Supreme Court of the United States

OCTOBER TERM, 1969
1970

In the Matter of:

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., et al.

Appellees

Docket No. 4-2

Place Washington, D. C.

Date April 29, 1970

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October Term, 1969

EVELLE J. YOUNGER,

Appellant;

vs. No. 4

JOHN HARRIS, JR., ET AL.,

Appellees

Washington, D. C.
April 29, 1970

The above-entitled matter came on for argument at 10:08 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Case No. 4, Younger against Harris.

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

ARGUMENT OF ALBERT W. HARRIS, JR., ESQ.

ON BEHALF OF APPELLANT

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

Mr. Chief Justice, may it please the Court:

This is an appeal from an order of a three-judge court in the Central District in California, declaring the California Criminal Syndicalism Act was unconstitutional on its face and in all of its parts and enjoining the District Attorney of the Los Angeles County from enforcing and continuing with the prosecution of a man named John Harris, Jr., who was one of the plaintiffs in this case.

The appeal is by the District Attorney and represented here by the Attorney General of the State of California.

The complaint in the District Court was filed by John Harris, Jr., following his indictment on two counts of violating subsection (3) of Syndicalism Act. He claimed in the complaint by reason of his prosecution and the presence of the act, he was inhibited in the exercise of his First Amendment Rights. There were three other plaintiffs enjoined in the lawsuit: Jim Dan and Hirsch both alleged that they were members of the Progressive Party, a party that advocated political and industrial change,

and they felt inhibited in attempting through peaceful nonviolent means to advocate Progressive Labor programs in light of the presence of this statute and the prosecution of John Harris.

The fourth plaintiff was a man named Broslawsky, who alleged that he was a teacher of history and he taught subjects in which Marxism was involved and he was uncertain what he could say about these matters by reason of the presence of the act on the books and by reason of the prosecution of John Harris.

Q Where did he teach these subjects?

A At State College, San Fernando State College, I believe, sir.

Q Was it a regular part of the curriculum of the course he taught?

A Well, it is all contained in about one paragraph in the complaint and that is all we know about it.

Q What is all we know. Thank you.

A The plaintiffs allege that there was irreparable injury. They allege no specific facts in support of this claim except the conclusion that they felt inhibited and were prevented from exercising fundamental constitutional rights.

The District Court held that it had jurisdiction to pass on all phases of the Act, not only the section under which John Harris was prosecuted. It held that it could not abstain in light of Dombrowski and Zwickler against Koota. The District Court went to hold the Act unconstitutional on its face in all

its provisions with no mention whatever of any California case that had construed any of the sections of the Act.

Finally, the Court issued an injunction against the pending prosecution of John Harris. The appellant submits here that the District Court had no jurisdiction whatever in respect to the claims of Dan, Hirsch, and Broslawsky. Those were the three plaintiffs that had not been indicted.

Q Was any threat made against them?

A There was no such allegation. Your Honor, in the complaint and, in fact, the District Court said in the opinion that it did not believe that the plaintiff stodd in any danger whatever of prosecution for the conduct that they had alleged that they had engaged in.

In addition, in connection with the jurisdictional question, we contend that the Court had no jurisdiction to pass on any provision except Section 3, the section under which John Harris was charged and upon which he was awaiting trial.

Secondly, as to Section 3 the District Court should have abstained.

Third, on the merits we submit that the Act is valid in the light of the narrowing state constructions in a number of state cases that we have cited in our brief.

Finally, all other things failing, we submit an injunction was barred under Section 2283 of Federal 28 and that there was no irreparable injury in support of the injunctive relief.

The first point in connection with the lack of jurisdiction in respect to the three plaintiffs other than John Harris is basically on the proposition that there was no overt acts by the State of California or representative of the state that might be construed in any way to have inhibited these plaintiffs in the exercise of Federal constitutional rights. There have been no arrests, there have been no threat of arrests, no searches, no denunciations of these plaintiffs.

The only claim that they can make is that the mere presence of the Act is sufficient to create a case for controversy. We submit that it is not and we submit that under the circumstances here that the action of the District Court amounted to an advisory opinion on an abstract question.

The facts as set forth in the complaint in connection with these three plaintiffs who were not charged do not show any substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the declaratory relief and to give rise to a case for controversy.

We rely principally in that connection upon your decision in the last term in Golden against Zwicker, where you dismissed the case because there was no case for controversy even though having included the statute was arguably over-broad and affecting rights under the Fifth Amendment.

Q Did an injunction actually issue against the state prosecution of Harris?

A Yes, it did, Your Honor.

Q And that has been existing all the way through?

A For four years or thereabouts, Your Honor.

In connection with Harris himself, we wouldn't argue that there is only an abstract question. He is under indictment and if the trial is ever held, he could possibly be convicted. But he is only charged under Section 3 of the Act.

