Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

DONALD BACHELLAR, ET AL., Petitioners	**Docket No.** 729
vs.	
STATE OF MARYLAND, Respondent	

Place Washington, D. C.

Date March 2, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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DONALD BACHELLAR, ET AL., Petitioners		
vs		No. 729
STATE OF MARYLAND, Respondent		

The above-entitled matter came on for argument at 12:58 o'clock p.m., on Monday, March 2, 1970.

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

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 729, Bachellar against Maryland.

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

ORAL ARGUMENT BY ANTHONY G. AMSTERDAM, ESQ.

ON BEHALF OF PETITIONERS

MR. AMSTERDAM: Mr. Chief Justice, and may it please the Court: This state disorderly conduct prosecution brings to the Court three issues, of greatly varying breadth.

The narrowest relates simply to the jury instructions inthis particular case, and it is whether, on this record, and in light of the trial court's charge, the finding of the offense of disorderly conduct.

The Court's failure to give certain instructions requested by the Petitioners caused the case to go to the jury on a constitutionally-impermissible basis.

The second and broader question is whether, on this record, a conviction of these petitioners under the specific definition of disorderly conduct, charged to the jury, violates the First Amendment. Or, in other words, whether the Maryland Disorderly Conduct Statute has been unconstitutionally applied.

And the third question is whether the Maryland Disorderly Conduct Statute is unconstitutional on its face, by

virtue of the First and Fourteenth Amendments.

Now, all three of these questions have in common the language of the offense of disorderly conduct inMaryland. REsolution of any of them requires careful attention to that language and I would like tostart with it.

Q Just before you do, Mr. Amsterdam, because I understand the distinct category in which you put your three issues in increasing breadth. You said the last one was whether the statute on its face, was unconstitutional and violated the First and 14th Amendments. Do you mean -- does this have to do with vagueness or breadth over-breadth or vagueness or does it have to do with what the statute explicitly prohibits and makes an offense?

A It has to do with the particularized standards of vagueness and over-breadth, applicable in the First Amendment area. And so when I say "unconstitutional on its face," I mean unconstitutional on its face in the same sense in which this Court has looked to the facial validity of statutes when applied in areas involving speech.

I am talking about a First Amendment contention, but it's not related to the general doctrines of vagueness and over-breadth. There is a more particularized doctrine of vagueness and over-breadth, applicable in the First Amendment area; it is that which we invoke.

Q All right.

Now, it is not unusual that in a disorderly conduct area the statute itself does not contain the exhaustive definition of the crime. The statute is found on page 4 of our brief and it simply says: "Every person who shall be found acting in a disorderly manner to the disturbance of the public peace, upon any street or highway or in other public places, is guilty of the offense."

However, the statute has been authoritatively construed by the Maryland Court of Appeals, and at pages 30 and 31 of our brief, we both state those constructions and set forth the portions of the specific jury charge in this case which embody the Maryland Doctrine to Disorderly Conduct.

And there are two distinct theories of disorderly conduct in Maryland. The first, as charged to Petitioner's jury is: "Disorderly conduct is the doing or saying, or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it."

Q Now, the term "peace and quiet" is linked up directly with the incitement -- the incite and the peace and quiet are linked; are they not?

A Well, it is unclear. Again, it's of the nature of definitions of this sort, that they don't make those linkages

clear. The verbal terminology is: "conduct of such nature as to affect the peace and quiet." Now, I think there is a relationship between that and inciting and disturbing, but the verbal nexus is not direct.

The second -- for shorthand, I think it may be helpful to call that "the disturbing of public theory of disorderly conduct," and I willrefer to it as that.

The second is the disobeying of police order theory of disorderly conduct and that was charged to Petitioner's jury as follows: "A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct."

Now, having focused in on the language, I would propose very, very briefly to describe the facts of the case. I know the Court is familiar with them; I only want to touch the highlights, and that, very briefly.

The case arises, of course, out of an anti-war demonstration in front of a recruiting center. There were pickets in front of the recruiting center, marching in a line; they had signs and placards.

The Petitioners here were part of the picket line; they joined the picket line and they marched with the placards in the line. They then went into -- actually three of them -- I don't regard this as material, three of the six went into the recruiting office and asked the sergeant in charge to display

their anti-war literature, which he said he had no authority to do, and declined to do; and, explaining that to them, asked them to leave. They did not; they remained and argued with him for a while, but no attempt was made to remove them from the office until closing time, something more than an hour later.

At that time the blinds were drawn down and after they were asked again to leave, both by the Recruiting Sergeant and the United States Marshal, and they declined to do so, they were removed.

At this point the testimony begins to diverge in as many directions as there are witnesses. They said they were taken out and thrown bodily on the ground in a violent way. The officers testified that they were put outside; some of the officers admit putting them down on their backs; others say at least one landed on his feet; some say they were escorted out. A photographer present says they were all carried out very close tothe ground and dropped on their rears; but in any event, they ended up on the ground outside. They may have sat down and they may have been dropped.

