In the

Supreme Court of the United States

United States Of America,

Petitioner,

V.

Josephine M. Powell,

Respondent,

No. 74-884

Washington, D. C.
October 6, 1975

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v. No. 74-884

JOSEPHINE M. POWELL,

Respondent.

Washington, D. C.

Monday, October 6, 1975

The above-entitled matter came on for argument at 2:04 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

JERRY J. MOBERG, ESQ., P.O. Box L, Moses Lake, Washington 98837, for the Respondent.

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. 74-884, United States against Powell.

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

ORAL ARGUMENT OF FRANK H. EASTERBROOK

ON BEHALF OF THE PETITIONER

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court: The statute at issue in this case provides that pistol revolvers and other firearms capable of being concealed on the person are not mailable. Interpretive regulations of the Postal Services provide that the phrase "all other firearms capable of being concealed on the person" includes but is not limited to short-barreled shotguns and rifles, and that a short-barreled shotgun includes but is not limited to shotguns with barrels less than 18 inches in length and an overall length of less than 26 inches.

Respondent was indicted for mailing a sawed-off shotgun from one part of the State of Washington to another. The evidence introduced at trial demonstrated that a shotgun with a barrel length of 10 inches and an overall length of 22 inches, sawed off both on the barrel and on the stock, was mailed by respondent to Mrs. Theresa Bailey, who apparently was not its intended recipient. Mrs. Bailey turned the weapon over to the FBI. The FBI turned the evidence over to the

United States Attorney.

Respondent admitted buying the shotgun, but denied ever having altered it or mailing it.

QUESTION: And what were the dimensions of this shotgun?

MR. EASTERBROOK: This shotgun had a barrel length of 10 inches and an overall length of 22 inches, actually 22-1/8 inches, including the stock and the barrel.

QUESTION: So it's well within the regulations.

MR. EASTERBROOK: It's well within the regulations, and in fact, it's well within the numerical definition set out in other Federal statutes and in a Washington State statute which prohibits the possession of similar sawed-off shotguns with barrels less than 12 inches.

The jury was instructed that in order to convict it had to find not only that respondent mailed the weapon, but that the weapon was capable of being concealed on a person. The jury returned a verdict of guilty.

The court of appeals reversed, holding that the statute is vague as to all weapons that were designed as shoulder weapons. Apparently no matter how small or readily concealable a weapon may be or whether it was so altered that it is no longer capable of being used as a shoulder weapon, the court held that the phrase "capable of being concealed on the person" is so uncertain in scope and application that it

cannot constitutionally be used by Congress, that Congress should instead have used numerical definitions as it has done in other statutes. The court did not refer to the Postal Service regulation, and the court made no attempt to clarify or construe the statute in such a way that it would alleviate the vagueness.

The only issue before the Court, therefore, is whether the phrase "other firearms capable of being concealed on the person" is so devoid of meaning that it cannot be used to support punishment, even if the particular shotgun is, as the jury found in this case, capable of being concealed on the person, and even if there is an entire class of weapons clearly capable of being concealed on the person.

Our point of departure is the general principle --

QUESTION: Did the court below ever get to whether it's vague as applied?

MR. EASTERBROOK: No, the court never did, your Honor.

QUESTION: It said on its face.

MR. EASTERBROOK: It said as to all weapons that were designed as shoulder weapons on its face, and it never reached it as applied to this person.

QUESTION: Is that issue still open?

MR. EASTERBROOK: That issue is still open and it will be open on remand. It seems to us quite possible that a

sawed-off shotgun of an overall length of 16 inches is clearly within the statute; a sawed-off shotgun with an overall length of 32 inches might or might not be within the statute, and there would be a vagueness-as-applied argument as to such --

QUESTION: If that were true, certainly the statute is not vague either on its face or as applied.

MR. EASTERBROOK: In this case.

QUESTION: Yes. So you can support your facial ... by saying a sawed-off shotgun is plainly within the --

MR. EASTERBROOK: That there are at least some sawed-off shotguns plainly within that statute.

QUESTION: If you made that argument and we agreed with you, the issue wouldn't be open on remand.

MR. EASTERBROOK: If you agreed as to the argument as to all sawed-off shotguns, then it would not be open on remand.

QUESTION: Wouldn't that be a matter of fact? Wouldn't you have to prove that as part of your case if you came in there with that 20-inch barrel?

MR. EASTERBROOK: Well, we proved as part of our case in this case that this particular weapon was capable --

QUESTION: You would have to convince the jury that -- if you prevail on this vagueness, if you prevail in asking us to reverse the judgment in this case, you would nonetheless -- wouldn't you have the burden of proof in an ordinary prosecution

proving that this weapon is capable of being concealed --

MR. EASTERBROOK: Yes, we would.

QUESTION: -- on the person to the jury's satisfaction beyond a reasonable doubt.

MR. EASTERBROOK: That's correct. And that issue went to the jury in this case and the jury was satisfied beyond a reasonable doubt.

QUESTION: Mr. Easterbrook, the only evidence in this case on that issue was to the effect that this weapon was capable of being concealed on the person. So there is no conflict as to that, is there?

MR. EASTERBROOK: We don't believe there is any conflict on the evidence.

QUESTION: Is there any evidence to the contrary?

MR. EASTERBROOK: One Federal agent testified that the weapon was bulky enough that it might cause a bulge.

QUESTION: Cause what?

MR. EASTERBROOK: Might cause a bulge under the clothing if it is attempted to be concealed under the clothing. And I think that created a fair issue for the jury whether that bulge was so observable that the weapon was not capable of being concealed on the person in a realistic sense.

