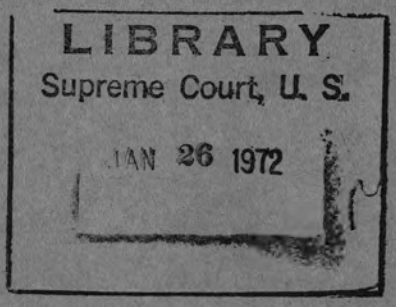
In the

Supreme Court of the United States



MARVIN MILLER,

Appellant,

vs.

STATE OF CALIFORNIA,

Appellee.

No. 70-73

Washington, D. C.
January 18, 1972
January 19, 1972

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

MARVIN MILLER,

Appellant,

v. No. 70-73

STATE OF CALIFORNIA,

Appellee.

Washington, D. C.,

Tuesday, January 18, 1972.

The above-entitled matter came on for argument at 2:51 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BURTON MARKS, ESQ., Marks, Sherman, London, Schwartz & Levenberg, 9720 Wilshire Boulevard, Beverly Hills, California 90212, for the Appellant.

MICHAEL R. CAPIZZI, ESQ., Assistant District Attorney, Orange County, California, for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-73, Miller against California.

Mr. Marks, you may proceed.

ORAL ARGUMENT OF BURTON MARKS, ESQ.,

ON BEHALF OF THE APPELLANT

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

The purpose of my argument, which,eventually I hope, will tie in with the questions which were raised on certiorari, I am going to make some statements which may sound as if they are perjurative or demeaning, they are not so intended. I express them merely as a statement of what I have experienced in the defense of obscenity cases.

My first observation is that, as far as I can tell, probably no member of this Court has engaged in either the prosecution or the defense of an obscenity case, where you are required to deal with the various rules of law and procedure which have been set forth by this Court concerning the handling of such a case.

And therefore it's somewhat equivalent, as my wife used to say, "You can understand that I have a lot of pain when I have a child, but you'll never experience it." There is a lot of pain in the trial a-d trying to work out the rules which have been established by this Court.

The second proposition is that this Court has expressed or perhaps not expressed but sub-vocalized the assumption that lower courts and lower judges, both State and Federal, will obey the mandates of this Court when it comes to deciding an obscenity case.

This case is an illustration of the fact that such an assumption is totally false, and is an illustration of what, in my opinion, is an immutable proposition that when you're dealing with obscenity or dealing with pornography, that, for the most part, it is a viscera turn-off to the majority of the courts in which you go in front of. And thus you may, as in this case, present uncontrovertible proof, uncontested proof that the material is protected, uncontroverted proof and irrevocable proof that there has been a prior judicial decision, as it was in this case, uncontested by the State, that the material was constitutionally protected and that, nevertheless, the defendant must endure what in this case was a seven-week trial, plus some other various procedural propositions which I will outline.

And I think this might also illustrate why this Court, I think, was absolutely wrong in Harris v. Younger, or Younger v. Harris and its progeny, in holding that one criminal prosecution is not any type of a hardship upon a defendant, at least in the area of obscenity. Because the criminal -- and it might also illustrate the fact that, some-

thing that I'm going to urge to this Court, that there should an attempt to delineate the difference between an obscenity prosecution and a prosecution under the ordinary rules of criminal procedure, because they do not gibe.

And for the past ten or fifteen years, since Roth, courts have been trying to take the obscenity issues and weave them and enfold them into the area or environment of a criminal trial.

And the rules of criminal procedure just do not meet the issues.

The suggestion is going to be, then, if my analysis is correct, that this Court must fashion some procedural rules for the conduct of obscenity cases along the lines of Mapp vs. Ohio, because, as this Court well knows, there has been a total chaos in this area.

Now, the first proposition that I have with respect to the rules laid down by this Court is that there is an irreconcilable conflict between the decisions of this Court; irreconcilable in the sense that they are logically inconsistent.

However, one court pointed out, and I have not been able to find the case, that logic is the minion and not the master of the law. So we can avoid that little proposition that perhaps this Court has been logically inconsistent, because it really doesn't matter if we can fashion some rules where we can handle what we're doing.

Q Are you talking about the Redrup decision?

MR. MARKS: I am talking about Roth vs. Stanley, ? and around in the circle back to Reidell, and perhaps a little shaking of Redrup, or a pinch of Redrup just to give us some, perhaps give defense attorneys a taste of Heaven, in the event we get a Redrup decision.

I'm assuming, for the purpose of this particular case, that we don't have a Redrup issue, because, presumably, this Court would decide this case on its easiest merits, and that is that it's constitutionally protected as a matter of law.

What we have here, in fact, is a very interesting proposition. Mr. Miller, as the evidence somewhat points out, is president of a corporation which sends out advertising brochures. The center of the brochures, or the place where the mailings originate, was in Covina, which is in the County of Los Angeles.

In the County of Orange, which is the neighboring county, a prosecution was commenced. In addition to this prosecution for violation of Section 311.2 for the brochures which are Illustrated History of Pornography, Sex Orgies Illustrated, and a book entitled Man/Woman.

There were several prosecutions in --

Q Are those exhibits in this case?

MR. MARKS: I believe they have been sent up.