Q Does that dispute in evidence have any relevancy to your point?

A Oh, it does, indeed, Your Honor. If this were a case in which wewere just claiming that the Petitioners conduct was not constitutionally punishable, we would accept

the findings of fact most favorable to the prosecution and I would have stated this case entirely in terms of the prosecution's testimony.

But, one of our major issues is: what instructions should have been given the jury? Now, of course, it is the function of the instructions to the jury to have them decide on the facts of the whole record which category the prosecution verdict or a defense verdict, the case falls on.

So, of course, the defense evidence is relevant and conflicts of the evidence are relevant on the question of what instructions should have been given the jury.

Q I evidently didn't make my question clear. I understand you are arguing now on the unconstitutionality of the statute on its face?

A No; that is one of three contentions and at the moment I am not addressing myself --

Q Suppose they were there wrongfully and they had a right to put them out and they did put them out. What would be the relevance of the way they put them out? In your case.

A Excuse me --

Q I'm not talking about whether it's right or wrong, a violation of the law.

A It would have no relevance whatever if they were charged with disorderly conduct in the recruiting center. They were not. That is very plain. The statute does not

apply to disorderly conduct except on a public street and in certain places, which does not include in a recruiting office.

At the close of the case the trial judge formally announced that. Nothing that they had done in the recruiting office was the basis for this charge. Whatever they may have done in there, the sit-in, if that's what it was, has nothing to do with their conviction of disorderly conduct. That has been plain from the beginning of this case.

Q Does it have some relationship in flow and sequence of events to what happened before they went in and after they came out?

A Absolutely. There is no question about that and I am not arguing for one moment that the court below would not take account in determining whether what they were charged with was disorderly conduct; that is, conduct in the streets, with their conduct before they went in, while they went in and after they came out. That is exactly why I am describing the facts.

Q You don't think the statute covers the conduct in the recruiting office itself?

A Pardon me?

Q I was just looking at the statute and it talks about any public street or highway and then various other places and then it says "or in any elevator, lobby or corridor of any office building." That would not, in your submission, include

the recruiting office?

A I am quite sure that the interior of a business office is not an elevator, lobby or corridor of an office building. This is a store-front office; this is not a public building or public corridor.

Q An office building is a building with an office in it, I suppose; isn't it?

A Well, but this requires it be the elevator, lobby or corridor of an office building and what we had simply is a store front, all of the space within which is working space. This is an office; it is not public space in an office building.

In an event, if I may, Mr. Justice, simply refer to Your Honor to the view the trial court took of this case. I think it is quite important. If you look at our brief in at page 25 in the runover footnote. "At the conclusion of the testimony the trial court declared that the offense of disorderly conduct with which they are charged, does not relate to anything that took place inside of the office." Now, this was in connection with a defense request to charge to that effect. The trial judge said he would charge to that effect. He did, in fact, neglect to charge to that effect, but that's not a claim of ours at this point. We raisedthat claim below that he should have, as a matter of state law; but his ruling is quite plain. He didn't think that anything that went on

inside the office was part of the offense.

Indeed, the Chief Justice's point came up at the trial; that is, whether we took the position that what went on inside the office was totally immaterial. Defendant's trial counsel did take that position and asked that the testimony be stricken. I do not at this point take that position. I think that the testimony was relevant background; the court rejected thatposition, but the court rejected it specifically on the ground that this was relevant background and not that the conduct inside the office was disorderly.

And in fact, if you take a look at the trial record, you will see that the prosecution hurried through the testimony as to what went on in the office. That testimony is quite unclear. There was no cross-examination on it by defense counsel, precisely because these events were simply not and everybody knew that they were not, at trial, what the basis of the charge was.

The charge had to do with what happened in the street.

Q Now, there were 25 or 30 other people who had been picketing on the street for a fairly long period of time while your clients were in the office; is that correct?

A That's correct, both before and after.

The picketers included the six defendant petitioner here and when they went in -- they were in there, remember,

for about an hour -- the picketing continued and from what it appears, the petitioner were in and out and other people were in and out. The six petitioner end up here because they were left in the office at 5:00. They were the ones who had stayed. And then they were thrown out.

Now, the point is, I think --

Q You spoke of them marching in a line. Now, some of the pictures indeed show they were marching in a line, but Exhibit 9, which is one of the exhibits here, is not much of a line; would you say? The crowd in front of the store, spilling out onto the street, and indeed, spilling out to the point where, although there are parking meters there, no car could be parked there at the time that the activity was going on.

A Let us be clear on timing, Mr. Justice. I wasn't responding to that question; I was talking about the picketing. The picketing had ceased by the time of Exhibit 9. Exhibit 9 refers to the time --

Q What was going on at the time of Exhibit 9?

