor traffic citation type matter which they either took a plea of guilty or they just never did come in to Municipal Court and dispose of. In those instances, the procedures of the Dallas Police Department is when they do reach an individual who has an alais citation, they bring

them to the police station and make them post a bond to insure their presence or at least the forfeiture of their bond.

The petitioners assert in their brief and throughout this case that they have used diligence in the State courts. We assert that they have not used diligence in any manner. They pled guilty or no contest. The statute said it's one and the same. They took the $10 fine and $2.50 court cost and they pled out and they did nothing further in the State courts.

They present two questions in this action. One is having once been fined, are they proper persons to bring declaratory judgment for the threatened future arrest? And also they pray for an expungment.

In the respondents' answer to the complaint, we asserted then and we assert now that the petitioners have failed to state a claim about which relief can be granted. They did not assert any allegations of bad faith or harassment against these respondents. They showed and indicated by their pleadings no irreparable harm or injury.

We have also asserted and still maintain they did not give any showing of diligence. Their actions with respect to the Texas Court of Criminal Appeals is putting the cart in front of the horse. It was not timely, it's not reasonable, it's not appropriate. They had the right to a trial de novo in the County Court of Appeals. They indicate this was a more

severe punishment than possibly one could have obtained in Municipal Court. I disagree. The fine in both courts, the maximum would have been $200. The exposure in Municipal Court is no greater than it was in the County Court of Appeals.

QUESTION: I noticed apparently these pleas were entered on February 22, 1972. Had they pursued a trial de novo, that would have been the next step, would it?

MR. CONNER: Yes. They had --

QUESTION: How much time did they have to do that?

MR. CONNER: I believe, your Honor, it's 10 days.

QUESTION: From February 22?

MR. CONNER: Correct.

QUESTION: And they filed this complaint in Federal court on March 27, that's after the 10 days.

MR. CONNER: That's correct.

QUESTION: Well,you say you believe 10 days. Is it or isn't it 10 days?

MR. CONNER: To my best knowledge, I'm almost positive, yes, it's 10 days.

QUESTION: They let the time for that appeal run out before they brought this Federal court action.

MR. CONNER: I am sure of that, yes, your Honor.

QUESTION: Mr. Conner, is the ordinance still in effect in the same form or has it been amended?

MR. CONNER: Sir, for the purposes of this case, yes,

it is in effect. To the extent of number of arrests, I do not know, but it still is being used and enforced.

QUESTION: Has its constitutionality been tested in State courts anywhere to your knowledge?

MR. CONNER: No, it has not.

It is the respondents' position that there is not a case or controversy here. These individuals are not proper persons to test the constitutionality of the city's ordinance in light of post-Steffel or any decision of this Court.

The Court should look at this case at the time of this review and not at the time that it was initiated. This is the usual rule in Federal cases. It is not our burden to prove a case or controversy. We have been stating that there wasn't a case or controversy, that they weren't proper persons from the initiation of this suit, and I think this position is stronger now than ever before. There is no case or controversy. These are not proper persons to bring this action.

QUESTION: Mr. Conner, I have one other question. I think there is an inference or implication somewhere that the prosecution in Dallas has as a practice dismisses charges under the loitering ordinance once someone has taken the necessary steps for a trial de novo. Do you have any comment on that?

MR. CONNER: Well, we didn't in this case. They

did plead out. We didn't dismiss it. We were ready for trial in this case. The law student who wrote the affidavit, I believe, on page 40 to 41 of the appendix said we dismiss maybe a quarter of the cases. Yes, there are dismissals, your Honor, but I don't think it's a practice of customarily dismissing it when we see the eyes of an attorney. No, sir.

This Court has said it's a rare case where a single prosecution constitutes a quantum of harm to justify Federal intervention. I say this case, sir, has been no showing of harm to justify Federal intervention. We can't look at the subjective feelings and only the subjective feelings of -- one of the petitioners said, "I have a chilling of feeling about my first amendment rights being affected." We have got to look to the genuine threats, if they are genuine, and look at the objective findings in the record.