These exhibits were -- and are described, if you

please, in the opinion of Judge Arquellis in the Los Angeles Municipal Court, East Los Angeles. His description of what the material contained is at page 18 of the reporter's transcript, and it repeats essentially what respondent is trying to foister upon this Court, that there were pictures of, if you please, cunnilingus, oral copulation, sodomy, oral intercourse between a man and a woman.

The fact that these particular pictures are drawings, artistic, seems to be irrelevant. The fact that some of them are copies of frescoes which come from Indian art and Japanese art also seems to be irrelevant, since it now becomes the job of the jury to determine, under certain rules laid down, whether or not they are "obscene" or not "obscene".

And also the job, apparently, of some experts to determine whether the average person looking at the pictures, as they come to him through the mail, the average non-consenting adult -- let's assume that that's the class we're talking about -- that the average non-consenting adult, upon seeing these pictures, will have an immediate appeal to his prurient interest because of this exhibition.

It doesn't seem to follow, there does not seem to be much empirical evidence -- and I have a red light.

MR. CHIEF JUSTICE BURGER: We will resume in the morning, counsel.

MR. MARKS: Thank you.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, January 19, 1972.]

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN MILLER,

Appellant,

v. No. 70-73

STATE OF CALIFORNIA,

Appellee.

Washington, D. C.,

Wednesday, January 19, 1972.

The above-entitled matter was resumed for argument at 10:00 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Marks, you may continue whenever you're ready.

ORAL ARGUMENT OF BURTON MARKS, ESQ.,

ON BEHALF OF THE APPELLANT - [Resumed]

MR. MARKS: Mr. Chief Justice, and may the Court please:

To continue with my preface, if you will, to the argument. Yesterday I was expressing the proposition that perhaps the Court has not become acquainted with the realities of the situation which lawyers and perhaps judges are faced with when approaching an obscenity case, when it is put into the criminal context.

For instance, the Fifth Circuit, in the case of U. S. vs. Groner, decided January 11, 1972, Mr. Justice -- or Judge Thornberry expressed some apprehension that he could not understand what was happening in the obscenity field and certainly could not make any determinations for himself, as to what was obscene or not obscene, in the absence of expert testimony; and also expressed that he thought that, in line with several other cases, a national standard as far as contemporary standards would seem to be just the ticket under the circumstances that the material goes between States.

The case involved is very interesting, I think, when you examine the history of this case of Mr. Miller, and

it illustrates, in my opinion, why Harris v. Younger was decided wrongly.

Mr. Miller has a company which publishes -- and it's in Covina, which is in the County of Los Angeles; they send mailers out, brochures out. Brochures went to Los Angeles County, Orange County, San Diego County, and to the various States. And you must understand that within the various counties there are district attorneys and city attorneys who are responsible for bringing prosecutions, and it's up to their discretion as to whether or not a prosecution will be had. That is, a complaint filed.

Now, in Mr. Miller's case, there were prosecutions filed in perhaps 15 different municipal courts on the same brochures within the County of Los Angeles; in different municipal courts, different district attorneys, deputies of the same county, prosecution in Orange County, prosecutions in San Diego County, and this is what happened in Orange County:

First of all, in Los Angeles County we brought a motion, and this is illustrated in the Clerk's Transcript before Judge Arquellis in East Los Angeles Judicial District. And the motion was presented in which we had expert witnesses testifying that the material was not obscene, was constitutionally protected; and Judge Arquellis made a determination dismissing the action, that the material was in fact protected as set forth -- for the reasons set forth in the

various cases.

After that the Orange County prosecution was started. Same brochures, same defendants, same plaintiff, to wit: the People of the State of California.

So what did we do in Orange County? We went to the first trial judge and we made a motion to dismiss on the grounds that it was constitutionally protected, presented expert witnesses, the People presented none; the judge denied the motion.

We then took a writ of prohibition to the Superior Court in Orange County, to stay the proceedings. Writ of prohibition denied out of hand.

Appealed to the Court of Appeals, Second Appellate District, for a stay, a writ of supersedeas. Denied.

Supreme Court of the State of California. Denied. No stay.

We then went the habeas corpus route, through the courts, alleging that the material was protected. We went to the Superior Court, the Court of Appeals, Supreme Court; all denied out of hand.

Also alleging, if you please, in the habeas corpus proceedings, that there was a res judicata, an estoppel. Ashe vs. Swenson, Waller vs. Florida, decided by this Court; the material is protected, it can't be prosecuted. Denied. Out of hand.

No court to date, as a matter of fact, if you now consider the fact -- and I think I misspoke myself. I said a seven-week trial; it was not. It was a seven-day trial.

But this is not -- this is a very short trial for obscenity cases, as a rule.

After all of these pretrial proceedings in which we were trying to get nothing but an adversary hearing, we then went to trial with a jury; a conviction; an affirmance without an opinion in which the appellate court completely abdicated its own responsibility, and that is to review the material. A simple affirmance in the matter. And, finally, an appeal to this Court.

Q Mr. Marks, following the conviction, you appealed from the appellate department's affirmance to the Court of Appeals for discretionary review, is that right?

