No. ~~308~~ 6
No. ~~309~~ 7
No. ~~310~~ 8

1956
~~1955~~ Term

YATES, et al. v. UNITED STATES
SCHNEIDERMAN v. UNITED STATES
RICHMOND, ET AL. V. UNITED STATES

Certiorari to the Ninth Circuit

Timely. Petitioners are the leaders of the Communist Party in California. They were all tried together, and separate petitions are filed here only because certain defendants have arguments not applicable to others. Defendants were alleged to have conspired with each other, and with the defendants in the Dennis case, to violate the Smith Act, and were convicted. The Ninth Circuit (Stephens, FEE, and Chambers, C.J.) affirmed. There are numerous questions presented.

1. Both parties requested the judge to instruct the jury that the language used was "reasonably and ordinarily calculated to incite persons to action." The judge refused. He considered the statement in the indictment, and in other instructions, that the defendants advocated the violent overthrow of the government "as speedily as circumstances would permit" was sufficient. The C.A. affirmed, attempting to find substantial differences between the present case and Dennis v. United States, 341 U.S. 494. It

This is same charge as in Dennis if we

Dennis had some general language that the advocacy was with intent to incite persons to such action as overthrow as speedily as circumstances would permit.

also remarked that the instruction along this line approved in Dennis was only indicative.

It seems to me that this instruction represents a considerable erosion of the Dennis rule. Mr. Justice Frankfurter in his concurring opinion pointed out quite clearly that incitement to action was the only form of speech reached by the Smith Act. The majority opinion talked in terms of the requirements of the First Amendment, and then stated that if there were incitment to action, the words were not protected. On rereading the Dennis case it seems clear that a line was drawn between "theoretical discussion" protected by the First Amendment, and the words of incitment which creates the danger sought to be prevented. In short, the Dennis case practically turns on the finding of "incitement."

The instruction actually given was to the effect that the jury must find that the defendants advocated overthrow "as speedily as circumstances would permit." This language certainly does not point up the essential distinction made in the Dennis case. It might just as easily include the class-room debate as the call to arms. And it may not be argued that all Communists try to incite to

action; this Court has recognized that membership may be innocent. I don't see how this instruction can meet the standards set up in Dennis.

2) The second question presented relates to the finding (or lack of it) of clear and present danger. It does not appear that the trial judge made any finding of law on this question, except to indicate that the proscribed intent was sufficient to create such a danger. The Court of Appeals, however, did make a clear finding that the circumstances now were not materially different than when the Dennis case was heard, and further concluded that as leaders of the State party, the defendants' power could roughly be equated to that possessed by the national leaders, the Dennis defendants. The Government now argues that this should be sufficient, since under Dennis, the presence of clear and present danger is a question of law to be decided by the Judge. I am not sure that this gets rid of the problem -- the jury apparently convicted without any instruction on the question, and the Court of Appeals made findings of fact on the relevant circumstances either from a cold record or as a matter of judicial notice.

This may be O.K. on the world conditions; but on the power wielded by the defendants the Court indulged in some questionable analysis.

On the whole, however, it would seem that this is not prejudicial error. If the instruction and finding by the judge had been given to the jury, the conviction would be more probable rather than less probable.

3. The next question relates to the scope of ther term "organize in 18 U.S.C. 2385:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow..."

The Party was rejuvenated in 1945, and the indictments here were not handed down until 1951. If "organize" means to bring the group into being, this count would be barred by the statute of limitations. If, as the courts below thought, the word "organize" means to increase the size of or form new cells of a group already in existance, there was "organization" during the period involved. In Flynn, 216 F. 2d 354, the trial court, in a similar situation, held the count barred by the statute of limitations. This point, however, was not passed

on by the Second Circuit. A trial Judge in the Third Circuit apparently reached a similar conclusion. Cf. United States v. Mesarosh, 223 F. 2d 449, 465 (C.A. 3d). Since there are not square holdings in the Courts of Appeal, however, there is no square conflict. But this is apparently the first time the statute has been so interpreted.

The legislative history is indecisive. On similiar statutes in the States, California has gone one wya, New York, the other.

But this count could be removed, I think, without materially affecting the sentence handed down. It is hard to tell from what is up here now.