A The six petitioner had been thrown out of the office and were on the sidewalk in front of it. At that time a crowd composed of the other demonstrators, that is, the picketers, and onlookers, gathered around to watch. It is unclear on the record, whether or not that crowd of onlookers was already obstructing the sidewalk in the way in which you

see in 9, before they were thrown out or whether that happened when they were thrown out. That is not a picket line, Your Honor. That is a crowd that is --

Q That is a crowd of people; no picketing in the sense that you were talking about at all, except that your clients are still engaged in their demonstration; aren't they?

A They are at that point, depending on the view one takes of the testimony, which was never resolved by the jury; either still engaged in a demonstration or lying on the ground where they were thrown, because they haven't yet had a chance to pick themselves up. If that issue had been resolved by the jury we would have a different case.

Q Isn't the whole idea ofthe disorderly conduct statute to preclude and prevent the kind of collection and episodes that are involved in Exibit 9?

A No; I don't think it is, by any means. Certainly not this disorderly conduct statute and in any event, there --

Q Doesn't it refer in terms to the responses of others? Now, the response of others here sometimes is peaceful, just curiosity, an interest in what's going on and sometimes it might be more than that. But the response is part of the statute; is it not?

A There is no doubt about that, unless the public responds in -- well, I'd better not go that far; it's just not

clear to me whether that's so. Let me take the statute apart and see.

In one sense response is necessary. That is, under the definition of disorderly conduct which involves doing something which offends, disturbs, or incites, the reaction of the crowd is relevant. What I'm concerned about is what it tends to incite may not turn the liability on actual reaction by the crowd.

Q Was anyone arrested while the picketing was going on in the orderly way?

A No.

Q Indeed, the police afforded protection to the them; did they not?

A They did, indeed.

Q They were there to guarantee their rights to picket and parade up and down the front of the recruiting office?

A Absolutely no question about it. Your Honor, I want to make very clear our position here, which both the Court below misunderstood and the Respondent appears to misunderstand. We are not contending that these petitioners were arrested because the police disagreed with their views; they were not. We don't suggest that for one moment. What we suggest is two things: first of all, what is in issue before this Court is not the reason for their arrest. What's involved

before this Court is the basis for their conviction and they were convicted on the theory that they did something which offended, disturbed and incited. It had nothing to do with obstructing the sidewalk or any basis for the police arrest.

Secondly, the offense of disturbing and inciting has to do with the crowd's response to their ideas. We're not saying the police disagreed with their ideas; we're saying that the police arrested them because they disturbed the crowd. What Your Honor is saying, Mr. Justice, is exactly right, that this offense turns in large part, not exclusively, on the crowd's reaction.

And what has happened in this case is that the crowd reacted with hostility to the petitioners. Why? Not because of their position on the street; because of their position on Vietnam. That's plain, on the State's own testimony. And as a result of that hostility the police then proceeded to arrest them for creating a disturbance.

Now, it is the purpose of disorderly conduct to prevent the public from being upset; and it is the purpose of the First Amendment to prevent disorderly conduct laws from allowing convictions where the upset is ideological. That is the essence of our submission in this case.

Now, I want to be very clear about the issues presented, because in my view, the respondent takes a very different view of the issues than Petitioner. And I think who is

ultimately right on the merits of this case depends in large part, if not exclusively, on whose formulation of the issues if the correct one. For that reason I want to tell the Court exactly what I think the issues are.

The question here is not whether these Petitioners have done something for which Maryland can constitutionally punish. More specifically, it is not whether they have a right to sit in a recruiting office; it is not whether they have a right to sit down on the sidewalk; it is not whether they have a right to obstruct the sidewalk. I am not asserting that they have any of those rights.

What they have a right to is a fair trial on the issue whether they did any of those things under a statute which, in terms, punishes doing those things, so that the issue submitted to the jury and fairly decided by the jury will be whether the Petitioners did anything Maryland had a constitutional right to punish.

Now, that is not this trial and that is not this statute. And, it is for this reason that we profoundly disagree with the Respondent's statement of the issues in this case. The Respondents make it a simple case: Petitioners obstructed the sidewalk, they were told to move on; therefore, they were charged with refusing to move on after being told to do so because they were obstructing the sidewalk and that's a perfectly constitutional charge.

The trouble with that is that the first time Petitioners have been charged with that is in this Court, and if I may refer to the record, I think I can satisfy the Court pretty squarely on that point. What the Respondents say, specifically, in their brief is: "Petitioners were arrested for blocking the sidewalk and for failure to obey a policeman's command to move on, when not to do so may endanger the public peace."

An examination of the record clearly discloses that obstruction of the sidewalk was the prevailing factor that caused the arrest of the Petitioners, not disagreement with their ideas.

I think I have already pointed out that the issue here is not what they were arrested for; it's what they have been convicted for. And at this point, when one asks what they were convicted for, one ought to look at another aspect of the Respondent's brief.