MR. MARKS: I asked for what was called a petition for certification. And this is discretionary with the appellate department of the Superior Court whether or not they want to certify the important question over to the Court of Appeals.

Q But doesn't the Court of Appeals also have a right, without certification, to grant you a discretionary hearing?

MR. MARKS: That is correct. They can. If the opinion is published, if there is a published opinion in the appellate department, which is entirely discretionary with

them, then the Court of Appeals has the right to exercise its discretion to determine whether or not it wants to decide that question, and take jurisdiction.

Q Did you have no right after the conviction to petition the Supreme Court of California for a discretionary review?

MR. MARKS: None. Absolutely. As a matter of fact it is expressly prohibited that you do make such an application. I believe there is a case that came out that said that once the court, once your petition for certification is denied from the appellate department, you have no right to appeal that or to -- it's purely discretionary under the court rules.

Q Where are the opinions in the California courts in these cases?

MR. MARKS: The only opinion that is in any court in the California Courts, with respect to the material in this case, is found in the Clerk's Transcript at page 17, that's Judge Arquellis, memorandum opinion and order; and this is the case out of the Municipal Court of the East Los Angeles Judicial District. It is not in the Appendix, it is in the Clerk's Transcript.

And this was the basis of the res judicata claim.

Q Mr. Marks, what was the sentence Mr. Miller received? I fail to find it in your brief.

MR. MARKS: Sixty days, county jail on this particular

charge, and a thousand-dollar fine, as I recall.

Which has been stayed pending this appeal.

To continue: Taking this history of the case procedurally, I have the following quote which I picked up from a recent case, and that is:

"I entertain more than a mild suspicion, however, that this is an exercise in futility, that the court is merely marching up the hill only to march right down again, and it is time we become just a little realistic in the face of a record such as this one." U. S. vs. Tucker, decided January 12th of this year. Mr. Justice Burger said that, in a different context.

Q No, that was Mr. Justice Blackmun, and I agreed with him.

MR. MARKS: I think that in taking the history of this case, if you please, it illustrates the futility of making a decision by this Court in the ordinary manner as to whether or not, for instance, contemporary standards are national or local, because it really doesn't matter. The judges below simply will not pay any attention to the cases. They do not rule, as a matter of law, in obscenity cases.

It is a very visceral reaction. You get a shock value on obscenity in no other cases. They, in my experience, do not function. And I suggest to the Court that the answer to the dilemma which is posed, that the paradox, the irreconcilable

conflict between the cases is that this Court set up a series of rules by which courts must act in obscenity cases. And that is that they must, for instance, prior to initiating a criminal proceeding, have the type of hearing on the material which is set forth in Freedman vs. Maryland, Blount vs. Rizzi?, and there should be rules whereby they are compelled to either state that it is protected or not protected, so that somewhere along the line, before the criminal process starts, the person who is going to be involved in a criminal prosecution will at least have the vaguest idea that what he is trying to purvey or sell is not, or is within the marketplace.

And I give you the following example, and I say this is why I believe it comes within the context of the certiorari questions. Because we have here the question: national standards or State standards?

If we do not have national standards, I think our brief pointed out that in the area of film, in the area of books which cross State lines, there must be a common standard, because otherwise State A can impose unreasonable burdens upon what kinds of films are shown in the motion picture theaters in their neighborhoods. Perhaps one community, local community or State, doesn't like R filsm, because R rated films have sex portrayed in them. X films sometimes have more violence than an R film, and less sex. It depends upon the individual idea of the censor himself.

Q Let me ask you about this administrative process you were just suggesting to be interposed before a criminal proceeding starts. Are you suggesting something like the old-fashioned board of censorship, to take a look at it first and advise the publisher?

MR. MARKS: I am suggesting a process whereby, if there is cause to believe, probable cause to believe that material which is being sent out or is being sold on the stands is or may be violative of the penal statute, or may be obscene within the area of the State statute, but the judge issues a show-cause order, and perhaps even a seizure warrant. The material is seized. It's brought into court. One-day hearing. Expert testimony. Two days to make a decision.

The decision should be in writing, stating the judge's reasons for believing that the material is or is not protected. At that point you have some sort of adjudication, because the real proposition and problem is with scienter, Mr. Miller and every other seller of pornography has -- just as in this case, a judge who says the material is protected in one jurisdiction, to no avail order in another.

Because he can't get any recourse. If he goes to a jury trial and gets acquitted, the judge in the next jurisdiction says, "Well, I don't know what the acquittal was based on; maybe it was just that the jury wasn't satisfied beyond a reasonable doubt that he was the person who sold it.

Maybe they weren't satisfied with scienter."

The criminal process is not equipped to deal with obscenity questions. It never has been and never was. There has to be a different type of process dealing in the civil area to deal with the sensitive area of suppression and censorship. That is why I suggest, for instance, that the national standard has to apply, but it has to apply in the area of interstate commerce; it has to apply also -- we have the very interesting question, what happens with the full faith and credit clause?

If one court says it's obscene in one State, doesn't this bind another court, under the full faith and credit clause? If it is obscene.

What happens? Is the man entitled to plead the other judgment in bar as an estoppel, or just as a defense in the grounds that he has no scienter; how could I possibly know that it's obscene if a court said it's not obscene.