We submit that the District Court had no jurisdiction to reach to other sections of the Act. There are five sections in Section 11401 that deal with different forms of conduct and declare them illegal under the general definition of of "criminal syndicalism" contained in Section 11400.

The Legislature provided in connection with this Act that if any portion of it, for example, Section 3, which relates to the distributing of handbills and the like, printing matters and things of that kind, any part should be held unconstitutional and the rest remaining portions should be sustained.

We have argued in our brief that in the Smith Act cases and the Smith Act had a structure very similar to this with a membership provision, with a printing or distributing section. In those cases this Court took each section and examined that section and declined to pass on the other sections; only the section that was specifically involved and had been invoked against the particular defendants in the Dennis Case, in the Yates Case and in the Scales Case.

We think that one of the problems in this case is that the District Court in passing upon sections of the Act that had not been invoked, sections of the Act as to which there was no actual controversy. For example, Section 4 is a membership clause provision. It prohibits organizing, it prohibits knowingly becoming a member of a criminal syndicalist organization, as defined therein. This was struck down by the District Court.

Harris was not prosecuted under this section. There was no intention by the District Attorney, nor has there been any contention by anyone in California, that the group to which Harris belongs, the Progressive Labor Party, I believe, is a proscribed organization and that belonging to it constitutes any crime.

In short, there was no actual controversy on that question and we think one of the problems may be -- when you don't have an actual controversy, and this case may illustrate that, is that there is not an informed judgment passed by the District Court.

The pertinent cases, and we have cited some of the cases, apparently were never considered by the Court, and we think this was due probably because the District Attorney was not interested in the membership clause, he was not prosecuted, Harris had not been charged under the membership clause and he was only interested in an abstract way in the validity of that section.

We submit that the decision here is concrete proof of what happens when a court goes ahead and, in effect, issues an advisory opinion. There isn't enough interest in the case apparently to give the informed judgment that constitutional adjudication that we submit calls for it.

Now, in connection with subsection (3), the only section we feel is properly before the District Court, we think the District Court should have abstained.

There are three reasons why we believe this to be true.

Q Mr. Harris, has that section ever been the subject of construction in other cases?

A Section 3, yes.

Q If it has, you will get to it I am sure.

A Yes, I will. Yes, it has been construed.

We think the Court should have abstained for three reasons, even though we don't argue as to the jurisdiction as to subsection (e) in connection with John Harris.

In the first place, this law was susceptible of a narrowing interpretation that would by revolving vagueness in terms of the statute, cure any problem of overbreadth, and thus we submit that there was a reasonable expectation there would be no necessity to adjudicate the constitutional limits of the state's legislation in this field.

Q What was the indictment charged against him

as to a public act?

A Circulating, actually, two handbills in the course of a coroner's inquest in Los Angeles.

Q What was the purport of the handbills?

A The handbills are set forth in an appendix filed by the appellees here and, in essence, it was directed to -- well, I will have to give a little bit of background.

This even occurred in May of 1966, the inquest. This was some six months after the Watts riots in Los Angeles County. The inquest concerned the death of a man named Leonard Detwiler, who had been shot by a police officer stopping him while he was driving under the influence of intoxicating liquor and accidentally the gun was discharged and Mr. Detwiler was dead.

The officer was named Bova. The first of the handbills that were set forth and attached to the indictment refers to "Bova the cop." It says "Wanted for the Murder of Leonard Detwiler." The statement is made that "they" referring to the Police Department, must all be wiped out before there is complete freedom. "South Los Angeles is one big concentration camp."

It goes on for two or three pages and this is in the appendix to the appellee's supplemental brief under the argument.

Q What is this, the appendix to the brief filed by the appellant on February 27, 1969?

A Those are illustrative ---

Q "Wanted for murder, dead or alive," This is the San

Francisco Michael O'Brien.

A Yes, Your Honor, that is from the Black Panther paper in San Francisco. That has nothing to do with the facts of this particular case. Those are illustrative of the conditions that we submitted at that time and warranted the upholding of this Act.

In connection with the question of abstention, we say that the state law can be saved. And if can be saved, it will avoid a constitutional decision by the Federal Court, be it the District Court of this Court, and that is one of the purposes of the doctrine.

There is a pending vehicle in the indictment of John Harris and the, if he is ever tried, trial and his appeal.

Finally, there is no evidence whatever, nor is it even claimed that there has been bad faith enforcements of the statutes for the purpose of denying the people of California their Federal constitutional rights. There is a contention that many years ago this may have occurred, but there is no contention that at or about the time this case was filed and decided in Los Angeles there was any bad faith enforcement of the Act.

We say that this Act is susceptible to a clarifying and a narrowing construction for a number of reasons. First of all, there have been a number of cases in California that have passed on various provisions of the Act since it was enacted in 1919.