QUESTION: Mr. Easterbrook, the word "person", is that a 5-foot, 7-foot, 500 pound or 200 pound or 100 pound person? That's the one that gives me the trouble.

MR. EASTERBROOK: The statute didn't define the term "person", Mr. Justice Marshall. On the other hand, I think the statute gives several clues that would enable someone who attempts to comply with this statute to understand the statute's meaning. Perhaps the most important clue is the fact that the statute provides that it applies to weapons capable of being concealed on the person. That would presumably mean a person who was determined to conceal it and was wearing whatever clothing was necessary to conceal it. Moreover it seems reasonable that it would include at least a person of average size and perhaps a person who could be [illegible] for concealing a weapon. That is a fairly large person.

QUESTION: Vaguer and vaguer.

MR. EASTERBROOK: Pardon?

QUESTION: The statute's getting vaguer and vaguer.

QUESTION: Yes.

MR. EASTERBROOK: The term "person" is one that applies to people of different sizes. I think there is nothing we can do to make that go away.

QUESTION: Well, as Justice Stewart says, it might make a difference who the person was and --

MR. EASTERBROOK: As a question of fact for the jury it might well make a difference.

QUESTION: On the matter of this bulge, I suppose a snub-nosed 38 caliber pistol commonly worn by police officers

often, in fact, creates a bulge that is noticeable.

MR. EASTERBROOK: I think so, when worn under a jacket.

QUESTION: But clearly that would be subject to this statute, wouldn't it?

MR. EASTERBROOK: I think so. And the same argument about the size of a person is makable with reference no matter how small those weapons may be. For example, a very slight person wearing tight-fitting clothing could not conceal a pistol no matter how small that pistol might be. It would always have a tell-tale bulge.

QUESTION: Yes. And if you took a 410 gauge shotgun and cut it down to 8 inches and cut the stock down to a pistol grip,which has been done, you could conceal it by strapping it on your leg, couldn't you?

MR. EATERBROOK: I think so, your Honor.

QUESTION: If you didn't wear tight pants.

MR. EASTERBROOK: There was testimony in this case that the place in which this shotgun could be usefully concealed is under a pants leg, and since both men and women wear pants, presumably that includes respondent's pants leg.

QUESTION: When you are outside of the First Amendment area what do you conceive to be the difference between vague as applied and vague on its face?

MR. EASTERBROOK: Our position is that the concept of

vague on its face simply has no meaning outside the First Amendment area, and that the argument someone has to make is that this statute did not give him notice that his particular conduct was within the statute prescription.

To the extent it has any meaning at all, it's a very delicate argument that there is no meaning in the statute, period.

QUESTION: Vague on its face -- you mean "vague on its face" doesn't have any meaning.

MR. EASTERBROOK: Right, as applied to statutes other than First Amendment statutes.

To the extent the concept of vague on its face has any meaning, it's a very peculiar kind of meaning. It's an argument that the statute's words are so uncertain that no one has any idea whatever whether his conduct is within the ambit of the statute, whether there is a zone of uncertainty around the statute, whether he could comply with the statute if he attempted to comply. That's an exceptionally narrow class of cases, and we submit it's a very far cry from the situation here, because the statute refers to a number of things that people might be able to judge if they were to look at the statute and attempt to comply. Concealability depends on a number of factors within the experience of most people. Shorter weapons can be more readily concealed than longer ones. Slim weapons are more readily concealed than bulky ones.

Light ones are more readily concealed than heavy ones. Each weapon possesses some combination of these characteristics, and when taken in combination, they establish its concealability or the lack of its concealability.

People of common understanding acknowledge that a short, light, single-barreled weapon, sawed-off as the Chief Justice suggested, is capable of being concealed on most, if not all, people.

QUESTION: Especially if they are bent on concealing it, they will wear clothing that will facilitate the concealment, is that not a reasonable assumption?

MR. EASTERBROOK: I think that's correct, and I think that's why there is significant certainty in this statute provided by the term "capable of being concealed." It refers to the concealability of the weapon and not to what an average person may be wearing on the street at a particular moment. It directs the attention of a person who desires to comply with this statute to the ability of the weapon to be concealed by some person determined to conceal it, to utilize the capability of the sawed-off shotgun to be concealed. And, indeed, common experience goes perhaps a little further than that and suggests that the only reason for sawing off the barrel and stock of a shoulder weapon is to permit its concealment on the person.

Then, too, the standard under this statute is an

objective standard. All of the factors we have suggested, the length of the weapon, the weight of the weapon, the bulkiness of the weapon, depend on verifiable objective factors pertaining to the weapon. The statutes with which this Court has been concerned and have struck down for vagueness depend on subjective standards, such as the degree of annoyance caused by standards, by conduct, or the amount of harm to competitors caused by particular conduct. When the statute's meaning turns upon the effect of the conduct on third parties, it's often hard for someone, even one who seeks to comply, to assess that conduct in advance. He can't know the ripples which his conduct will propagate among other people.

Not so here. The standard is objective, physical, turns on an analysis of the gun itself, not on an analysis of what the gun will do to other people or how they will react to it. In fact, as I have suggested before, perhaps the proper construction of this statute is that all sawed-off shotguns are within its scope. And as Mr. Justice White stated, if the Court agrees with us on that submission, then there is no problem of vagueness as applied, or a vagueness on its face.