Q Mr. Marks, in the case tried in the municipal court from which you're appealing, was the question of Federal versus State standard raised by a request to charge the jury?

MR. MARKS: There was no request to charge the jury on the national standards. The charge was made in the terms of State standards, because, at the time, there was, and still is, a case of In re Giannini, which is cited in our brief.

And in the Giannini case, our California Supreme Court said, in the matter of dancing, topless dancing, they said: At least the standards have to be Statewide, because there has to be some sort of uniformity, although they felt that you can't trans- -- you can't cross a dance act between -- cross a county border, and obviously the local community should be the best judge. But there at least has to be some uniformity.

Applying that rationale of the Giannini case to motion pictures, books, those magazines that travel across State lines, it would seem that the national standard is the only standard which has any reasonable grounds.

Now, --

Q Mr. marks, can you help me out on one other thing? Your statute, I think, is Section 311(e), and this was amended about the time of the prosecution here. Am I correct in assuming the indictment and the trial were after the amendment?

MR. MARKS: It's a complaint, Mr. Justice Blackmun, but the -- I believe both were after the amendment.

Q So it's under the new statute, then?

MR. MARKS: Well, no, because the acts were before the amendment. So the question was, at one time, whether or not you had the definition, the original definition was "knowing the matter to be obscene"; the second definition was "having knowledge or being aware of the contents of the matter", which,

to me, is just as vague a statement as some of the other definitions that we have had regarding obscenity.

Q Well, then we are dealing with the old form of the statute in your prosecution?

MR. MARKS: I don't know, because if you read the instructions that were given, one of them says that the person to be convicted, Mr. Miller, had to know that the matter was obscene, and know all of the elements, that it went beyond contemporary limits of candor, et cetera; and a second set of instructions said that, it's very confusing, that it only meant he had to be aware of the contents of the matter.

Q Well, this is why I asked the question, because I'm confused, too.

MR. MARKS: Well, it's a very confusing subject, because to some judges and, I suppose, lawyers, it means the same thing. To me it doesn't, it means an entirely different thing. Because "being aware of the character of the matter", that's what the new section reads, and what the character of the matter is is a very, very elusive quality. Does it mean that the character is that of sex, is it the character of violence, is it the character of sadism, sodo-masochism, one of the characteristics of pornography? We do not know.

It's probably whatever the jury wants to think it means.

One of the big problems that comes up in the

prosecution or the trial of the case, and the defense of the case, is this question of the various and, I might say, paradoxical rules that this Court has set up. Because in Roth the Court said that -- and I'm paraphrasing a little bit; but in paraphrasing, Roth said that obscenity is not speech.

And then in Stanley vs. Georgia the Court said that obscenity is speech.

And then in Reidell the Court said: We adopt both Roth and Stanley and we don't vary one way or another, so we come to the unusual proposition that speech is not speech.

I adhere, perhaps, and this is my final argument, to the add-on theory of constitutional protection. It appears that, from reading the various cases, that you have a First Amendment protection and you add on, for instance, the Ninth Amendment, the right to privacy, as in Stanley, one and nine equal fourteen, and you have constitutional protection.

In our case, we have a few other add-on protections that Mr. Miller should avail himself, he has the First Amendment protection, he has the Fifth Amendment,which is the res judicata or estoppel; he also has the Ninth Amendment. So in this case we have one, five and nine equaling fourteen; and he should be able to have a reversal just on that theory alone.

Getting to the more mundane, I say very seriously we

need guidance from the Court, this Court, and I think it cannot be done in the framework of deciding whether national or local standards apply, because the courts below do not know how to apply them, even if it is shown to them what it means. They work on a case-by-case basis, and I had one judge say to me, when I pointed out Blount vs. Rizzi, he says: That only counts if the defendant's name is Rizzi and the plaintiff's name is Blount; and otherwise it's distinguishable on that fact.

So set us up some rules, give us some guidance, let's get this type of action out of the criminal area unless there is a distinctive criminal case with knowledge and the type of pre-warning that is generally accepted as a part of due process.

Q Well, I've read the opinion you referred me to, and that opinion results in dismissal of the complaint.

MR. MARKS: Yes, sir.

Q And the judgment held that this material is constitutionally protected.

MR. MARKS: Right. In the East Los Angeles Municipal District.

Q Is that the only opinion in this case?

MR. MARKS: Yes. There is no other opinion.

Q And then what happened?

MR. MARKS: He was prosecuted in the Orange County

Municipal District.

Q Where is the opinion in that?

MR. MARKS: There is none.

Q Where is the record in that?

MR. MARKS: The record in the Orange County case is -- consists of the Appendix, which is a jury verdict of conviction and an appellate order which says the conviction is affirmed, period.

Q We don't have any of the evidence?

MR. MARKS: You have the brochures upon which they related it. You have the reporter's transcript in the --

Q Did the expert witnesses who testified in this Los Angeles case testify in the Orange County case?

MR. MARKS: Yes, sir.

Q To the same effect?