The Respondent points out at page 42 that the prosecutor elected not to proceed under a Maryland statute governing obstruction of the streets. The Respondent suggested it's immaterial that the State didn't proceed under that statute. I suggest that the fact that the State didn't proceed under that statute is the essence of this case. Because what the charge was that was, in fact, made, was the broad, general disorderly charge underSection 123.

Now, that charge, as I say, has two aspects: doing or saying or both of anything that offends, disturbs or incites. Now, with regard to that charge, I want to point out that there is not only nothing about obstructing sidewalks; there is nothing in it about disobeying a police order. And this was put before the jury as a separate ground of conviction.

With all the facts, including, Mr. Justice, the background facts like the fact that these people were walking with signs and that they were singing "We Shall Overcome," when they were on the street.

Now, the State, even in this Court, calls their singing on the sidewalk, misplaced vocalizing and suggests that it was disorderly because it prevented them from hearing police orders.

And that's where I think this Court has to focus in this case, not on the question of whether they were obstructing the sidewalk or anything else. Certain of their conduct was clearly protected by the First Amendment. The picketing was, with the placards and with the signs, the singing "We Shall Overcome." Not all of it, but parts of it.

The State's charge here was a blunderbuss. It was a charge that they did offend, disturb and incite a crowd of people. That's the issue which was submitted to the jury. Now, for the State then to abandon that up in this Court for the first time, to say that that head of liability which it

insisted on to get these convictions, and then in its brief at the Court of Appeals -- pardon me -- in the Court of Special Appeals, stood on it to get the conviction affirmed is now to be abandoned and this is to turn into an obstructing the sidewalk case, is to do precisely what this Court in Gregory and a numberof other cases have said cannot be done.

Q Are you saying also that no one could possibly know from the statute that sitting down and blocking the sidewalk was covered by the statute?

A I most certainly am saying that no one could know that.

Q That's part of your vagueness?

A Yes, but Mr. Justice, let me explain why I am saying that. As I read this statute and the constructions put on it below, I can sit and down and block the sidewalk all I want and I don't violate this statute unless I offend, disturb, incite or tend to incite a number of people, or disobey a police order when not to move on may endanger the public peace, I have not violated the statute.

Now, if I sit down on the sidewalk --

Q You don't think I'm disturbing anybody who wants to use the sidewalk if I block the sidewalk completely?

A I have no doubt that you would be disturbing those people who want to use it.

Q Well, then, why isn't that covered by the statute?

A Because the statute --

Q And why wouldn't you have notice of that, that sitting down on the sidewalk and blocking passage would disturb people?

A Well, even on the face of the statute itself, it's not simply a matter of disturbing; it is a matter of acting in a disorderly manner to the disturbance of the public peace. That doesn't simply mean disturbing any individual from engaging in his own pursuits. The notion of disturbing the public peace is one with which courts have struggled for a long time and this Court witnessed State Court definitions of disturbing the peace in Cox and Edwards. It's a very different thing from simply disturbing somebody who wants to walk along the street.

And, in any event, the whole purpose of the Petitioner's request to the jury, request to charge the jury would have been to limit the statute to exactly that. We admit that the statute is not clear in what it means. I do think that one would not know that sitting down is a violation of this statute. But in any event, I am clear on one thing: that the jury should know what is and what is not a violation of the statute when it comes time to try the case. And when a trial judge submits the issue in terms of generally disturbing, offending and inciting and we ask for instructions that say: it's only if you disturb people by obstructing the sidewalk --

Q Well, I understand --

A -- that you're guilty.

Q I understand that you have more to your case but than just saying that sitting down on the sidewalk isn't covered by the statute, because even if it is, why you still have a lot of your case left, because it covers a lot of other things too.

A There is one other thing I should respond to, Mr. Justice. Your question assumes something that I think the Court may well assume when it comes to this case and I want to be very clear: I don't think it's a fair assumption, and that is the assumption that these people sat on the sidewalk.

Now, I'm not, as I said in my brief: I'm not going to be evasive about that. That issue was not fairly tried below and I think this would be a different case if the way this case had gone to the jury the question presented was allowed the jury to decide whether they did or didn't sit on the sidewalk--

Q You don't think they had any chance at all to get up before they were arrested?

A I think that the testimony was conflicting on that. And I think that it was --

Q Aren't conflicts resolved by jury verdicts?

A Pardon me?

Q Aren't conflicts in testimony always resolved by jury verdicts?

A Only if the issue is submitted to the jury for their resolution. When the trial court submits to the jury the question of whether or not the defendants' conduct offended, disturbed or incited a crowd, to take the jury's verdict is then in settling the proposition that they sat on the sidewalk would be totally incomprehensible.

If the trial court had said to the jury:"Did they or did they not willfully" -- indeed, we submitted instructions. If the Court will take a look at our proposed instructions. We submitted instructions at pages 15,16, 17 which would have allowed the definition of the offense in exactly those terms.

Our alternative instruction 1-A had three heads of liability, one of which was: knowingly and purposely engaging in actions they had no lawful right to do and which obstructed or hindered pedestrians or traffic. Over on the next page, 16 of our appendix, our instructioning would have defined in precisely Mr. Justice White's terms "obstructing traffic."