We acknowledge, as I have acknowledged before, that there are words in the statute that include a potential for uncertain application. The word "person" is not definite. There is no reference "man." The court of appeals thought that

was enough to strike the statute down.

QUESTION: Do you think it's any more or less vague than the term used in many statutes "dangerous weapon"?

MR. EASTERBROOK: I don't think so, your Honor.

QUESTION: That presents an issue for a jury to decide whether, as in one case did, a Coca Cola bottle is a dangerous weapon.

MR. EASTERBROOK: That's correct. And it's also an issue, not only for the jury, but for the court through a process of continued adjudication. Courts can hold after a number of cases that Coca Cola bottles are inside or outside the statute's scope, and those adjudications will give notice to those who seek to comply with the statute as to the statute's meaning.

So here, this statute as well can be construed by a court to eliminate most, if not all, of the problem of vagueness. That is, if this Court, or if the Ninth Circuit had announced that sawed-off shotguns are so readily capable of being concealed on the person that they are within the statute's ambit, the problem of vagueness is by and large cured through judicial construction and there is no need to strike the statute down.

QUESTION: But I have trouble with all sawed-off shotguns beyond all the same length, I have trouble.

MR. EASTERBROOK: That's correct. And it seems to us

that if the Court were to say --

QUESTION: I mean, if it was cut off one inch, you couldn't conceal it very well, could you?

MR. EASTERBROOK: If the Court were to say that sawed-off shotguns are by and large within the ambit of the statute, there is still a question for the jury in every case whether this sawed-off shotgun was in fact concealable. And that's a question --

QUESTION: I thought we were getting rid of the can you conceal.

MR. EASTERBROOK: No, it goes to the jury in every case.

QUESTION: You need that.

MR. EASTERBROOK: We need it to go to the jury.

QUESTION: Mr. Easterbrook, I really don't think that's what Congress intended. You go back to Justice Holmes' holding in that old B&O case on negligence in the 1920's that the courts have to lay down standards of what is or what isn't negligence, and if you don't stop at a railroad crossing, it's negligence per se.

That was largely rejected by cases that came after that. It seems to me here Congress intended that it be up to the jury to decide under the congressional definition. I don't really think they intended that courts were to define classes in or out of the definition.

MR. EASTERBROOK: I think that's correct, and as I indicated to Mr. Justice Marshall, we think there is a question for the jury in every single case.

The only point of my argument was that the problem of vagueness can by and large be eliminated, that is, if the Court announces that this statute includes sawed-off shotguns to the extent they are capable of being concealed on the person.

QUESTION: Hasn't Congress announced that already?

MR. EASTERBROOK: We think it has, and that's why --

QUESTION: What would be added by the court doing it?

MR. EASTERBROOK: Respondent claims that what was clear to Congress and what is clear to us was not clear to her.

QUESTION: That may be why we granted certiorari.

MR. EASTERBROOK: And we think that can be cleared up with some ease, actually.

Having set out the skeleton of our position, I would like to discuss a number of arguments that respondents make that border on vagueness arguments, but that we submit, aren't vagueness arguments.

The first of these we have touched on earlier. And that's the argument that the shotgun in this case had a bulky stock, would have caused a bulge under someone's coat, and therefore was not in fact concealable. That argument went to the jury and the jury rejected it. It is, we submit, not a vagueness argument at all, but simply a question of fact

to be adjudicated under the statute.

The second argument is the argument that the statute could have been drawn with greater precision and therefore should have been drawn with greater precision. This, we think, is an argument about legislative policy. The constitutional question is simply whether the words Congress used are devoid of meaning. If Congress uses words of clear purport in at least some cases, the fact that they could have been clearer still is immaterial for constitutional purposes.

Third, respondent argues that there is some murky zone between large and therefore mailable sawed-off shotguns and small and therefore nonmailable sawed-off shotguns, and that respondent could not tell where in the zone of uncertainty her conduct fell. This is again not a vagueness argument by and large but an argument for the jury. To the extent it's a vagueness argument at all, it's an argument about vagueness as applied to particular weapons. It may well be that there are some sawed-off shotguns that are so large that even though the jury concludes ultimately that they are capable of being concealed on the person, that it was so uncertain whether the jury would do so that respondent cannot properly be held culpable for her conduct.

Now, this Court has indicated that in most ordinary criminal statutes, a person who approaches a zone of uncertainty simply takes the risk that he will cross the line. That, we

submit, is the proper resolution of the vagueness-as-applied issue in this case. Respondent approached the zone of uncertainty and took the risk that she would cross the line.

However, it's not altogether necessary to reach that question in order to decide this case because the court of appeals has not yet addressed that argument.

QUESTION: May I ask, aren't there other statutes making unmailable various other kinds of firearms and explosives, and so on?

MR. EASTERBROOK: There are statutes making unmailable destructive devices and explosives fall into the category of destructive devices.

QUESTION: Do they, too, make it a criminal offense to mail them?

MR. EASTERBROOK: Yes.

QUESTION: In other words, respondent could have been charged under those other statutes without any problem, couldn't she? And if we decided this case against you, all those other statutes would be available.

MR. EASTERBROOK: I think that's still possible, your Honor.

The final argument that respondent has raised is because the statute doesn't specifically mention sawed-off shotguns, it does not reach them, it's too vague because of the term "other firearms." Whether "other firearms" is too

vague is another question the court of appeals did not reach. The problem the court of appeals found in the statute is whether the phrase "capable of being concealed on the person" is too vague. The vagueness problem discerned by the court of appeals would exist in this case even if the statute said that pistols, revolvers, shotguns, and other firearms capable of being concealed on the person shall be nonmailable, because respondent still could contend that her shotgun was not capable of being concealed on the person, that the statute was vague as to her.