MR. MARKS: The same effect. You see, in Orange County there was a pretrial hearing in which we had our experts testify, and the People offered no evidence. Then, on trial, we again offered -- the People then offered their experts who said the matter is obscene, or whatever other elements they thought were present, and our experts testified to the contrary, and it became a battle of experts, and the jury looked at the material and said, guilty.

Q Where are the instructions to the jury?

MR. MARKS: The instructions to the jury are found in

the Clerk's Transcript, and I believe in a part in the deferred Appendix, which is the -- this brown one.

Q Well, do you think that Roth should be overruled?

MR. MARKS: I think that Roth should be clarified to show what it actually meant, because it makes no sense the way it reads now, in light of subsequent opinions; because of the way the Court has ruled, for instance, in Redrup, and there's various qualifying matters with respect to Roth, and then, all of a sudden, out comes Reidell and 37 Photographs, and says: It doesn't mean what we said.

I think it should be overruled. I think that the First Amendment should bar criminal prosecutions in the absence of direct knowledge -- I can't; I don't know.

Q In the absence of what?

MR. MARKS: In the absence of direct knowledge, a prior knowing hearing that the matter is probably within the context or framework of prohibited speech.

Q Do you suggest that in your briefs that you've filed with us that you have laid down this standard that you want us to adopt that will solve all the problems?

MR. MARKS: No. I'm just saying that this seems to be, after going through the various cases, and the paradoxes that have arisen, and a decision by the Fifth Circuit as late as January 12th, that there is no other answer. Because you

can't resolve the decisions of this Court and the various Justices, and the only resolution is to take everything and say: Okay, that's the way it is, speech is not speech if it's obscenity. And then set up a set of rules so that the judges will know exactly what to do when they get with an obscenity case. And I say bar the criminal prosecution, take it out of the criminal area, until you have a prior hearing as to the obscenity or non-obscenity of the material.

Thank you very much.

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

Mr. Capizzi.

ORAL ARGUMENT OF MICHAEL R. CAPIZZI, ESQ.,

ON BEHALF OF THE APPELLEE

MR. CAPIZZI: Honorable Chief Justice, may it please the Court:

Initially, I'd like to attempt to set the record straight in this matter.

In early April of 1969 a complaint was filed in Municipal Court of the Harbor Judicial District for Orange County. And thereafter, on April 16th, 1969, a demurrer was filed by Mr. Marks, the defendant in that action.

Thereafter, an amended complaint was filed, May 9th, 1969, and, following the amended complaint, the same demurrer was held to apply to the amended complaint.

The hearing on the demurrer, under California law, is

limited to face the complaint. However, Mr. Marks did introduce expert testimony at that time; expert testimony related to the obscenity of the material in question. And that was not controverted by the prosecution, simply because, under a demurrer, no evidence can be taken. The inquiry is limited to the face of the complaint.

Thereafter there was an appeal to the appellate department of the Superior Court in Orange County, and the denial of the demurrer was sustained.

Now, this record --

Q I gather that Mr. Marks -- I'm not sure I understand it, but I gather that his complaint is that the issue he's tendering is kin to decisions in this Court on the vagueness test for constitutionality of criminal statutes. Do you so understand it? That what we have done, what we have set as standards are too imprecise, too vague, to pass muster under criminal constitutional law. Due process.

MR. CAPIZZI: I understand that to be one of his contentions, Mr. Justice Douglas. However, I think he's also made the contention that action in an adjoining county constituted res judicata.

Q Oh, I understand that, too.

MR. CAPIZZI: I tend to disagree with him. I think, depending on how the standard or the definition announced by this Court is interpreted, it's workable. I think the

procedural aspects and there must be a clarification as to --

Q But if California adopted the statutes saying that it's a crime to publish a book that has -- is without social redeeming value, would that pass muster by the California Supreme Court decision?

MR. CAPIZZI: Well, California has gone one step beyond Roth and has adopted a position that has not been concurred in by a majority of this Court as being constitutionall required, in that the California statute requires that the prosecution establish that the material goes substantially beyond customary limits of candor, that it predominantly appealed to prurient interests, and the material considered as a whole be utterly without redeeming social importance.

So, by statute in California, all three elements must be established by the prosecution and must coalesce.

Q In other words, the California statute adopts two of the basis of our Redrup decision?

MR. CAPIZZI: Well, it adopts the definition of obscenity as first founded in Roth and then later expanded upon, I believe, in Memoirs: the "utterly without redeeming social importance" aspect. I don't think a majority of the Court concurred in that requirement. But, nevertheless, California, by legislative Act, has added that third requirement.

And that's why there were experts produced by the People on all three of those elements of definition, and the

jury was instructed as to all three, and instructed that they must coalesce.

Nevertheless, counsel points to the action that took place in Los Angeles County, and with respect to that action, in the opinion of the Los Angeles County Municipal Court judge, there was never directly pointed out to the judge in which the action was pending, the instant action was pending for trial.

It's part of the record, the Clerk's Transcript in this appeal, simply because it was an exhibit to a petition for a writ of prohibition that was filed in our Superior Court, attempting to prohibit the misdemeanor prosecution. And in filing that petition for prohibition with our Superior Court, he apparently lodged a courtesy copy with the Municipal Court, and that's how it became a part of our record.