The great flurry of prosecutions arose between 1919 and 1924, and there has been very little -- only this case having reached any kind of an appellate statute.

Q Excuse me, Mr. Harris. You were referring to something that was an appendix or a supplementary brief in the argument?

A Yes, I have got a supplemental brief to the argument and reply thereto.

Q The blue cover ---

A The blue cover, Mr. Justice Brennan, and it is an appendix to that supplemental brief.

Q I guess I don't have it here. Thank you.

A It was filed by the appellees, not by the appellant

Q I don't have it either.

A The decision over 20 years ago in the Danskin case by Justice Trainer made it very clear that in view of the California Supreme Court, the California Criminal Syndicalism Act couldn't be evaluated simply on its face and in its own terms. It had to be evaluated in light of decisions by this Court in the area of the First Amendment. In fact, Justice Trainer said that the Act should only be applied to prohibit conduct where there was imminent danger that advocacy will give rise to the evils that the state may properly prevent.

That is language that is very remiscent and is very close to the language used by this Court in the Brandenburg case

last term when you struck down the Ohio Syndicalism Law on the ground that it was not limited to speech or advocacy directed to and enciting violent action, and it contained no condition that such actions are likely under the circumstances.

We submit that a fair reading of Danskin gives a very close parallel with your decision in Brandenburg, and you can reasonably anticipate the California Supreme Court, if it sustains the law, would sustain it under that kind of a clarifying and narrowing construction.

Now, in connection with Section itself, the so-called "circulating or distributing section," in the Malley case -- People against Malley, which is cited in our briefs -- the State Court many years ago and in anticipation of many of the doctrines that have developed, held that to prosecute and convict a person under this section, it had to be proven that he understood the doctrine in the material, in the handbills that he was handing out, that he wasn't just out there handing out something because somebody told him to.

He had to understand it and he had to intend to bring about the consequences, that is, the unlawful acts, the unlawful means, terroristic means, that are proscribed under the statute. He had to have an intent himself to do that. And in addition there had to be a clear and present danger of such unlawful act occurring.

This is very close, we submit, to what the decisions

of this Court have held in the intervening years in the Dennis case, and in many other cases.

Looking to New York, to anticipate State Court action in the Epton case. The criminal anarchy statute there was given a narrow construction.

Looking to the decisions of this Court in this field, the Smith Act cases all gave a clarifying and narrowing construction to those sections, the Dennis, Yates and Scales decisions, and each of those cases finds its parallel in one the provisions in the Criminal Syndicalism Act.

This is not a case such as Baggett -- in the Baggett case, the Zwickler case, Zwickler against Koota, where the Court felt that there was no chance that this statute could be saved, that it affected expression, but it could not be saved by a narrowing construction.

In fact, we think this is a classic example of the other extreme, a case that can and, I would say, in speaking of the probabilities, which I supposed we are concerned with in this issue, the odds are certainly very heavy that this statute can be saved and that it would be saved by the California Courts if ever presented to them.

Now, there is a case at the moment. That is the prosecution of John Harris. If he is found guilty and sentenced, he has an absolute right to appeal his conviction and the validity of his conviction .

Q Mr. Harris, I don't seem to have that indictment here. I don't have that appendix or whatever it is. The Clerk doesn't seem to have it either. You have it there. What is the form of the indictment in relation to the statute?

A Well, the indictment is a typical indictment in California. California indictments are in the language of the statute.

Q In the language of the statute?

A Pardon me?

Q In the language of the statute?

A In the language of the statute.

Q And does that say, then, that subsection (3) is reprinted in the indictment?

A Well, not reprinted, but he is charged with having -- accused of having violated this particular statute, 11401(3) of the Penal Code, and it goes on to say that on or about the certain date he did wilfully, unlawfully and feloniously issue and circulate and so forth certain papers and forms that contained written and printed advocacy of, in effect, criminal syndicalism, advocating terrorism and advising the commission of crime, et cetera.

It is rather lengthy because the statute itself is rather lengthy. And, in addition, attached to the indictment is the specific handbill that he handed out on each occasion.

Q And that is the Clerk's room now, I hope. Thank

you.

Now what page is the indictment?

A The indictment starts at page 3 of this appendix and it runs for quite a number of pages because there were two different days, two different handbills and two different counts in this indictment.

The indictment should be read in light of the California procedure wherein the defendant had made available to him the Grand Jury transcript automatically without any questions asked, so that to charge himsimply in the language of the statute doesn't prejudice him. He can find exactly what the evidence was and pinpoint the charge.

Q At what stage is this first opportunity to get this limited as you have suggested that the California Court would limit it?

A Yes.

Q That is clear and present danger and so forth.

A We submit, Your Honor, that under the standard California procedure the first opportunity in the trial court would be when instructions are given to the jury.