We think, therefore, that the argument that the statute does not specifically mention shotguns is simply not a vagueness argument within the posture of this case.

In sum, the only problem presented is whether the phrase "capable of being concealed on the person" is so devoid of meaning that it cannot ever carry with it a criminal punishment. We think that it can and that it can be construed to be even clearer by this Court, especially perhaps by reference to the Postal Service regulations which have made it about as clear as can be.

We think this case is governed by what the Court wrote two terms ago in Letter Carriers. There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent upon finding fault

at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.

QUESTION: Mr. Easterbrook, a couple of inconsequential questions. Does this record show the offense for which Mr. Bailey was confined?

MR. EASTERBROOK: I do not believe that it does, your Honor.

QUESTION: Does it show the offense for which Mr. Powell was confined?

MR. EASTERBROOK: I do not believe that it does. I may be incorrect.

QUESTION: Am I correct in my impression this statute has been very seldom used?

MR. EASTERBROOK: It has been used very seldom. Most shipments of firearms of this sort cross State boundaries and so other statutes are available for prosecution.

QUESTION: If that the reason it was utilized here?

MR. EASTERBROOK: That was the reason the United States Attorney selected this statute, your Honor.

QUESTION: And the only reason, as far as you know?

MR. EASTERBROOK: As far as we know it's the only reason why this one was selected.

If there are no further questions, I will reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Moberg.

ORAL ARGUMENT OF JERRY J. MOBERG ON

BEHALF OF THE RESPONDENT

MR. MOBERG: Mr. Chief Justice, and may it please the Court: I think initially there needs to be some remarks addressed to the question of whether or not the respondent is making a facial attack. I believe it has been the position of respondent both at the trial court and at the court of appeals level that the statute was vague as applied to her. And I believe that a careful reading of the opinion of the Ninth Circuit, a per curiam opinion, and therefore by definition being rather short, does, although not very precisely, set forth that this statute is vague as it applies to sawed-off shotguns, and I believe that a fair reading can include in it as it applies to respondent in this case, and that therefore the attack and the question before the Court is not whether this is in fact a facial attack of a non-First Amendment statute, but in fact whether or not this statute, criminal statute, as applied to the respondent, is unduly vague.

I think that as it applies to shotguns of the kind -- and I believe that the only record was that --

QUESTION: It does include all shotguns?

MR. MOBERG: I believe that the opinion the court of appeals since it only had the evidence of one shotgun of a specific dimension was referring then to that shotgun.

QUESTION: I thought you said a minute ago all shotguns.

MR. MOBERG: No. I would say to the shotgun of that dimension. I believe that's the only record that the court had. And I don't believe, then, that the court --

QUESTION: If you take that, then you are talking about a shotgun.

MR. MOBERG: A specific shotgun, which was --

QUESTION: Which is a jury question.

MR. MOBERG: Well, that becomes a question. It becomes a jury question if properly submitted to the jury. If the statute then is of such certainty that sawed-off shotguns would fall within the ambit of that statute. It's respondent's position that the statute as applied is not of such certainty that it would include shotguns and therefore make it a jury question. And it was moved at the trial court to determine as a matter of law that the shotgun was not a concealable weapon. Otherwise, we get into, I believe, the question that this Court has expressed some concern with, is whether or not we can make a statute become a jury question and whether or not the estimation of the jury will be the deciding factor in the statute itself.

QUESTION: Mr. Moberg, didn't -- I'm looking at page 3A of the Government's petition of certiorari where the court of appeals opinion is set out. Didn't the court of

appeals extend its invalidation to the term "other firearms" and not just to sawed-off shotguns?

MR. MOBERG: I believe that there's language in there that could support in a very narrow reading that it would apply to other firearms. I think that unfortunately because it is a per curiam opinion, that the other language in the opinion referring to sawed-off shotguns, saying that this case, at least as applied to sawed-off shotguns, is a case where the vagueness challenge has been supported, that the court was meaning to say that considering the record before the court on appeal and the manner in which the issue was presented on appeal, that as applied to this shotgun, this statute was vague and that it did not include in its prescription the mailing of this weapon.

QUESTION: What they said on 3A is this: Having decided the unconstitutional vagueness of this statute as it applied to "other firearms", we need not reach the other assignments that are made by appellant.

MR. MOBERG: That is correct, Mr. Justice. And I think that they are referring to other firearms in reference to sawed-off shotguns, that is, as opposed to other firearms in reference to capability of concealment.

I think the language is unfortunately not precise, but I think that the reason fairly of the opinion is that as to the other firearms restriction, as applied to sawed-off shotguns,

because the court at one point in the opinion did indicate parenthetically that their comments were as applied to the sawed-off shotgun.

QUESTION: But look at the paragraph above the paragraph I was just reading from on page 3A of the petition where it says: "To require Congress to delimit the size of the firearms other than pistols and revolvers." That sounds like they are focusing on that clause in general. And isn't that a holding that as applied to other firearms, i.e., shotguns, it's void on its face?

MR. MOBERG: It would be my reading of the opinion that it is not that broad of a holding or the court was referring, then, principally to the sawed-off shotgun as being an "other firearm." And on that basis it was vague. And then I think in -- rather, dicta in this opinion said that this firearms provision could be rather more precisely drawn. But I don't believe that was necessary to the resolution of the case as applied to the appellant at that point, the respondent in this case.