Of the five respondents, only two of them remain. There is no showing as to the actions of the incumbent city officials. There has been no harassment or no bad faith alleged. There has been no pattern of arrest indicated which would apply to these persons that wouldn't apply to anyone else. The city of Dallas hasn't been shown to go after and just prosecute hippies or college students or any ethnic social group or any racial minority or any distinct class of persons to which the petitioners might belong.

The law student indicated that there are 40 to

maybe 50 arrests a month under this ordinance. I maintain it's highly, highly speculative and conjectural that these persons will again be arrested under this ordinance. Just sheer mathematics, if they were in Dallas, and we don't have a showing that they are and they probably are not, we are a municipality, the eighth largest city in the country, with a population in 1970 of 844,000 and a county population in excess of a million three. And the mere mathematic possibilities are very remote, particularly for someone whose whereabouts can't even be shown to be in Dallas.

The petitioners waived with the advice of counsel their right to proceed further. This Court has looked closely any time someone takes a plea and waives his constitutional rights to proceed. I think this Court should particularly consider this in the light of the fact that this is a misdemeanor offense and look at the posture it puts the respondents. How can we proceed further when the petitioners plead out? We cannot go further. We are barred from going any further. Yes, we took a plea of guilty and what else can you expect of the respondents? And look what posture the petitioners have placed us, the respondents.

QUESTION: The fact remains, Mr. Conner, does it not, that the district court here dismissed this complaint on the authority of Becker v. Thompson.

MR. CONNER: That's correct.

QUESTION: And Becker v. Thompson was explicitly overruled by this Court in Steffel v. Thompson. So wouldn't it logically follow that the thing to do is remand this to the district court to consider the case free of its misapprehension that Becker v. Thompson is the law?

MR. CONNER: Your Honor, I think it was decided under the Younger doctrine primarily and the interpretation of the Fifth Circuit of Younger. Steffel makes the strongest argument as to case or controversy, the genuineness of the threat of prosecution, and the Allee decision also strongly supports the position that in only cases of genuine threats of future prosecution should this Court or any other court entertain Federal intervention. And I think that position is made stronger by recent decision of this Court than ever before.

QUESTION: In other words, you are saying in order to remand we have to find the case or controversy here and now.

MR. CONNER: Yes, and not at the time the action was initiated, but at the time of review.

QUESTION: Isn't your position also from your remarks that there was not a sufficient case or controversy at the time the district court decided this?

MR. CONNER: That is exactly my position.

QUESTION: That even under Steffel v. Thompson this

plaintiff didn't show --

MR. CONNER: A case or controversy or a genuine threat of future prosecutions sufficient to involve the intervention of a Federal court.

QUESTION: That's right. Not only no case or controversy, but there wasn't a sufficient allegation of a genuine threat of future arrest or prosecution.

MR. CONNER: And I think the Court should look in the pattern and practices of the respondents, the government officials involved, and see whether or not there is a genuine threat, and there are no allegations in the complaint and no allegations today or any time.

QUESTION: Can I take it one of your positions is that wholly aside from Steffel, Younger v. Harris bars this suit in the Federal court because they failed to follow their case up through the State system, that Younger v. Harris would -- that there had been a criminal case pending and it would still have been pending if they had appealed their case and presented their Federal constitutional claims in the State courts.

MR. CONNER: I would believe, and I do urge that Younger v. Harris should be applicable or at least considered in this Court's ruling. The only thing that precludes Younger from being considered here is that there is no pending prosecution, and that was the --

QUESTION: But there was. There was one and a conviction which could have been appealed.

MR. CONNER: Right. But the petitioners by their own actions took the less stringent course and so they are not bound by Younger because "we paid the fine." And I think that's rewarding the less diligent from the stringent guidelines of Younger which I think are inappropriate and unfair to any litigant in Federal court, and particularly one who occupied the position of respondents.