Now the question might arise in connection with evidence as it is offered, but by and large it would be, I think, the elements would be set forth in the instructions to the jury, the things the jury has to find in order to convict this man.

Now, it has been contended here that Harris moved under

995 of the Penal Code to dismiss the indictment. That motion was denied.

He demurred to the indictment on the ground that the statute upon which the indictment was founded was wrong on its face. The demurrer was denied. The motion under 995 was denied.

Now those are simply trial court rulings.

Harris then applied to the District Court of Appeals under Section 999(a) of the Penal Code. Now, this is a special California procedure. Under 995 you can attack an indictment on the ground either that the indictment either was unlawfully returned, some error occurred in the process, or on the ground of not probable cause to hold the defendant to answer.

That turns on the evidence before the Grand Jury. It is an evidentiary issue.

Now, if this is denied, California has a special statutory procedure, 999(a), and I don't know of anything similar in Federal practice -- it is a very good provision -- whereby you can go to the appellate court, the intermediate appellate court, and ask for a writ of prohibition under this section on the ground that you are being held without probable cause and that you shouldn't be put to all the trouble of trial.

999(a), however, is limited to this issue, whether or not the defendant is being held without probable cause.

Q You say that is in Texas with reference to the Grand Jury?

A Yes, that is correct, Your Honor.

That is the only issue that may properly be raised with this special statutory section. Now, the question of whether or not the statute is itself valid on its face and similar questions cannot be raised at that point.

This is simply to determine whether the man should be for trial.

Q Suppose there was nothing whatever in the Grand Jury testimony which satisfied the ingredient of clear and present danger and so forth, then what would happen?

A Well, I think you con't have any precedent as to precisely what would happen under those circumstances, Your Honor, but I think clear and present danger is one of those elements that would be tested at the trial as opposed to Grand Jury indictment.

The Grand Jury indictment is just to put the man to trial, not to convict him. And there is evidence in this transcript which would indicate the clear and present danger, but I don't think that under our procedure it is called for at that particular time.

Now, it has been argued that the application for 999(a) relief, which was denied, and in a petition for a hearing by the California Supreme Court was denied, it has been claimed by the appellees that this, in effect, gave the State Courts a chance to limit the statute in its application.

They didn't take that chance. We don't think that is a sound argument for the reasons I mentioned. 999(a) does not embrace a question of this kind. It embraces only the evidentiary question.

Secondly, there are considerations in any pretrial motion of this kind, in addition to the legal question that is presented. There is a question of whether you should disrupt the criminal trial or whether you should not, whether you should let it proceed.

The application of the California Supreme Court is like the application to this Court for certiorari. It is a highly discretionary act. We don't think this has been properly presented to the California Courts. We are confident that when it is, the statute will be limited and brought within constitutional limitstions.

The place in California procedure where this should really be accomplished is in the jury instructions. And then if those are not adequate, in the event that Harris is convicted -- there is the possibility that he may not be. If he is convicted, there can be a review on a full record of instructions as applied under the evidence in light of the statute and all of its controlling cases.

It is not a simple question. It is a complex question We think that that is the time to review and we think that it will not prejudice John Harris to await that time for review of

the interests he is concerned with. That is whether he is going to be held guilty of violating Section 3.

Certainly a trial court, in passing on a demurrer, that was no authoritative interpretation of the State Courts of this section of the Criminal Syndicalism Act.

There are procedures available in California that perhaps could secure a ruling pretrial on this question. They were not invoked here. Habeas corpus might lie. A writ of prohibition in the sense that the normal extraordinary writ, not the special statutory 999(a), might possibly lie in this situation.

These things were not done. These are the cases that were referred to in the briefs filed by the appellees as showing this opportunity given to the State Courts.

I would like to save anytime that I have.

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

Mr. Wirin?

ARGUMENT OF A. L. WIRIN, ESQ.

ON BEHALF OF THE APPELLEES

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

The ultimate question, as we view it, is whether or not the California Criminal Syndicalism Act is unconstitutional as violating the First Amendment and whether the District Court in so ruling was correct. But long before that ultimate question was reached, there is concededly a serious threshold

question, and we the appelless, and particularly appellee Harris have to succeed in crossing that threshold in order to prevail.

The threshold question is whether or not, where there is a special procedure in a state for the raising of Federal as well as state constitutional questions prior to trial, as there is in the State of California as frankly and candidly and fairly stated by Mr. Harris. Where there is a special procedure or raising, both of constitutionality of a statute on its face and as applied and the sufficiency of the evidence adduced before a Grand Jury in connection with such a statute, and where a defendant charged with an offense has exhausted every available -- where there is a procedure available to him and where he has taken every step under that procedure, and having failed in these steps to secure to narrowing of the statute or a dismissal of cases violating the First Amendment, whether or not if and in the case involving only an expression of opinion, only pure speech un accompanied by plots or conduct or acts or anything other than expression of opinion.