I believe that at any point that most properly, then, we have a question in terms of an application of this statute to a sawed-off shotgun that has been described as 22-1/8 inches in length, 10-inch barrel, and rather bulky.

I think particularly in the testimony provided by the State that there was some testimony by the expert that, yes,

this weapon could be concealed in a full coat, but as a matter of fact, a rifle, a full-sized shotgun, could be concealed in a full coat and that most any weapon could be concealed on the person should someone want to conceal it.

So that I don't believe the testimony was of such -- expert opinion that this was a concealable item. And I think that the testimony was that almost any weapon is capable of concealment on the person, which I think--

QUESTION: Would you have needed expert testimony in a case like this? Why isn't it something that the jury is as good a judge of as any expert?

MR. MOBERG: I would answer the first part of that question, no, you wouldn't need an expert in regard to the testimony if, in fact, it was properly an issue before the jury. That is, if in fact it had been determined that this item was within the ambit of the statute and therefore it became an element of the problem.

QUESTION: How is that ordinarily determined? It's determined by a ruling of the trial judge, isn't it, that there is sufficient evidence to go to the jury, not by some expert getting up and testifying.

MR. MOBERG: That's correct, except that I think the ruling of the trial judge in terms of whether there is evidence and whether or not this weapon is within the ambit of the statute could be premised partially upon expert testimony as

to the concealability of the weapon. In other words, I think the trial judge could call upon that expertise.

QUESTION: Expert to tell the jury that this gun can be concealed on a person. What was the expertise of the expert?

MR. MOBERG: He was Tobacco and Firearms Agent --

QUESTION: Would you have a clothing man there? I mean, who is expert on what you can conceal in clothing? The average person, that's all. There is no expertise in that at all.

MR. MOBERG: I would say, Mr. Justice, that it's not a question that is exclusively within expert testimony, but that expert testimony does not make it any more or less difficult determination. I'm not saying that there needs to be expert testimony. I'm saying that there needs to be determination that the statute, that the charge regarding this weapon would fall within the statute.

I think curiously enough that the Government has not --

QUESTION: For example, an expert says almost all firearms can be -- did one of them say that?

MR. MOBERG: That's what he said. He said a full-length shotgun could be concealed.

QUESTION: Did he say all firearms? I hope he didn't. I hope he didn't put a bazooka under somebody's coat.

MR. MOBERG: I believe that he said -- the literal

context of the appendix was that he said that almost any firearm could be concealed. And I think the import of his remarks was that it doesn't take a great deal of problem to conceal one.

QUESTION: A final question. Did the judge instruct the jury on the experts?

MR. MOBERG: Yes, there was an instruction on expert testimony presented.

QUESTION: Didn't somebody object to it?

MR. MOBERG: At that point through the trial we were raising the objection that it was not a jury question at all and therefore not even properly subject to expert testimony, that clearly the statute did not apply to sawed-off shotguns and therefore it was not an element of the crime and that it wasn't a jury question.

I think in reference to the vagueness argument, that we need to operate on a couple of premises. I think that first of all we need to consider the statute and whether or not it does fairly apprise --

QUESTION: Would an 8-inch sawed-off shotgun come under the statute?

MR. MOBERG: Eight inches in entire length?

QUESTION: Um-hmm.

MR. MOBERG: I would say that not clearly, because it is a sawed-off shotgun, and in terms of that it is a shoulder

type weapon, that it would not clearly come under the statute, but that a stronger argument could be made --

QUESTION: An 8-inch shotgun would be a shoulder type weapon?

MR. MOBERG: It is a shoulder class of weapon.

QUESTION: An 8-inch? How would you shoot?

MR. MOBERG: I think the testimony was, in fact, that if you have a sawed-off shotgun, that you need to shoot it from the shoulder or from the hip, as distinguished from a pistol because of certain recoil characteristics of a sawed-off shotgun.

QUESTION: But the point is as to whether it can be concealed, that's the point.

MR. MOBERG: That's correct. And I think the --

QUESTION: And you can't ignore that point. It doesn't say all shotguns are outside of the statute. I hope you're not saying that.

MR. MOBERG: Well, I'm not saying that in terms of this case except that the Government would have a stronger position to urge in regards to sawed-off shotguns of that dimension.

QUESTION: Are you saying that this shotgun is outside

MR. MOBERG: Yes, I am saying that this shotgun, this 2(

QUESTION: That's not what the court ruled. The court said all of them were.

MR. MOBERG: Well, it gets back, then, I guess to interpretation of that court's opinion, because the court did say that -- and had only reference to this size of a shotgun, and there was no evidence that a smaller size of shotgun could or does exist. So that I don't believe that a broad reading of that per curiam opinion would be fair in terms of the court's decision.

QUESTION: This is a 22.8 inch length and bulky.

MR. MOBERG: That's correct.

QUESTION: And that applies, that court's opinion applies to all 22-1/8 inch sawed-off shotgun that are bulky.

MR. MOBERG: That's correct.

QUESTION: Will you tell me what bulky is?

MR. MOBERG: Well --

QUESTION: I mean so I can measure it.

MR. MOBERG: Bulky in terms of size, in terms of width, weight --

QUESTION: How much weight and how much width? That is a horrible word.

MR. MOBERG: I believe that that point there was --

QUESTION: But you didn't make any effort to restrict it to this case, did you, the decision here? Did you argue the whole --

MR. MOBERG: No. The question before the court of appeals was whether or not the statute as it was written would

apply --

QUESTION: To what?