The Court in Steffel spoke of res judicata difficulties, and I think this is res judicata difficulties here. There was a plea in Municipal Court, and it was over. This Court would be substituting itself for the County Court of Appeals to reverse or change over this decision, and it would have a definite res judicata effect. I think to remand this case would be a reward or award to the nondiligent, to take them away from the stringent rulings of Younger v. Harris. I think the Court should see that there is no case or controversy, and Allee and Steffel both assert, and this Court's trend to look to see of the genuineness of these threats of possible prosecution.

I would like to reserve whatever remaining moments I have for rebuttal, if possible.

MR. CHIEF JUSTICE BURGER: You have a few minutes left, Mr. Neuborne.

REBUTTAL ORAL ARGUMENT OF BURT NEUBORNE

ON BEHALF OF THE PETITIONERS

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

Merely on the case or controversy, as we understood it, the case or controversy perimeter which this Court had laid down both in Steffel and earlier in Boyle v. Landry flowed somewhat like this: In Steffel there was a direct threat to a direct person, and that was held to give sufficient standing. In Long Island Vietnam Moratorium v. Cahn, which this Court affirmed last year, there was a generalized threat by a prosecutor to the public at large, and that was sufficient to give standing. In Roe v. Wade and Doe v. Bolton there was the mere existence of the statutes themselves unaccompanied by any specific threat, and that was held sufficient to give standing. In Epperson v. Arkansas there was a discredited statute which had been on the books -- which had not been enforced since 1928, and in Epperson that was held sufficient to give standing.

We think that the petitioners, at least in January of 1972 when the case or controversy was originally -- or March of 1972 when the case or controversy was originally submitted to the Federal court, manifested a sufficient stake, a sufficient fear of future arrest which was neither chimerical or imaginary within the language of this Court in that the only conduct which they have been guilty of was to be guilty of being on a Dallas street at 2 o'clock in the morning in a

car driving in a Dallas suburb. They had no idea why they were arrested, had no idea what conduct on their part triggered the arrest. Indeed, you had a statute sufficiently broad that would virtually invite dragnet and suspicion arrests, and if these people don't have standing to challenge the statute, it would be virtually impossible to hypothesize anyone else to whom the statute might be applied who would have standing. It's the very vice of the Dallas ordinance that it's so vague, so without standards, that it's not directed particularly at anybody, that it is a virtual grant of untrammeled discretion to the police to make whatever arrests they wish. Having been arrested under it once, we think that that would have been sufficient back in 1972 to determine whether or not there was a case or controversy, especially given the current patterns of enforcement which the Dallas police were engaged in.

Your Honor, we do not ask this Court to substitute itself, or the Federal court to substitute itself for the appellate forum. The only thing that we ask in this case is that if a jurisdiction which permits nolo contendere is prepared to allow a criminal defendant to offer a nolo contendere plea and to take the nolo contendere plea, that under general principles of nolo law, that grants a benefit to the State and it allows the State speedy disposition of the particular proceeding and the imposition of sanctions.

On the other hand, the person who offered the nolo plea himself is attempting to reserve to himself the opportunity, should it be appropriate, to mitigate the underlying legal issues in Federal court pursuant to the choice of forum rules granted by the Civil Rights Act of 1871. In fact, in candor, the basis of our claim is that a nolo plea, if accepted by an appropriate jurisdiction, is the functional equivalent of a reserve under England v. Louisiana Board of Medical Examiners and is the attempt in a criminal litigation to reserve for a future time the opportunity to present underlying legal questions to a Federal court. The option whether to accept it lays with the State. The State is under no obligation to accept a nolo plea, but they did so, and under those circumstances we believe the petitioners have not foreclosed their rights to present the underlying legal issues at some appropriate time to a Federal court.

QUESTION: I gather you argue anyway that you are under no obligation under something said in Monroe v. Pape and Preiser v. Rodriguez to exhaust any judicial remedies --

MR. NEUBORNE: Oh, of course. To the extent this is appropriately a 1983 action is now, I take it, axiomatic that there is no obligation to exhaust State judicial remedies prior to the presentation of a constitutional issue.