If those instructions had been given and the jury had voted against these Petitioners, we wouldn't we here. That wouldn't be this case. But what was submitted to the jury was not the question of whether or not the Petitioners sat on the sidewalk, but a broader one.

Now, there is one aspect of the court's charge that may seem to submit that question. It is not in the portion defining the offense, but it is on page 157, where, in

describing the defense case, and I want to take an aside one moment to point out that the court summarized the evidence here, as well as giving instructions on the law.

When it summarized the prosecution's case, you would think at least it would mention obstruction if obstruction is an issue, even though that wasn't wasn't a legal element, but they didn't even talk about obstruction.

There is nothing, either in the instructions to the jury on the law, nor on the summary, even of the prosecutor's case, which suggests that obstruction was an issue here, and therefore, Mr. Chief Justice, the question of whether they sat there or whether they obstructed anything was not resolved by the jury.

Now, one quibble that one might have with that is this: there is, in stating the defense case, a statement that: "The position of the defense is that they didn't hear the command of the officers to get up and move. If that is the case they had a right to sit on the sidewalk, or in the case of one or two who had been restrained there by the hand of the officer."

But, notice that the jury charge submits two theories of liability: offending, disturbing and inciting is one and the other is refusing to move on. This says that they had a right to sit on the sidewalk, i.e., not to move on if they didn't hear the instruction of the officer. It doesn't say anything

about whether they're guilty or not guilty under the first theory. And it is perfectly consistent that the jury, in resolving this case, Mr. Chief Justice, found that although they did not roughly sit down, they were thrown there by the officers; although they did not have a chance to get up or although they were held down, which is their testimony, that nevertheless, they did something that offended, disturbed and incited a crowd. In this case which the State now talks about singing, "We Shall Overcome," the total context of that activity which Your Honor earlier suggested: picketing outside, going into a recruiting office, presenting literature and then refusing to leave the office and then getting out on the street I think,the jury, in fact, didn't resolve these conflicts. It would be impossible for this Court to say it did.

The jury took this case the way the state submitted it.

Q Is it still the law in Maryland, Mr. Amsterdam, that -- a rather peculiar law in Maryland -- that the jury is the judge both of the facts and the law?

A Yes, Your Honor; there is such a rule in Maryland.

Q Then of what relevance are the instructions of the trial judge?

A They are supposed to be merely advisory, but inasmuch as the Court of Appeals of Maryland has held that a

conviction is reversible if the advisory instructions are wrong, it seems very clear that this Court would have to say, as a matter of Federal Law, whether the instructions were wrong, and if they were wrong, then the judgment wouldhave to be reversed.

Q Well, I just wondered in a case -- and I think perhaps the unique situation in Maryland where the jury is made the judge of both facts and the law, whether our decisions coming from other jurisdictions where that is far from true, are completely relevant.

A I have no doubt that if the Court were disposed to treat Maryland differently than any other jurisdiction for that purpose that Maryland's whole law of disorderly conduct would have to be unconstitutional. Because what that would do would be to deprive this Court of imposing legal restrictions on the formulation of rules in the First Amendment area and that very deprivation would cause inevitably the kind of vagueness and overbreadth which this Court has held bad when applied to First Amendment conduct.

If it really is true, and I simply do not take it seriously, because frankly, the Maryland Court of Appeals doesn't take it seriously, that the jury is a judge of the facts. For all ordinary trial purposes it isn't. Counsel can get up and argue and the jury is told that they are, and that sort of thing, but as this Court pointed out in Brady and as the Giles

opinion that it refers to in Brady pointed out: "All ordinary rules of review are applicable in Maryland. If the instruction is wrong, the jury judgment gets reversed." That's all that's in issue here.

This is a matter of Federal Constitutional Law. This instruction is wrong and rendered wrong because of the refusal to give the requested charges and if so, Maryland Law itself, says that this judgment has to be reversed.

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

Mr. Lentz.

ORAL ARGUMENT BY H. EDGAR LENTZ, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF RESPONDENT

MR. LENTZ: Mr. Chief Justice, and Associate Justices, may it please the Court: Before addressing myself to the principal issue raised by Petitioners, namely that they were tried for the wrong crime, it would assist the State's presentation if the Court would permit the State to present their argument first from the standpoint of the application of the statute to the Petitioners by reviewing the actual facts involved.

Secondly, considering the issue of vagueness, which Petitioner has raised, and finally, from the instructions to the jury.

MR. CHIEF JUSTICE BURGER: Mr. Lentz, would you raise your voice a little?

MR. LENTZ: Certainly.

This is not a complicated case. However, the facts must be considered in detail to present a -- to arrive at a proper legal determination.

The State anticipates emphasizing in its argument that this is a disorderly conduct case, not a freedom of speech case. The arrest and prosecution of petitioners was based on their disorderly conduct, which caused a disturbance of the public peace, on the streets in the City of Baltimore.