MR. MOBERG: -- to respondent in that particular case. And the shotgun which respondent had --

QUESTION: This shotgun.

MR. MOBERG: That's correct. And in the briefs the shotgun was described in terms of its length and its width and arguing that it is not a weapon capable of concealment, and also that the statute is not of such precise language to include that class of sawed-off shotguns, that class of weapons of that size and bore. And I think that's precisely the issue.

I think that this statute does not provide a sufficient amount of notice to apprise someone that if you mail in the mails a sawed-off shotgun that is of 22-1/8 inch length and as imprecisely as has been attested to is bulky, that you fall within the prescription of this statute. I think that if we operate on the premise that, number one, as a criminal statute, the statute needs to be strictly construed; and number two, that under the Connally case that it has to be a statute drawn to such precision that men of common intelligence could decide clearly that this weapon is within the ambit of the statute, then you reach the question of the certainty of the statute.

It could have led to a double meaning, and I think

that it gets down to the point that where, then, is the line drawn? Is it drawn at 22-1/8 inches? Is it drawn at 28 inches? Is it drawn at 17 inches?

QUESTION: Would a reasonable man have very much difficulty in concluding that this gun, this particular gun, could be concealed under a heavy overcoat?

MR. MOBERG: I would say that the reasonable man --

QUESTION: I am taking an extreme case. Heavy overcoast or very loose, baggy pants.

MR. MOBERG: Well, I think the testimony was that it could be concealed in an overcoat, as could a full-size shotgun.

QUESTION: And the judge by submitting it to the jury obviously made a decision that a reasonable man could so conclude, did he not?

MR. MOBERG: I believe that could be read into the judge's decision of submit ing it to a jury. I think that the question, though, is the notice to the defendant. That is, would in the reading of this statute --

QUESTION: .. my question went to. You're really telling us that a reasonable man could not reasonably conclude that this could be concealed some way.

MR. MOBERG: No, I believe that a reasonable man would not conclude this weapon concealable under the language of this statute, because this statute refers to pistols,

revolvers, and other weapons capable of concealment. I think that's --

QUESTION: He knew this wasn't a pistol and he knew it wasn't a revolver, therefore it was an other weapon, was it not?

MR. MOBERG: It may be, except I think at that point in determining the other firearms --

QUESTION: But what else is it but an other firearm?

MR. MOBERG: It is an other firearm, but not all other firearms are within the prescription of the statute. Then it's a question is it an other firearm capable of concealment on the person. And I think that at that point, if we do in fact determine the statute and its meaning to the man of common intelligence, according to any principle of construction, clearly this statute wasn't meant to apply to sawed-off shotguns.

QUESTION: That's a statutory argument, not a constitutional one.

MR. MOBERG: That's correct, and I think it is entwined with the argument that petitioner raises in terms of the constitutionality of the statute. In determining its vagueness, I think that we need to look at the construction of the statute as one of the principles in determining whether or not it is certain and that it is certain as applied to sawed-off shotguns. And I believe that this statute interpreted

with any kind of statutory construction would lend support to the argument that it does not apply to sawed-off shotguns. It is not drawn with language so that it would apply to sawed-off shotguns.

QUESTION: But the Ninth Circuit didn't go on that ground.

MR. MOBERG: No, the Ninth Circuit did not, in its opinion, reach the construction argument.

QUESTION: Isn't that kind of strange that they didn't reach the construction argument because they went right to the constitutional point?

MR. MOBERG: I don't know if I would characterize it as strange. I may characterize it as unfortunate, because I believe there is a construction argument there that probably under the leadership of this Court, it has been clear in U.S. v. Harriss that if the statute can be construed in a constitutional manner, then it should be, and that this statute in fact, and part of the argument raised before this Court is that this statute in fact can be construed in a constitutional manner, but that construction would not admit to the inclusion of the kind of weapon as before the Court in this case.

QUESTION: Would you object to right now just vacating the judgment below and sending it back to face the statutory question at the outset?

MR. MOBERG: Well, I think I would object on the terms

that it is not a clear question that the statute as applied is so certain that it applies to sawed-off shotguns. I think that if this Court decided that there is a question or an issue of vagueness and there is a question of vagueness of the statute as applied to this case, to save that statute from its constitutional challenge as being vague, that the Court may, and in fact I think the Court must, at least as I read Harriss, then interpret the statute so that it can avoid the vagueness issue. And I think there's little doubt that there must be some question as to the certainty of that statute by the very fact that we have the court of appeals wondering and in fact ruling that the statute does not cover sawed-off shotguns.

I think in a similar case in Colorado,, Cokley v. People, which is on page 7 in my brief, in a similar statute they concluded that firearms, other firearms provision in a statute that referred to pistols, revolvers, knives, and billy clubs, the other firearms provision was not within the ambit of that statute.

So I think there is a considerable question as to what application the statute has. I think that application issue goes to the issue of whether or not the language is certain enough to advise a man of common intelligence that the mailing of a sawed-off shotgun, 22-1/8 inches, is in fact in violation of this statute, especially if you look at the

history of the statute in the first instance. Because I believe the history of the statute in the first instance was that it was to control the mailing of pistols and revolvers, of handguns by mail order people. I think clearly in that history it refers to the Sears & Roebuck mailing of handguns and the loss of the control of the States in a mail order situation.

This statute was not meant, I do not believe from its history, from its meaning, and from its interpretation, to be a statute to prosecute one who mails a single sawed-off shotgun in the mail.