QUESTION: I gather that's certainly been settled as to State administrative remedies, but what about --

MR. NEUBORNE: I think State judicial remedies, too, your Honor. I believe --

QUESTION: That is suggested in Monroe v. Pape, I gather.

MR. NEUBORNE: And Preiser v. Rodriguez.

QUESTION: The language in Preiser is only "If remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a State forum," and then the first case cited is Monroe v. Pape, 365, at 183 where it was suggested that you need not exhaust --

MR. NEUBORNE: I think that's right.

QUESTION: With respect to the extent Younger might make you.

MR. NEUBORNE: Yes, sir. And the reason that Younger we think does not apply here, your Honor, was the nolo contendere aspects of this case. Texas, your Honor, had it within its power to insist upon a merit determination.

QUESTION: You would have a different story if they had pleaded guilty, as far as Younger is concerned.

MR. NEUBORNE: It would be a different issue, yes, sir. It would be a great deal more difficult.

QUESTION: It might be different, but how would you decide it?

MR. NEUBORNE: Your Honor, under those circumstances, I would want to know whether there was a two-tier system of

justice so that the appeal might have been impeded. In the absence of a two-tier system --

QUESTION: But I think a while ago you agreed that if you had gone to a trial de novo, presented your constitutional claims, had been rejected and you had been convicted and you had appealed --

MR. NEUBORNE: We could not have used 1983.

QUESTION: Because of Younger.

MR. NEUBORNE: Yes, sir. But, your Honor, the appeal from the --

QUESTION: That's all I --

MR. NEUBORNE: I'm sorry, sir.

QUESTION: Well, I don't understand. If you concede that, why then are you not in the same position not having taken a de novo appeal.

MR. NEUBORNE: Your Honor, in a de novo appeal, the potential maximum was 20 times greater.

QUESTION: Why is Younger -- if you could have stopped there without going on to the State Supreme Court or wherever you had to go under the Texas procedure before you had exhausted all your judicial remedies, and you say that would have barred your access to Federal court, why doesn't it under the circumstances you are in now ?

MR. NEUBORNE: The difference, your Honor, is that a trial de novo, the sentence one received in a trial de novo

cannot be changed on appeal except in accordance with the strictures of Pearce v. North Carolina, so that there is no threat of a greater sanction caused by going up through the appellate process. But when you go to a trial de novo, you take the risk, in this particular case you are taking a risk of a 20-fold increase in sentence. And it's that impediment on the free exercise of the appeal that we think distinguishes the two types of actions.

QUESTION: If nolo contendere helps you out, why couldn't you bring a 1983 action before the original trial?

MR. NEUBORNE: Your Honor, I think that under Younger principles --

QUESTION: You couldn't.

MR. NEUBORNE: The State was perfectly entitled to impose punishment on us for that particular prosecution.

QUESTION: But now the nolo is different, it is someplace between a guilty plea and no trial.

MR. NEUBORNE: Yes, sir. And we think the difference is that in a nolo situation, we subjected ourselves -- the State interest which Younger was designed to protect with the capacity to prosecute a person for a particular incident. They revindicated that interest in this case.

QUESTION: You think that's a very thin line?

MR. NEUBORNE: Your Honor, I think it's an important line, though, because the State interest that Younger was

designed to protect was the ability to prosecute a particular defendant for a particular incident. And that State interest has been vindicated here. These defendants have paid the fine, they have paid the penalty that Texas saw fit to impose upon them. The issue is whether or not they are going to be foreclosed from raising the underlying legal issue at some future time in a Federal forum, and we think that no principle of Younger requires that. Younger doesn't guarantee the State courts the opportunity to pass on the underlying legal issues. It only guarantees the State courts the capacity to complete a pending prosecution. And they have done so successfully in this case.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:38 a.m., the oral argument in the above-entitled matter was concluded.)