The question is, therefore, when a defendant in that circumstance, under that kind of a procedure in a State Court, after having failed to secure narrowing of the statute in the State Court by a procedure available to him to secure such a narrowing, whether it be then and only then he repairs to a United States District Court, whether the United States District Court then if it chooses fails to abstain,then it uses its

discretion in such failure to abstain.

Q Mr. Wirin, is there anywhere in these appendices a record of what you did in the 999(a) proceeding or something?

A Your Honor, the record is in two parts. In the first place, it is set forth in the complaint filed in the District Court in the record at page 2, and particularly in paragraph 8 on page 6, filing of adequate proceeding in the Federal Court the plaintiff has -- appellee here -- filed proceedings in all of the State Courts of California and that section 995.

Now in addition to that, Your Honor -- and I do want to emphasize, I suppose one should emphasize -- two matters with respect to the record. One is we submitted to the District Court at its request the leaflets now the subject matter of the indictment. We have set forth these leaflets now in an appendix to our supplemental brief, as we have set forth the entire transcript before the Grand Jury, namely, all of the evidence against this defendant before the Grand Jury.

Now, in addition that, Your HOnors, because and in view of the fact that this is one of a number of cases which are going to be argued before Your Honor on the issue of abstention, we thought this Court ought to have available to it all of the proceedings in the California Courts, the proceedings before the Superior Court, trial court, the proceeding before the Court of Appeals and in the Supreme Court of California, so that Your Honors will see that he raised the Federal constitutional questions

as well as the state constitutional questions, because my client is not well-heeled and was permitted to proceed in the form of paupery. We did not have the funds. We did not print the entire record of the proceedings in California Courts, but they are lodged with the Clerk of this Court for Your Honors' examination, should you be so advised.

However, we have pulled from that record, which is in the possession of the Clerk, portions which we think are highly relevant and we printed them in this appendix to which Your Honors have referred.

Now, as stated by the ATtorney General in his brief, the Attorney General says that the defendant has been charged with acts in violation of the California Criminal Syndication Act. One may call it what one wants, but the acts with which he is charged consists solely of the distribution of two handbills on two separate days, therefore he is charged with two violations under the California Criminal Syndicalism Act.

A violation of the California Criminal Syndicalism law was considered by the California Legislature very serious when this statute was adopted 50 years ago. So he fases a penitentiary sentence of 28 years, 14 years for each pamphlet distribution, for pamphlets only being distributed on two days, one after the other.

Moreover, there could be no question of that these leaflets were concededly highly critical of Los Angeles Police

and were distributed at a proper place and a proper time on a proper occasion. A Negro had been shot and killed by a white officer. Negroes in Los Angeles were very concerned about the matter.

An inquest was being held as to the cause of the death and these leaflets conceivably couched in very strong language were distributed outside of the inquest hearing on the steps of the building where the hearing was held.

Now I must hasten to add one thing, Your Honors. The leaflets -- I want to try to clear up a matter about which there could be some misunderstanding. The leaflets which this defendant distributed, as Mr. Harris stated, Your Honors, are not the horrendous leaflets issued by the American Nazi Party which are attached to the appellant's opening brief, which have nothing to do with the defendant, which three leaflets pertaining to statements made by organizations with which the defendant has no relationship. These were leaflets which were never introduced before the Grand Jury, leaflets which couldn't have been introduced before the Grandy Jury because they are dated two years after the indictment.

They are offered to Your Honors as evidence that California is in grave peril from organizations that want to destroy it and, therefore, these leaflets two years thereafter are relevant to the indictment of the defendant two years before.

Q Are the leaflets distributed by your client --

are supposedly here somewhere. I can't seem to find them.

A Oh, well, I can help you with that.

Q I have found the ones you told us to disregard, but I haven't found the other ones.

A As a matter of fact, I don't mind your reading them because we make an argument about those leaflets that the Attorney General of California is a zealous prosecutor and sees dangers to California which no one else sees by virtue of these leaflets.

But the leaflet I have doesn't answer your question.

Q No.

A The answer is, it is a blue document and on page 3 ---

Q The appendix to appellee's supplemental brief on reargument?

A Exactly, Your Honor. And pages 3, 5 and 6 are -- contain the complete text of the indictment against the defendant, and the complete text of the leaflets.

Now you will notice upon reading the indictment, there is no reference to any conduct or any acts other than the distribution of these leaflets.

Now I have said to Your Honors and I am trying to emphasize, because as I read this Court's decision, the distribution of leaflets unaccompanied by acts constitute freedom of the press exercise by the poor man, and I don't want to get into

the argument whether the exercise of freedom of the press has a higher priority than other rights in the Constitution, But, in any event, it is a right which this Court has recognized again and again where there is expression of opinion, where there is no claim by the prosecution to the expression of opinion accompanied by any overt acts ---

Q I would like to get this clear. I gather your basic position is that it was appropriate for the Federal District Court to intervene, as it did, because, if I understand your argument, you had in fact exhausted this special procedure that California provides unsuccessfully to get a determination that the statute was unconstitutional or to get a narrowing construction.