Then, thereafter, just prior to the trial, he did make a motion to dismiss on the basis of res judicata, but no evidence was presented, and there was no hearing on that particular motion. And, in particular, the opinion was not a part of that particular motion.

Q In the East Los Angeles proceeding, was a jury actually empaneled in that case, or was that a dismissal on a preliminary motion?

MR. CAPIZZI: That was a dismissal on a preliminary motion, Mr. Justice Rehnquist. It did not go to trial, it was what's known in California as a Noroff motion, a determination

of the question of law, the mixed question of constitutional fact and law.

Q Didn't you say it was on demurrer, or was that another case?

MR. CAPIZZI: The --

Q Demurrer, wasn't it?

Q Demurrer to the complaint.

MR. CAPIZZI: In Los Angeles County --

Q No, I mean yes.

MR. CAPIZZI: In Los Angeles County, I believe it was a motion to dimiss and demurrer, based on two cases: People vs. Noroff? and Zeitling vs. Aaronberg? as I recall.

Now, the appellant contends that this Court, at least members of this Court, had in the past suggested and that this Court should continue to conduct de novo hearings to determine obscenity vel non.

He further suggests that in reaching that determination of constitutional fact, a mixed question of fact and law, the judge, when applying contemporary standards for customary limits of candor, should adopt a national community standard.

What appellant requests may be easier for this Court than for other courts, because the scope of this Court's judicial inquiry is nationwide. However, I suggest that, even for this Court, it's not an easy task and is, in fact, an impossible task.

Appellant also suggests that each judge, from the trial level through each level of review, should redetermine the issue de novo using the same test, the national test. And I would submit that this is practically impossible. Local, trial, appellate, and State Supreme Court justices just don't have the sufficient scope of judicial inquiry to apply a national standard.

With respect to their contact with national standards or customary limits of candor, I would suggest that it is no more broad than the average potential juror.

And I think the case which counsel has just called this Court's attention to this morning, the Fifth Circuit case, demonstrates that, when Judge Thornberry indicates that he is not sufficiently qualified to determine customary limits of candor.

Q Suppose you could get experts who might testify as to national standards.

MR. CAPIZZI: Yes, Mr. Justice Douglas. In fact, Mr. Marks has suggested experts. But I think that demonstrates another problem that will further compound the problems that are already existing. Experts may be fine for the initial judge, the trial judge, who can examine the witness, determine his credibility, watch the demeanor while he's testifying, and all the things that a trier of fact generally does.

But what position does that leave the appellate judge,

the reviewing judge in? If there are conflicting experts, how does he determine credibility of the carrying witnesses? It's totally impossible, and to say that the reviewing judge would determine credibility would be a substantial departure from firmly entrenched rules of appellate review.

Q I suppose if that's true, what you're saying, and I gather it is, it would be also very difficult for a publisher, an author to know when he had crossed the line.

MR. CAPIZZI: I don't think it's that difficult for a publisher to know when he's crossed the line. In fact, he Reporter's Transcript in this particular case, I believe it's Volume 2, around page 50, give or take a few pages, indicates that Mr. Miller indicated to the person who was sending the material out that the brochures themselves he felt were borderline; but the material itself, that they were advertising, he considered to be pornography.

And the brochures are nothing but the more graphic depictions of sexual activity that are contained in what he, himself, described as pornography.

So I think --

Q This was a plea of guilty, then?

MR. CAPIZZI: No, it wasn't, Your Honor. It was a trial. The statement made by Mr. Miller came in by way of one of the persons who was stuffing the envelopes and assisting in the distribution.

I would suggest, however, that if we do apply the approach in the instant case, that each level of court must determine a constitutional fact-law question that's readily apparent, that in this case, as far as that constitutional fact is concerned, that this material is obscene, no matter what test is used, whether we use a local, State, or national community.

It exceeds candor of any community; it predominantly appeals to the prurient interest and is utterly without redeeming social importance. That California test.

Having concluded that it's not constitutionally protected, it's submitted that this material should fall into the same category as any other conduct that the State can regulate by police power, any other conduct which is not itself constitutionally protected.

And the States, in regulating that other non-constitutional conduct can define it in any manner they wish. The States vary in definition of robbery, from State to State; burglary varies from State to State. And, assuming this initial constitutional fact-law, determinations made by a judge who has determined that it's not constitutionally protected, then the States should be free to adopt whatever standard they wish, just as they do in other areas of criminal law.

Q Has California at any time undertaken to use nuisance statutes or local nuisance ordinances to deal with

pornography and obscenity?

MR. CAPIZZI: Yes, Your Honor. In the County of Orange we've utilized what's known as a "red light abatement" Act, to abate as a public nuisance places that are used for lewd purposes, prostitution and assignation. More often in the area of live entertainment than in the area of printed material.

This has meant, however, that it's not necessary to do as appellant suggests, to determine this constitutional fact in this manner, when looking at a State prosecution under State law. The Constitution permits the States to adopt the standard that the State chooses, as long as the standard is compatible with due process and in isolating obscenity.

As Justice Harlan said, the State by the due process liberty provision of the Fourteenth Amendment is not held to the same test as is the Federal Government under the First Amendment.