QUESTION: What is the use of a sawed-off shotgun?

MR. MOBERG: Well, I think there are various uses. Number one, I think sawed-off shotguns are -- there are dealers in sawed-off shotguns.

QUESTION: Yes, but when you get out into the field, what use is made of it?

MR. MOBERG: Well, sawed-off shotguns provide a less restrictive choke on the expulsion of the pellets from the shotgun and gives it a wider stream.

QUESTION: Yes, I know. What do people use them for as a result of that less restrictive choke?

MR. MOBERG: Well, in terms of what people use them for, I don't know, because I think that's a rather general question.

QUESTION: They are used to shoot people with.

MR. MOBERG: They may be used to shoot people, they may be used to shoot --

QUESTION: Isn't that the only use for them?

MR. MOBERG: I would not admit to that, no.

QUESTION: Do you know of any other use for them?

MR. MOBERG: I believe that you could use them in hunting birds, for example.

QUESTION: Would you ever pick a shotgun with a 10-inch barrel as opposed to a shotgun with a 2-1/2 foot barrel to shoot birds with?

MR. MOBERG: I think you'd have a considerable problem, as Mr. Justice raises, at great lengths. But I'm not willing to admit that that is the only purpose for reducing the size of a barrel.

QUESTION: If we get the bird up at two feet that means you can use a sawed-off shotgun.

MR. MOBERG: If the barrel is only sawed off 2 inches or 3 inches, then I think that your range is in proportion to the reduction size of the barrel.

QUESTION: Mr. Moberg, a couple of questions, just leafing through the record. Did Mrs. Powell persist in denying that she ever mailed this?

MR. MOBERG: Yes, she did.

QUESTION: And am I correct in my impression that

she said she purchased it for her self-protection at home?

MR. MOBERG: She purchased a rifle, a shotgun, for her protection. That shotgun was not the shotgun, I believe, as I recall it. There were two shotguns involved. The full-length shotgun that they did attribute to her purchasing was not the shotgun that's the subject of this appeal, the one that she testified she purchased and was in her closet.

QUESTION: Then, is it as to the other one that she conceded she never assembled it?

MR. MOBERG: As to the sawed-off shotgun, she testified that she never purchased the weapon that was subsequently reduced to a sawed-off shotgun and that the only weapon that she purchased was in fact the full-length shotgun which was, in fact, produced at trial.

QUESTION: Isn't there some testimony on her part that she put it in the closet and never assembled it?

MR. MOBERG: That is correct.

QUESTION: Why wouldn't she, if she purchased a shotgun for self-protection?

MR. MOBERG: Well, I think at that point, as I recall the evidence, her testimony was that she put it in there and she just simply -- she was not familiar with weapons to start with, and she did not in fact know how to assemble or clean the weapon, and she placed it, then, in the closet with the idea of then sometime putting it together, and forgetting

about it. And there wasn't a long period of time between the purchase, I think, and the subsequent interrogation by the postal authorities.

QUESTION: So she bought it for her protection but she didn't do what was necessary for her protection.

MR. MOBERG: That's correct, from the record. And I would hasten to point out that that is not the shotgun that is the subject matter of this appeal.

QUESTION: That may have had something to do with the jury's assessment of her credibility, I suppose.

MR. MOBERG: Oh, very much so. I guess that's not an issue before this Court or was before the court of appeals in terms of her credibility, and not one that I could properly raise because I believe that that is truly within the ambit of the jury to decide whether or not she in fact purchased the weapon.

But I think that the question it comes back to, in terms of its interpretation, in terms of the statute's meaning, is does the statute, number one, give the notice, and does it, too, number one, provide the protection against an arbitrary law enforcement? I think that that second part of this Connally test, and the same test was raised in Lanzetta, is even evident in this case. Because I think that at the point, and I can only surmise the reasons that the prosecutor decided to prosecute under this seldom-used statute, one that

is to control mail order, is that the prosecutor did not feel that he had a sufficient case for other possible crimes that he could have charged -- and I think as one of the Justices pointed out -- could have charged this defendant with. And by the very fact of the broadness of the statute, then, the prosecutor had open to him a catch-all statute. He said, I don't -- and I think this is a fair supposition -- I don't have the evidence to convict her on some other crime, but I can charge her on this mailing crime. And I think clearly it is inconsistent with the statute itself that this charge should have even been brought as a mailing violation under this statute.

There are statutes in terms of possession that are very clearly defined in sawed-off shotguns, there are statutes I believe that could have been brought. I think that I raise this point only to show that this statute does in its rather vague language permit an arbitrary enforcement of the statute itself. Because there is no discernible standard.

QUESTION: Let us assume that someone disagrees with you and holds that the statute is perfectly clear insofar as sawed-off shotguns, just as clear as it is with pistols. You don't agree with that, but let's assume that someone decides that's the way it is. On that assumption there is no discretion at all on the prosecutor except just don't bring a case, but that's true of any statute. I mean, it certainly

isn't giving him any range of discretion he wouldn't have under any criminal statute if it's clear that the statute covers this weapon.

MR. MOBERG: I believe that his discretion is reduced except that the statute as written, I think in its entirety, is a statute to control mail order shipment of pistols and revolvers and maybe mail order shipment of sawed-off shotguns. And that is not the purpose of the statute to prosecute an individual mailing of that kind of an item. So that I don't think that at least practically that is the purpose or has been the use of the statute.

QUESTION: That's not a vagueness argument.