4. The defendants also argue that the evidence was insufficient, particularly in respect to overt acts required by the general conspiracy statute. 18 U.S.C. 371. Two courts have reviewed the sufficienty of the evidence, and have upheld it, which is usually sufficient. To detail teh evidence would require many pages. But there is the same general problem involved as that which split the Third Circuit in the Mesarosh case. The Government relied on general statements of the aims of the Party as showing the wrongful intent, and then

used as overt acts, the presence of defendants in Communist meetings, and the fact they were leaders or speakers at these meetings. There is very little to connect each ~~speaker~~ defendant with an overt act within the conspiracy to effectuate it within the prosecution period. The Government considers the fact that these meetings were an attempt to strengthen the party as making attendance or participation overt acts. Maybe this is enough, I don't know. If it is, however, there does seem to be ~~a~~ a different standard applied to the Communist conspiracy cases than to other conspiracy cases.

Essentially, what is being done here is inferring guilt and an unlawful intent from the fact of association and leadership in the Party. I personally doubt whether that is sufficient, of itself, to uphold Smith Act convictions.

Since the majority of the Third Circuit, however, agreed with the Ninth here on this point, there does not appear to be a direct conflict. Perhaps some sort of inference is permissible -- nonculpable speech or action may have a sinister quality when placed against the background of a conspiracy. My trouble is that this is about all the overt acts that

appear here.

5. While the trial was under way, the serialized publication of the "Philbrick Story" and the release of a previously confidential "F.B.I. Report" occured. The defendants claimed this was prejudicial and asked for a continuance. This was denied, and quite correctly so, I think. Neither of these publications mentioned the defendants, and there is no evidence that the jury was influenced. Defendants' argument apparently is that if the jurors had read these, there was grounds for a continuance or a new trial. The problem is one of prejudice, I think, and the defendants did not wish to ask the jurors whether they were prejudiced by the story.

6. Petitioners requested an instruction that evidence presented by undercover agents of the FBI should be weighed with caution. Since the most that defendants can argue is personal pique, the right of cross examination and confrontation should be sufficient to rebut this. I can't see how the refusal of this instruction was error.

No. 309, Schneiderman, raises one additional

argument. In 1939 the Government attempted to revoke his naturalization on the ground of fraud. One material question was the nature of the Communist Party and Schneiderman's activities within the party. The case finally reached this Court in the early forties, 320 U.S. 118, in which this Court reversed the order of revocation on the ground it was not clearly proved that the nature of the Communist Party was as suggested by the Government. The argument now is that collateral estoppel applies, and the Government cannot relitigate the question of the nature of the Party, Schneiderman's activities, and so forth. It is agreed that his behavior since 1945 is not materially different from that during the thirties which was litigated in 320 U.S. The courts below permitted the relitigation on the ground the circumstances have materially changed since the War. This I think is correct, and review of this question is not warranted. While this Court approves of res judicata, it has indicated that this doctrine should not be applied to give any person a vested interest in violating the law which is beyond the reach of the enforcement agencies. Cf. the Sunnen case in the tax field. 333 U.S. 591.

The nature of the Party in the late twenties and early thirties simply should not control the nature of the party now.

No. 310, Richmond and Marshall, raises the additional problem that petitioners were publishers of a newspaper. The paper followed the Communist line, and the control of the Party over the paper was considerable. An additional argument about freedom of the press, however, is presented. This seems to me to present no additional problem. The Dennis case involved a limitation on the freedom of speech -- the freedom of the press stands on the same level, and if one may be restricted, the other may as well. Hence if Richmond and Marshall's freedom of speech may be limited by a Smith Act conviction, their freedom of press may be likewise limited.

There are also several motions to file briefs amici curiae. These requests come from the following persons:

1. The International Longshoremen's Union. The Union wishes to address itself to the use of undercover agents as witnesses. Officers of the Union are being prosecuted also with the use of

such ~~witnesses~~ witnesses. I don't see how their argument can present anything more than would be presented by the petitioners, and accordingly I suggest the motion be denied.

2. The ACLU. This organization wishes to relitigate the question of the constitutionality of the Smith Act. Because of the strong precedent of the Dennis case, however, this appears to be hopeless. While the point of view is different from that of the defendants, I also suggest the motion be denied.

3. A group of citizens. The brief would attack the use of paid informers as witnesses. I suggest it be denied.

4. Members of the Southern-California-Arizona Conference of the Methodist Church. Their plea is solely that the case is important, and should be considered by this Court. It presents nothing but general statements as to the sensitive area of liberty in which these convictions appear. It should be denied.

RWH

No. 308 - Grant
No. 309, 310 -- Grant to extent petitions raise the same questions as are raised in No. 308.
Deny motions to file amici.