A That is precisely my argument, which I hope to reach now in just about a minute or half-minute.

Q Don't overlook it.

A No, I had better not. But just let me quickly emphasize at this point that the Criminal Syndicalism Act, a part of which the Court passed and which may be found in the record, which is a green paper, at pages 8 and 9, it is the record on appeal.

Q When you speak of "record," you mean the one labeled "appendix"?

A Yes. Thank you, Your Honor. That is what I mean Your Honors will look for a moment -- my moments to me

are precious -- at the text of the Criminal Syndicalism Act you will find on page 8 that it is an act which proscribes doctrine and precept. So, it is an act aimed at expression of opinion.

And, says Mr. Harris the Assistant Attorney General, the defendant Harris was charged with subsection (3). If Your Honors will take a third of a minute to look at that which is on page 9, you will find that that makes it a crime to print, publish, edit, issue, so forth. So far as any charge against this defendant is concerned, it is purely a charge involving the expression of opinion.

Now, I had better get to that problem of ---

Q Yes, I suppose you are right, because, whether or not that is constitutional, the real issue here is whether you ought not fight that out in the state courts and not in the Federal Courts at this junction.

A Yes.

Now our position is that this is not a case under some of the abstention decisions by this Court where a person rushed into Federal Court. It is not a case where he sought relief in the Federal Court prior to exhausting available remedies to him to secure the same kind of relief which he ultimately secured from the Federal Court from the State Courts.

And that leads me to a discussion, then -- what I would agree is the heart of this case -- as to the special procedure, the nature of the special procedure in California to

do that because if California has a special procedure, whether or not other states have it is at this moment of no concern to me, though I think it is, of course, of concern to Your Honors. But I think in other cases, in the other abstention cases following this one rather than this one, where it is conceded by Mr. Harris there is a procedure in California.

Of course we don't agree entirely as to the scope of that procedure. We have brief the man and, by way of capsule summary, this is the thrust of our brief and this is the nature of our position.

We challenge the constitutionality of the statute on its face and as applied in the trial court, to start with. As Mr. Harris conceded, in the California procedure, in contra-distinction to procedure in the Federal Courts, a transcript of the proceedings before the Grand Jury is filed with the Clerk of the Court and a copy furnished to the defendant.

He may challenge the sufficiency of the evidence as well as the constitutionality of any prosecution -- of any statute upon which a prosecution is based in a proceeding which is known as Section 995 of the Penal Code.

Q What is the number of that?

A Section 995. It is referred to in the complaint. It is discussed more or less extendedly, particularly, Your Honor, in our reply brief, which is a manila covereddocument, at pages 6, 7 and 8.

Mr. Harris said to Your Honors that before a trial in California -- I think he said -- may challenge the constitutionality of a statute by habeas corpus or by petition for prohibition.

A petition for a prohibition was filed by this defendant.

Q In what court?

A That goes to the first immediate appellate court called the Court of Appeals.

Q That is your intermediate appellate court, not that special appellate you have in California?

A No, that is not Appellate Superior Court, because felonies are filed in your Superior Court. Then it goes to an intermediate appellate court known as Court of Appeals.

So an adverse ruling by the Court of Appeals, one goes to the California Supreme Court by a document known as a petition for hearing, in which petition for hearing all of the papers which are filed for proceedings in the Court of Appeals go up to the Supreme Court.

And in this state, as Your Honors will see if you will examine the one copy of the proceedings in the California courts compiled by the Clerk's office, all of the proceedings in the trial court are annexed to the proceeding in the Court of Appeals, including the transcript of the record before the Grand Jury.

Q Are you going to deal at some point with the impact of 995 and 2283?

A Yes, yes, I am.

Now, it is our view and we discuss it, Your Honor, particularly at these pages which I have referred to, pages 6, 7 and 8, that under California procedure the California statute itself and the California Courts have ruled that relief must be accorded to a defendant where the evidence is insufficient after any essential element of the offense.

In this case, the essential element of the offense, as Your Honors decided unanimously just this last term in Brandenburg vs. Ohio, is that the advocacy must be accompanied by incitement to imminent lawless action. Urged upon all of the California Courts was that there was no evidence before the Grand Jury as there is no charge of the indictment of any incitement as distinguished from advocacy of abstract doctrine.

And incidentally, Mr. Justice Harlan, you will be interested to know that the District Court was greatly persuaded by Your Honor's ruling in Yates and in Noto -- maybe that remark I just made is irrelevant to my point which I am making.