Petitioners were a portion of a group demonstrating against United States policy in Vietnam. However, their political view and ideas did not cause their arrest and prosecution. This position is established by the recognition that a minimum of 35 to 40 demonstrators, whose activities were peaceful, were not arrested, but on the contrary, they received police protection and were granted complete freedom to picket an army recruiting office and distribute literature to unsympathetic onlookers.

Only when the Petitioners sat down on a ten to 12-foot-wide sidewalk in a commercial section of the city, blocked it as a public passageway, refused officers' request to move, were they arrested for disorderly conduct.

These demonstrators could still be picketing if the Petitioners had not laid down on the sidewalk.

Q I take it that Baltimore has no anti-picketing

law?

A That is correct to the best of my knowledge, Your Honor.

Q And the State has none?

A That's correct.

Q Is there a law or ordinance about disobeying the order of an officer?

A No, Your Honor; there is a state law which is embodied in the interpretation of 62 Article 27 Section 123, which is your State disorderly conduct statute.

Q It isn't a separate one just for that alone?

A Not to my knowledge; no, sir.

Q But there is a statute, as I understand it, making it an offense to obstruct a street or sidewalk?

A Yes, sir. That is Section 121 of Article 27.

Now, the thrust of Petitioner's argument is that their arrest and prosecution was based on an expression of their political views and ideas. The Respondent, of course, argues that the arrest and their conviction was based on disorderly conduct and the vehicle used for the prosecution, namely: Article 27, Section 123, is a valid constitutional vehicle.

At the outset, the Respondent would emphasize to the Court that this case does not present the fighting words of Chaplinsky; it is not a racial arrest that was patently illegal, such as we had in Shuttlesworth, Cox and Edwards. It is not a

pure speech case, such as we had in Terminello. It is not a peaceful picketing as was in Gregory. The case is purely and simply an instance where the conduct of the six petitioners was disorderly.

Q Well, could I ask you then: surely the statute and the instructions to the jury would permit convictions for saying anything to disturb someone; and the instructions specifically permitted the jury to convict on that basis?

A Yes.

Q Now, is there any evidence in the case, on which imaginably or rationally the jury could have convicted for saying something?

A None whatsoever, Your Honor. There is no testimony offered, either by the prosecution or by the defense that any verbal remark, any words were used.

Q Well, you mean at the time they were arrested, right then?

A At any time during, outside of the singing that went on.

Q WEren't these petitioners among those who were carrying signs?

A Yes.

Q Weren't they carrying handbills inside the --

A Yes. Well, the evidence does not indicate whether they were carrying handbills inside. They had a large

poster.

Q Well, they wanted to display their large posters; didn't they?

A That's right, that they wanted it placed inside in the window.

Q And you say there is no evidence in this record from which anybody could rationally infer that the jury might have convicted these Petitioners for what they said?

A That is correct, Your Honor. The only words --

Q Let's assume there was; let's assume for the moment that there was something in this record from which it could be inferred that -- that the jury could rationally have convicted them for speaking, and the instructions authorized them to do so, then we don't know on what basis they convicted them, do we?

A There would be no basis for arriving at that level, Your Honor, because the only words brought out were the singing that was done. But there were signs carried by the picketers; there was a sign that the Petitioners attempted to have placed inside the recruiting office.

Q Well, if these Petitioners had been carrying signs at the time they were arrested, had signs in their hands at the time they were arrested and a jury might have convicted them for speaking in a way that disturbed people. What would you think about their convictions then?

A Well, this Court has ruled that picketing is not pure speech so that we get into that never-never land, that grey area where it's not purely covered by the First Amendment umbrella of protection. We might have a symbolically perforated umbrella that we're going to bring into play if we're going to get into an area of them carrying signs.

But I don't think the Court need confront itself with that problem, because there is no testimony in the transcript to indicate that when the Petitioners left -- were ejected from the recruiting office that any signs were in their hands, Mr. Justice.

Approaching the position when the Petitioners were in the recruiting office and where a period of two hours remained while peacful picketing and this is very emphatically demonstrated by referring to the State's exhibits 4, 5, 6, 7 and 8, demonstrates the peaceful picketing outside the recruiting office, it indicates that no crowd had gathered on the sidewalk; it indicates that police protection was afforded these picketers for a two-hour period on State's Exhibit Number 8 which is on page 69 on the lefthand side, a uniformed policeman will be observed, noting the peaceful picketing that is transpiring.

And, of course, the sidewalk is perfectly clear. One-half of the sidewalk, approximately, seems to be utilized by the picketers while the other half permits free passage by

pedestrians.

When the quitting time was reached that the Petitioners were inside the office and were requested to leave by the Sergeant, five o'clock arrived; they refused. So, certainly if we did not have a trespass between three and five, the trespass certainly occurred at 5:00 o'clock.