And, as Justice Harlan indicated, that's readily apparent from the language of the two amendments themselves; the first provides Congress shall make no law, and obviously we can't apply that in its precise terms to the States through the Fourth Amendment, because Congress doesn't exist in the States. So, obviously, we have to do some initial editing and, additionally, it's rather obvious that if, in enacting the Fourteenth Amendment, it was the intent to restrict the States as the First restricts Congress, it would have been very simple

to have so stated, that the States are prohibited from enacting any law breaching freedom of speech.

I would certainly not suggest that those persons who framed the Fourteenth Amendment were so imprecise or so inarticulate that, if that had been their intent, with the background of the First Amendment, that something consistent with the First Amendment could have been specifically provided to the States.

Q Is there any reason why California is limited to using its nuisance procedures against what you call live or -- live obscenity or obscenity which is essentially conduct? Would it be available, in other words, used against books or moving pictures?

MR. CAPIZZI: I don't know, Your Honor, we haven't progressed, in our cases that are pending against a particular book store, to the point where we have applied it. There have been acts of lewdness as well as the sale and distribution of books from that particular book store, however, that have gone on inside the premises.

The Act itself states that it applies to places of prostitution, assignation, or lewdness.

Q Although your brief doesn't say so in these words, I gather from your oral argument that you think that the decisions of this Court, making applicable the First Amendment to the States, were wrongly decided?

MR. CAPIZZI: Yes, Your Honor, in its expressed terms. I feel that --

Q Do you think that De Jung and all the other decisions should be overruled in that regard?

MR. CAPIZZI: Well, I would suggest that the -- again the position taken by Mr. Justice Harlan, and expressed by him in the Roth case, is entirely reasonable and it's consistent with the Constitution. When we're talking about the deprivation of one of the fundamental liberties without due process of law, the inquiry should be whether or not the State action so subverts the fundamental liberties implicit in the due process clause that it cannot be sustained as a rational exercise of power.

And I would submit that adoption by a State of a local or Statewide standard for limits of candor, as a portion of the definition of obscenity, is not subversive of fundamental liberties but is actually a rational exercise of power.

Whether -- well, I'd suggest that neither practicality, reason, or the Constitution require a national standard for customary limits of candor, as suggested by the appellant.

Initially I'd suggest that practicality demands that something other than a national standard be used. How is the national standard to be determined? Wholly apart from the legal question, the mixed question of constitutional fact-law, as a matter of fact presented to the jury, how is a national

standard to be determined?

Well, as far as that factual determination, I would assume that experts could testify; however, in this case, an expert testified as to the Statewide standard, an expert who is an employee of the Los Angeles Police Department. It took him 30 days to conduct his survey and analysis of the State, and five years on the job.

The City of Los Angeles now charges $400 a day every time one of their experts goes outside the city limits to testify,to recoup the cost of conducting their survey and updating their survey.

Can you imagine the additional cost that would be involved if that expert had to spend thirty days traveling each of the fifty States? Why, it would take him fifty months just to complete his survey.

And long before he concluded his survey, he would have to update it, because it requires contemporary community standards. So if we multiply the cost by fifty times four hundred, and fifty times a month; it's totally impossible and impracticable.

I'm not suggesting that cost alone is a factor that should cause us to overlook any constitutional right. I am simply suggesting that the Constitution itself does not require experts, and it's impractical to prove through experts a national standard.

Reason also requires that a local or State standard be adopted.

Obviously one local area will accept material that another local area will not. A national standard could very likely prevent a local community that had liberal attitudes and would accept material from receiving that material, because of the restrictive influence of a conservative community some 2500 miles away.

And the opposite is also true. The conservative community would be forced to accept material because of a nationwide standard that is diluted by a more liberal standard of a community, again 2500 miles away.

Thus, adoption of a national standard would have just the effect that the appellant in this case and the amici are suggesting is undesirable. It would have the result of making us all one, making us all little tin soldiers out of a mold, and all receiving the same material, the same standard, and would not provide for differences from one community to another.

We suggest additionally that the Constitution supports a State or local community standard.

Initially, in Roth, this Court used the term "community", and in spite of the dictionary definition that's in the footnote to Jacobellis, I suggest that the customary meaning of "community" is a local community, the area in which people

shop, live, and entertain themselves.

I think that definition of community is also consistent with the same paragraph of the dictionary referred to in that footnote in Jacobellis, which defines community as society as a whole.

Additionally, it's constitutionally permissible to accept a local or Statewide standard because of the definition announced in Roth that the community standard must be contemporary with the times. Without that term "contemporary" we would be stuck, I would assume, with the same definition of obscenity that was -- that existed in 1791 when the First Amendment was adopted.

Q Well, are you suggesting that a standard would become outdated and therefore not contemporary after the lapse of two or three years; is that what you think contemporary means?

MR. CAPIZZI: I think it must be a standard, yes, Mr. Chief Justice, that exists at the same time as the distribution or the time of the crime. I think it has to exist in tune with our particular times; it's not a community standard that existed in, say, 1850 or 1791, because of the term "contemporary".

Thus we have --

Q Well, there's quite a difference between saying that we aren't bound by the standards of 1791 than saying that

the standard is outdated if it's based on some sort of a survey made in 1965. I get it that you're suggesting that this has got to be kept up to date almost on a month-by-month basis, to see what people are thinking just lately.