But the distinction between abstract advocacy, on the one hand, and incitement against those laws, on the other, which distinction is not drawn by this statute and, hence, it is overbroad and vague under decisions of this Court. That distinction was never made, that distinction was never recognized by any California Court in claims made by this defendant to that Court, and therefore -- two more things and then I am sure my time is

up.

Therefore we do not agree with our adversary that the California Criminal Syndicalism Act, an act aimed at precepts and doctrines of that time, has ever been narrowed by the California Courts to comply with the limitations that this Court has imposed in Yates, Noto and in other cases and, in particular, in Brandenburg.

Q Are we called in this case to review the proceeding that you have been spending so much time on here? The question is whether the Federal Court had any business barging in on the state prosecution at the stage in the face of 2283 and in the face of a situation that carries no harassment of this man by finding an indictment against him.

That is the narrow issue in this case.

A Well, I will address myself to that issue.

Q Well, that is the whole issue.

A But I will agree to do it.

But, Mr. Justice Harlan, it is my position that a district court -- now I want to say this firmly, but very respectfully -- does not barge into a state prosecution when there is a state procedure which authorizes and provides for relief prior to trial, which state procedure has been exhausted by a defendant in every California court.

It is our view it is no disrespect to a state court, it is no prostration of the authority of a state court if in

that circumstance, when a state court has been given every opportunity to narrow a statute and has not done so, for a defendant to then repair to the Federal Courts, particularly when he couldn't come to this Court, because that situation is not a final judgment reviewable.

And I must also confess, Your Honors, that I do draw the distinction between a free speech case and another case.

Q Mr. Wirin, you are not suggesting, are you, that having exhausted this rather unusual California pretrial procedure, that he could not under state law continue to assert his constitutional defense that the criminal prosecution -- you are not suggesting anything of that sort?

A No, I am suggesting nothing of that sort. I am merely suggesting ---

Q So that now he would be in the same position as would be the defendant in any other state that did not have any such pretrial procedure as California has. It need be just simply a defendant having been charged with an offense and there were available to him in the state courts all of the constitutional defenses. Isn't that correct?

A I agree entirely with what Your Honor has said with, of course, a qualification. My qualification is that so far as the doctrine of abstention is concerned, a doctrine which is positive on the constitutional principle that the Federal Court should not prostrate the actions of state courts,

except where appropriate, that if there is a special procedure in the state court and it is followed by a defendant, that it is timely for him to repair to the district court and secure redress in the district court with respect to matters for which he has not secured redress, ---

Q Then you run up against 2283.

A Now I come to 2283.

And there are two things to be said about 2283 in connection with this case. First, 2283 was never raised by the District ATtorney in the trial court. I don't know how important that is. Maybe after I explain in a moment.

In the notice of appeal to this Court 2283 was not mentioned. In the jurisdictional statement to this Court 2283 was not relied upon, although shortly thereafter the Attorney General filed a memorandum in support of the jurisdictional section, raising for the first time Section 2283.

Of course, in Section 2283 -- it is a jurisdictional statute, and I don't understand that position, Mr. Harris. It can be raised here, whether it was raised below. But I make some point of the fact that it wasn't raised below for this reason: The District Court essentially made a declaration that the statute was unconstitutional on its face.

Then, if I may say, to help the District Attorney it went on and issued a preliminary injunction, sua sponde, not a request of the plaintiff, because all that was pending before

all that was pending before the District Court was a motion to dismiss by the appellant. It issued a preliminary injunction and in order to give the District Attorney an opportunity to appeal to this Court and secure a review, and had Section 2283 been raised in the court below, it is very possible that he would not have been issued an injunction for his declaration of statute being unconstitutional would probably have been insufficient.

Now that is part of the argument, but not the main part.

Now, Section 2283 contains three subdivisions, each of in our view was complied with in this case. One of the subdivisions in Section 2283 is, "Where an order of a District Court is an aid of its jurisdiction or an aid of its judgment."

At the time this matter was heard by the three-judge District Court, no responsive pleading had been filed by the appellate. All that was before the Court was a motion to dismiss, which motion to dismiss the District Court rejected. It had jurisdiction over the cause, so Mr. Harris concedes and, therefore, to preserve its jurisdiction and its authority, ultimately later it went a judgment, a declaratory judgment under Zwickler vs. Koota, which doesn't involve the injunction statute at all, and which was the only matter which the District Court really decided.

And in Zwickler vs. Koota he won it unanimous, although

there was an exciting and concurring opinion by Justice Harlan. So, what the Court did, therefore, was to issue an injunction to sustain its jurisdiction in order to be able to effectuate its ultimate judgment, which could have been only a declaratory judgment, which as we say under Zwickler vs. Koota, it is quite a "dump."