I would submit thatit was a reasonable removal, since it was closing time --

Q Mr. Lentz --

A I'm sorry.

Q Before you leave these exhibits, exhibits --

A I've got a clogged up eustacian tube, Your Honor, so that might account for me not hearing you.

Q Right.

A Proceed, if you will, please.

Q Before you leave these exhibits, is Exhibit 7 taken inside the recruiting office?

A That's correct; yes, Your Honor.

Q And so the gentleman as you look there at the left, is not a policeman, he's a --

A That is Sergeant Grumley, the recruiting officer assigned to the recruiting office.

Q Thank you.

Q About what time was this Exhibit 9 taken? Do you have any idea? That's the last one with the big

crowd.

A Exhibit 9 on page 170, Mr. Justice, would have to be taken sometime between 5:00 and 5:15. This was taken after the Petitioners were ejected from the office.

Q I see quite a few policemen in the middle there.

A Yes.

Q Does that help you on the timing?

A No. As I say, the testimony indicates that Exhibit 9, this photograph was taken after the Petitioners were ejected from the recruiting office. Yes; there were police officers in the middle and this crowd is combined of -- and you might also refer to State Exhibits 2, Mr. Justice, on page 173, which gives a closer-up view of that.

Now, after the Petitioners had beenremoved from the building there was testimony indicating two Petitioners tried to crawl back in. There was an ample supply of police present; as a matter of fact, one of the Petitioners phoned the police department the day before the demonstration to advise them that such a demonstration wouldtake place. And I might add that this is a common occurrence. There were officers from the two districts bordering on this particular locality, as well as officers from the Traffic Division.

Now, the State's position is that this disturbance on the sidewalk was caused directly by the Petitioners

refusal to get up, stand and move. This blockage of the sidewalk occurred when the Petitioners refused to move. As many as five requests were made: three by one officer and two by another.

The Petitioners took the position that they did not hear the request. Now, an explanation is offered that possibly the singing at that time could have been of such volume that the Petitioners did not hear the officers' request.

Nevertheless, a surrebutal witness, one Fogarty, a newspaper reporter testified that he saw the officers standing at the feet of the Petitioners talking to them. Because of the noise of the crowd, he could not hear the words that were directed.

Now, we reach the level as to the particular crime with which the Petitioners were charged. Certainly, if our State's Attorney is to possess any degree of discretion, he is the one that makes the decision as to what particular statute he will charge the accused of. We have not reached the point where the accused is going to select the statute that he wishes to be prosecuted by; certainly he was in violation of 121, the blockage ofthe sidewalk, but certainly he was in violation of 123, the disorderly conduct statute.

Number one, the disorderly conduct violation occurred when he hit the sidewalk and remained in that position. He could have stood; he -- they could have stood; they could have

joined their fellow-picketers, but they chose to flop on the sidewalk and prevent the use of the sidewalk for the purpose for which it was intended; namely: the free passage by pedestrians. Instead, they very selfishly chose to make use of their own purpose for utilizing the sidewalk.

Now, the Court will, I am sure, consider the position that the police are placed in at that time. They must make a decision; may they permit the Petitioners to utilize the sidewalk for a purpose for which the sidewalk was not built, and deny pedestrians the right to use the sidewalk for the purpose for which it was built? And if they do make that determination then it would follow that they would have to detour the pedestrians into the street. The problem that presents itself then is the danger, not only to pedestrians, but also to the motorists it is presented.

Another possible avenue of escape for the police officers at this point is to detour the pedestrians so they will avoid the area that is being blocked by the Petitioners. In which case, can they properly detour pedestrian traffic one block north and one block south of the location? And if so, what position were the police in when one of the pedestrians refuses to follow the detour? May that pedestrian be arrested for disorderly conduct?

And assume, if you will, if that procedure is followed and again, I call the Court's attention to the exhibits and to

the various shops that are on that side of the street. Are the rights of these shopowners denied if the pedestrians are not permitted to use that side of the street.

All of these are practical problems, with which the police were presented at the time.

However, returning to the question raised by Petitioners at this time, that the States position is that the State's Attorney has the right, he has the responsibility as to elect which particular violation that he decides to proceed under and he did so in this particular case, by electing to proceed on the disorderly conduct statute.

A word on the vagueness of the Maryland statute as alleged by Petitioners. Assuming, arguendo, that the conditions as I have described and as the Maryland jury found to exist, and as the Maryland Appellate Court found to exist, assuming arguendo that these conditions existed, what tool did the Baltimore city police officer have to counteract this action? And I submit it is Title 27, Article 23, the disorderly conduct statute and also, of course, the blockage of the sidewalk.

Now, insofar as the vagueness of the statute is concerned, and I am reading verbatim: "Acting in a disorderly manner to the disturbance ofthe public peace upon any public street or highway in any city, town or county of the state. And the question: Is this statute as interpreted by the Maryland Court of Appeals, void for vagueness?