MR. CAPIZZI: I think that is true, Mr. Chief Justice, that -- because of --

Q Then you've set out an impossible task for yourself, haven't you?

MR. CAPIZZI: I think it's a task that has been required of us by the term "contemporary", and the California Supreme Court, in the case of In re Giannini, requiring that community standards be established by experts.

Q Of course, Giannini, as I read that opinion, dealt only with a dance in a local tavern in a town in California; right?

MR. CAPIZZI: Yes, Mr. Justice Douglas, however --

Q But we're dealing here with the big Doubleday and Company, and other big publishers of books and so on.

MR. CAPIZZI: No, in this case we aren't dealing with Doubleday.

Q No, I say but the problem deals -- that we're dealing with deals with a big distribution system that's national and so on. How does your local standard fit the normal pattern of the American book publishing business or magazine publishing business?

MR. CAPIZZI: Well, the same definition of obscene was applied to the topless dancing in In re Giannini as is applied to printed matter in California because of the California Supreme Court statement that the dancing is an expressive conduct.

Q Yes, but my question really relates to whether or not, in this area, we're not really in the area of a common market of literature and ideas, so far as the national rather than the local standard.

MR. CAPIZZI: Well, I'm suggesting that this --

Q Say, in California, the privilege of doing what they want with topless dancers.

MR. CAPIZZI: Yes. I submit that the Constitution permits a changing standard based on geographical lines, even if the material is distributed nationwide.

Now, in this case, we have no evidence that the material was distributed nationwide. The only evidence we have is that it was mailed in either Los Angeles or Orange County, and it was received in Orange County. That's the only evidence, as far as I'm aware, in the record indicating the scope of its distribution.

Q Mr. Capizzi, if, in fact, the Court were to adopt a local or community standard as opposed to a federal standard, wouldn't the guarantee of jury trial in each case be itself some way of evidencing the jury's reaction would be

some evidence of the local community's standard, without the necessity of expert testimony?

MR. CAPIZZI: Yes, Mr. Justice Rehnquist, I believe that it would. It would relieve this Court and appellate courts from determining that which they are not really capable of determining on their own, the constitutional fact-law question. It would eliminate that from consideration, and it would permit us to rely on the jury verdict, and, assuming there was a conviction, a sufficient-evidence test to determine whether or not it complied with due process.

And I think the changing standard from one geographical location to another again has constitutional background, simply because we do have the one variable, as I was suggesting, the contemporary community standards. It's a changing standard, and it must be a standard that's contemporary with our times.

So why is it so inconsistent to say we have another variable? A geographical difference, a variable -- a variation that would differ from geographical location to another.

We have procedure for punishing utterances in one location and not in another; "Fire" in a crowded theater is punishable, and in an open field it's not. The words are the same, it's the location that constitutes a clear and present danger, and maybe that's what we're saying in this case. If one community can consider a matter which violates its particular standard for limits of candor, dangerous and within

its police power, and yet another community really wouldn't so consider it.

The adopting of this test, the appellate courts would then use the sufficient-evidence test to review convictions, and the time saved of delving into other issues.

In other -- whichever test is used in a particular case, I would suggest that the judgment should be affirmed if we use a national standard; I would suggest that the State-wide standard in the State of California is a liberal standard and, in effect, had the net effect of requiring of the prosecution a greater burden of proof than if the national standard had in fact been established and could be established.

It's a Statewide standard, that was what was done in this case, and if it's a local standard, again it operated to the benefit of the appellant to use a State standard because the Statewide standard, I would submit, for the State of California is somewhat more liberal than the conservative standard of Orange County and again required of the prosecution a greater burden of proof.

Q Let me ask you, -- you urge the local standard, would you say the -- well, I'll preface this by saying, let's assume that the First Amendment applies to the State the same, to all the States the same way. Would you say that if California can use a local standard,there are no limits to what might be held to exceed the standards of candor in a

community?

MR. CAPIZZI: No, because under California law it would still be required that the prosecution prove that the matter, taken as a whole, predominantly appeals to a prurient interest, and the matter taken as a whole is utterly without redeeming social importance.

However, I would suggest that even --

Q As I read your Giannini case, it wasn't the local standard, that the sentencer thought that it should be the local standard.

MR. CAPIZZI: In the Giannini case, the California Supreme Court --

Q The majority said it's a State standard --

MR. CAPIZZI: -- said it was a State standard.

Q -- and not a local standard.

MR. CAPIZZI: And in California we're bound by a State standard because of the edict of our State Supreme Court. I'm suggesting, however, that the Constitution requires no more than a local standard, and if the States, in enacting their laws, wish to adopt a State standard or a national standard, they should, under the Fourteenth Amendment, be free to do just that.

Q In other words, you, as a matter of Federal Constitutional law, you take the view of Justice Burke in dissent, in Giannini?

MR. CAPIZZI: Yes, Mr. Justice.

I submit the matter, unless there are further questions.

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

Mr. Marks, I think you have consumed your time.

The case is submitted.

[Whereupon, at 10:53 o'clock, a.m., the case was submitted.]

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