And finally, of course, Your Honors, we make the argument, though this Court has never decided the matter, that the Civil Rights Act under which this suit was filed in the District Court, which authorizes the District Court to grant relief in the way of damages and injunction, is one of the exceptions to the injunction statute and that the District Court below, therefore, merely was complying with the authority which the Congress has conferred upon it in the Civil Rights Act in issuing the injunction in this case against an injunction not necessary, not issued at the request of the plaintiff, but issued to help the District Attorney and to help Mr. Harris.

Q Now would the result of that be that the state has been helped to the extent that for four years they haven't been able to move? Is that right?

A Well, Your Honor, it turns out that four years is one year too long. Maybe that isn't important.

Q Well, I was ---

A Also part of the time, Your Honor, it is attributable to this Court because you heard this case before.

Q The thing we have before us is the injunction and whether or not the appellant asked for it anything, to me, is rather unimportant. He did issue the injunction and it has to be tested against 2283.

A And we say that there are three exceptions pertaining to 2283, and that in this instance -- and these are disjunctive, these exceptions -- any one of them, and in this case ---

Q I don't see what jurisdiction he was protecting. He could issue his declaratory judgment. He didn't need to issue an injunction to protect his right to issue a declaratory injunction.

A I think he -- it was a three-judge court, that is all right. In any event, to maintain the status quo in order not to have its jurisdiction mooted, we think it was proper to issue some kind of a relief.

Q Well, isn't it answered very simply by the fact that he hasn't issued a declaratory judgment yet?

A What the District Court did, in effect, was to issue a declaratory judgment, but not a final declaratory judgment, because ---

Q He hasn't made it final yet. What is stopping him from making it final?

A To appeal to this Court.

Q He just decided that that was enough?

A To appeal to this Court.

Q Well, so if we upset the injunction, then he can go ahead to file his declaratory judgment.

A In the District Court.

Q Then how is he damaged?

A Not very much, except we think that the three-judge District Court had the impression of anticipating this Court's ruling in Brandenburg. We wouldn't like to see the judgment reversed.

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

Mr. Harris? You have four more minutes.

REBUTTAL ARGUMENT OF ALBERT W. HARRIS, JR., ESQ.

ON BEHALF OF APPELLANT

MR. HARRIS: I didn't get to the last two points in my opening remarks, because at the time the problem -- I didn't mean to waive any point in connection with either the merits of the Act or the impact of Section 2283, which we set forth at very considerable length in our brief.

We think it barred the injunction here in looking at the complaint, which appears in the appendix and at page 7 it is quite apparent to me that a permanent injunction was prayed for, a temporary restraining order and a preliminary injunction, in fact, were all prayed for by the plaintiff, John Harris, and by the other plaintiffs here.

We still urge and I think if you will examine the

cases that have been cited by the appellee that the 999(a) procedure does not permit the raising of the constitutional question that they presented here. They argued, but they didn't do it within a procedural framework that would permit the state courts to decide it.

We also submit that, however, whatever our view might be or whatever the District Court's understanding might be of the procedural niceties in California shouldn't be determinative of this case.

2283 still bars aninjunction without any regard to what interlocutory procedures are provided for in California. Now, as far as the declaratory judgment is concerned, we urge that the statute can properly be saved and under Zwickler this is a consideration that should have prompted the District Court to abstain and let this statute be thrashed out in the state courts and let John Harris have his remedy, and I think there can be no real doubt that he has a real and meaningful remedy within the California courts.

Only a week ago, Monday, this Court in Ware against Schneider in 1225 affirmed percuriam a case out of Louisiana, where the Federal District Court had abstained from getting into a Louisiana prosecution and there there had been an application to the Louisiana courts, in fact, an application to the Louisiana Supreme Court for relief by the defendant during the course of his application to the Federal Court.

This was not deemed to be of any great consequence under that particular situation and we think it is somewhat comparable to the situation here. Now what the procedural niceties are in Louisiana, I have no idea, and we don't that this case should turn on that.

2283 clearly barred the injunction. The statute can be salvaged insofar as Harris is concerned and certainly no more than the one prosecution that he is facing.

There is no -- I think the delay here, as mentioned in a question, has been very considerable. As the case proceeded in the state courts, no doubt it could have been terminated long since, and we stand here four years with the State of California in the situation of being unable to proceed against John Harris, whatever the merits of that case might be; and, more importantly, unable to proceed within the constitutional limits of the Criminal Syndicalism Act.

It is not a question of zealous prosecution, it is a question enforcing the law within the proper constitutional limits that this Court has laid down. And it certainly suggests in Brandenburg that within the Criminal Syndicalism Act there is an area within which the state may properly act to prohibit the advocacy of criminal means, whether it be killing all cops, whether it be blowing up a building, arson or whatever.

We think the state should be able to prove the positive relationship between the advocacy and these criminal

acts.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harris. Thank you, Mr. Wirin.

The case is submitted.

(Whereupon, at 11:10 a.m. the argument in the above-entitled matter was concluded.)