MR. MOBERG: No. And the prosecutor can very well bring it if we assume for the sake of argument that it clearly applies to sawed-off shotguns. He would be very well within his rights to bring this case under the statute. But I believe the fact that he did under this statute as it presently is written points out to the arbitrariness, really, in the enforcement of this statute, and that it was not meant under its history or its interpretation to bring up a conviction in this kind of a case.

I say that only as a support of the vagueness argument.

I think that the other thing the Court needs to concern itself with is the construction of the statute. I believe that under the Harriss case that this Court may and

should, then, if it determines that the statutory language is not so overly broad or not so vague that men of common intelligence could not choose their path in the conduct that's prescribed, could save that challenge of this statute by a fair construction of the statute, based, number one, on its language -- pistols and revolvers and other firearms capable of concealment on the person. I think that the statutory construction is that pistols and revolvers will modify the general language in the statute and the general language will be then presumed to be of the same class as the pistols and revolvers. Pistols and revolvers are in the class of handguns, and it would seem to me that clearly under that theory of statutory construction, this is a statute to control the unlawful mailing of handguns.

I think that the history of the statute in the Congressional Record --

QUESTION: Have you got any proof that a sawed-off shotgun can't be fired in one hand?

MR. MOBERG: Only the testimony of the Tobacco and Firearms man that because of the recoil characteristics, it would not be a weapon that you could fire arm extended.

QUESTION: You couldn't.

MR. MOBERG: Could not, because of the recoil characteristics that are not the same characteristics of a pistol.

QUESTION: But you can fire it with one hand?

MR. MOBERG: It can be fired with one hand against the shoulder or against the hip.

QUESTION: That's right, they can be fired with one hand.

MR. MOBERG: I would resume they could be fired with one hand.

QUESTION: That makes it a handgun. What are you going to do with that?

MR. MOBERG: Well, I think the distinction between handgun and shoulder-type weapon is not that it can -- all guns are fired with the hand or hands, can be hand or hands guns, but I think that the distinction is that a handgun characteristicslly can be fired with one hand away from the body, where a shoulder type of weapon needs to rest against the body itself. And whether the structure would be the shoulder or the hip, it needs to rest against the shoulder or the hip. I think that's the distinction, not whether one uses a hand to manipulate the trigger, because all guns are fired in that way. Pistols and revolvers, first, I think, set up the class in terms of size, and I think that they also set up the class in terms of characteristics.

QUESTION: The difference between a handgun and a shoulder gun, that's the basic difference. And a sawed-off shotgun once it's sawed off, is not a typical shoulder gun.

MR. MOBERG: I would say it is not a typical shoulder gun, but that it is --

QUESTION: That's why you saw it off.

MR. MOBERG: Again, the question why it's sawed off for the ultimate purpose, I don't think is one that we can give speculation to. I think the question and the argument I am raising is that pistols and revolvers define not only the class and that handgun as opposed to shoulder, but also define the size, and that under either of those classes, this statute refers to pistols and revolvers. And I think that it is not unreasonable and men of common intelligence quite readily may assume that there are not pistols and revolvers of the 22-1/8 inches in size with a barrel of 10 inches. And I think they are not of a bulky nature.

So I would say at this point it seems, and it is a construction argument in the sense that if the statute can be saved from its vagueness, then it must be saved by construction. But even further, that construction argument points to the problem in the statute in terms of its certainty, because from the construction analysis of the statute, it does not apply to sawed-off shotguns. It does not govern a weapon of that size or the kind of crime that was charged. And I would think that other firearms capable of being concealed is not any more definable, it's symbolic language that has an outward reference point and that outward reference

point is not clear. I don't think it is any more clear than the current rate per diem in the Connally case.

So I would say in conclusion, then, that this statute is unduly vague and that it can be saved, I believe, by this Court from its vagueness challenge by construction limiting it to pistols and revolvers and pistol-type weapons.

Thank you.

QUESTION: Assume for the moment, as painful as it may be, that this Court possibly may decide against you on both the constitutional and statutory issues, would any issue of fact remain for the jury to decide upon remand? If so, what?

MR. MOBERG: Issues of fact in terms of the --

QUESTION: Suppose we decide the case against you. Just assume it, and the case were remanded, what issues of fact would remain? There was a jury verdict against your client.

MR. MOBERG: There was a jury verdict, that's correct.

QUESTION: And instruction No. 8 laid out the statute verbatim so that the jury found that this weapon could be concealed on the person. Would there be any issue of fact left in the case?

MR. MOBERG: I would say that in terms of the concealability of the weapon, that there would not be an issue

of fact. It may require a considerable difference in trial strategy because at the point that the respondent assumed the position that it was not a concealable weapon, then respondent was not willing to open up that issue to the jury and said, in fact, it is not a jury question.

QUESTION: Yes, but, if this Court reverses, that reinstates the conviction already entered, does it not?

MR. MOBERG: That is correct.

QUESTION: Nothing more. If we reverse, that's the end of it.

MR. MOBERG: Well, except there were six or seven other items that the court --

QUESTION: In the court of appeals.

MR. MOBERG: In the court of appeals. But as far as -- I don't believe the respondent could go back and ask to open up the evidentiary hearing to show that it was any less concealable.

QUESTION: If you get a new trial, it will have to be on some issue not yet determined by the court of appeals.

MR. MOBERG: That is correct, Mr. Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Easterbrook.

MR. EASTERBROOK: I have nothing further, your Honor.

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

[Whereupon, at 2:59 p.m., the argument in the above-entitled matter was concluded.]