A problem exists, admittedly, in drafting any disorderly conduct statute. It is literally impossible to articulate with the utmost specificity all of the precise activities which are prescribed. Disorderly conduct activity defies precise statutory definition. The subject is such that greater specificity is not feasible.

Now, the State would submit that the interpretation given to this statute by the Maryland Court of Appeals is fair warning to the common man as to precisely what actions are prohibited and this interpretation is: "The gist of the crime of disorderly conduct" -- and I'm reading --

Q From what?

Q Where are you reading from?

A I am reading from my notes, Your Honors. I'll refer you to --

Q If you can't find it, that's all right.

Page 29 of the Respondent's brief at the bottom. "The gist of the crime of disorderly conduct as it was in the cases of common law predecessor crimes, is the doing or saying or both of that which offends, disturbs, incites, or tends to incite a number of people gathered from the same area."

"Also it has been held that failure to obey a policeman's command to move on or not to do so may endanger the public peace, amounts to disorderly conduct."

In considering whether this statute, as interpreted,

is sufficiently clear to a person with common intelligence. I would first remind the Court that the Petitioners in this case are all college students or college graduates and no suggestion has been made that they lacked common intelligence.

This Court, however, has twice considered the Maryland disorderly conduct statute in the Drews cases in '64 and '65 and no quarrel was found with its constitutionality on the vagueness issue.

The Court of Special Appeals of Maryland, in deciding this case, made specific reference to the findings of this Court in Drews.

Now, let's consider the other -- the enactments of other states and attempt to draw a comparison with the Maryland statute. Set down on pages 55 through 69 of the Respondent's brief, the state has attempted to offer for this Court's consideration the disorderly conduct statutes of all the states and also the ALI Model Penal Code disorderly conduct statute.

They all seem to be strikingly similar in their wording and I would certainly submit that the common man would have less difficulty, considerable less difficulty in understanding, comprehending and applying this disorderly conduct statute to himself than he would many, many other statutes, including, if I might also suggest, our income tax regulations.

Simple generic terms have been used in the statute and these express to a man of common intelligence what is

necessary or what is prohibited. I would suggest that the Ten Commandments are expressed in the simplest of terms, yet they are completely understandable to the sinner, although theologians might experience some difficulty in agreeing on the interpretation.

The same might apply to the disorderly conduct statute. I don't think that the common man would experience any difficulty in applying this statute. However lawyers or judges might well contest its specific meaning, as they have been doing for centuries over such terms as: "probable cause, due process, reasonable, competent, fair or proper."

I would refer this Court to the words of Justice Frankfurter in Addison versus Holly Hill where he stated: " "Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

This Court has, in the recent past, considered similar disorderly conduct statutes in Zwicker versus Boll, in the Woodward case, which is cited in the State's brief, while the Second Circuit considered a similar Illinois statute. And in neither instance were these statutes held to be void for vagueness.

As recently as November 1969 in the O'Leary case where the issue was whether statutory overbreadth in a Kentucky

statute which prohibited "acts and words likely to produce violence in others." This language was upheld while cert was denied.

The final argument advanced by Petitioners, namely that the trial court erred in its charge of the jury, and that this charge was of constitutional dimensions.

I would point out that all instructions in criminal cases given by judges to juries in Maryland are advisory only. Maryland is one of two states having this provision in its constitution. This Court has taken cognizance of this procedure in Brady versus Maryland and the Maryland Rules of Procedure that the Court need not grant any requested instructions if the matter is fairly covered, and I emphasize "fairly covered," by the instructions actually given.

Decisions of the Maryland courts permit counsel to argue to the jury the facts and the law, even if it's contrary to the advisory instructions given by the trial judge. And where the trial judge refuses to permit counsel to argue the law and the facts, reversals have resulted.

Now, the requested instructions that the Petitioners offered in number 1 through 4-A and also 8 were properly covered by the instructions of the nisi prius juris. Instructions 5, 6 and 7 are all based on the expression of views or ideas theory. These instructions were, it is true, refused by the Maryland trial judge and we feel properly refused.

And the reason for the refusal is found in the opinion of the Maryland Court of Special Appeals and I am reading from page 180 of the transcript.

"The evidence before the trial court clearly establishes that the arrest and charged resulted from Appellants' refusal to cease their obstruction of the sidewalk and resultant public disturbance and because they had refused to comply with the three lawful commands of the police officer."

Q Now, how do we know that? There was a general verdict there; wasn't there?

A There was a general verdict; that's correct, Your Honor, and the instructions as given by the nisi prius jurors were to the effect that these are both questions that are open for resolution. It is your responsibility to make the resolution on these two issues. And that resolution would have had to be made in the affirmative, by reason of the general verdict that followed.

We further note that the standing demonstrators were not arrested, since the evidence adduced below rejected any substance to the allegation that the arrest was predicated upon suppression of political views, the instructions were properly rejected.

I thank the Court.

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

(Whereupon, at 1:55 o'clock p.m. the argument in the above-entitled matter is concluded)