In the

Supreme Court of the United States

WILLIAM RABE, Petitioner,	)	
vs,	)	No. 71-247
STATE OF WASHINGTON, Respondent.	)	

Washington, D. C.
February 29, 1972

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WILLIAM RABE,

Petitioner,

v. No. 71-247

STATE OF WASHINGTON,

Respondent.

Washington, D. C.,

Tuesday, February 29, 1972.

The above-entitled matter came on for argument at 1:45 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 Juste

APPEARANCES:

WILLIAM L. DWYER, ESQ., Culp, Dwyer, Guterson & Grader, 13th floor, Hoge Building, Seattle, Washington 98104; for the Petitioner.

CURTIS LUDWIG, ESQ., Deputy Prosecuting Attorney for Benton County, P. O. Box 510, Prosser, Washington 99350; for the Respondent.

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'll hear arguments next in No. 71-247, Rabe against Washington.

Mr. Dwyer, you may proceed.

ORAL ARGUMENT OF WILLIAM L. DWYER, ESQ.,

ON BEHALF OF THE PETITIONER

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

In this case the Courts of the State of Washington have declared themselves to be not bound by this Court's constitutional definition of obscenity, and they have thrust it aside to punish a man criminally for exhibiting a motion picture which is clearly non-obscene and is protected under the First Amendment guarantee of freedom of expression.

In the course of doing this the Courts of the State of Washington have wielded a general obscenity statute of the type which typically exists in all 50 States. And of the type which this Court has repeatedly made clear can be used only to punish or suppress material which is obscene under the test promulgated in the leading case of Roth vs. United States.

As summarized in many cases since then, perhaps most explicitly in A Book vs. Attorney General in 1966, in order to convict the State must prove that three elements coalesce.

First, it must be established that the dominant theme of the material, taken as a whole, is an appeal to prurient

interest in sex and not some other kind of appeal.

Second, the material must be patently offensive in offending contemporary community standards of candor, in representing or depicting sexual matters.

Third, that the material is utterly without redeeming social value.

I mention those elements despite their well-known familiarity to the Court and the counsel in this field, because of our belief that it is vital that this definition be honored and adhered to if freedom of speech is to survive the application of the obscenity laws in the United States.

If this definition should be weakened or abandoned, the small crack in the wall which is afforded to the general obscenity laws, as to unprotected speech, would very quickly become a wide-open door to the punishment of protective expression.

In Roth, the Court pointed out that it was implicit in the history of the First Amendment that obscenity was utterly without redeeming social value. And that finding, that belief is the basis for obscenity law as it exists today. And the Court has repeatedly made clear, both in full-scale opinions and in per curiam reversals over the last 15 years, that that definition applies so as to protect material which most people would find offensive, disgusting, of little value perhaps; but the definition must be adhered to in order for

the First Amendment guarantees to be carried out in the actual day-to-day enforcement of the laws.

Q What was the actual sentence here?

MR. DWYER: $600 fine, Mr. Justice Douglas.

Q He wasn't to be put away for five years?

MR. DWYER: He was not sentenced to prison at all, just a fine.

The sentencing judge remarked, however, that he was fixing the fine at a level he considered high enough to prevent such displays of motion pictures from happening again in that community.

Q And this motion picture was based on the opera "Carmen", was it?

MR. DWYER: Yes, Mr. Justice Stewart, it is based on the libretto of "Carmen", without the music.

Q And called "Carmen Baby"?

MR. DWYER: "Carmen Baby", right.

Q Did it have any more in common with it than the title?

MR. DWYER: It did, as several witnesses testified at the trial, the story follows the story line of the opera "Carmen", which in turn followed a novel by Merimee, a French novelist. The character of Carmen is very similar: an evil young woman fatalistically headed toward her own destruction.

Q How do the criminal sentences in obscenity

cases in Washington State run? Are they very heavy?

MR. DWYER: In a few cases there have been prison sentences in the neighborhood of thirty days, as I recall most recently in Seattle. In motion picture prosecutions, prison sentences have only been meted out in the type of film that's shown in places called the Adult Book Store, for example, which specializes in erotic materials.

In exhibitions for general consumption, such as the present case, fines have been the usual penalty on those.

Q This movie was shown without incident in other cities in your State; right?

MR. DWYER: It was indeed. It was shown in Seattle, and it was shown in Yakima, which is not far from Richland, in eastern Washington.

Q In a public theater?

MR. DWYER: In public theaters.

Q And it has been shown throughout all the United States, hasn't it?

MR. DWYER: It has. It's been reviewed in --

Q Public review in the newspaper?

MR. DWYER: Reviewed in the New York Times. One witness testified in the court below that he saw it shown at Oak Ridge, Tennessee, in a situation where it was shown on an outdoor screen, and the sound was piped into the motel for those wishing to listen in.

Q And, in fact, there's nothing in it that can be suppressed under the Constitution, and that's been decided in two other courts, was it not?

MR. DWYER: It was decided in New Jersey and in Maryland, I believe. And the opinion in New Jersey, I think, is very eloquent.

Q Did it involve drive-ins in Maryland?

MR. DWYER: No, in neither State, Mr. Justice Marshall, did it involve drive-ins.

Q It involved movies, though?

MR. DWYER: It involved the same movie, but was shown at an indoor theater.

Q But is there anything, is it true in this connection that there were houses nearby where somebody could sit on the porch and see it?

MR. DWYER: The photographs in the record show that there are a few dilapidated houses at some distance from the screen, some of which would be able to have a view of the screen.

Q There was nothing to stop a young kid from standing there and seeing it?

MR. DWYER: There was nothing to stop anyone of any age from standing at the fence and looking; that is, there was no physical obstruction.

Q Do you see any difference between that and a closed theater that does not allow children?

MR. DWYER: I'm sorry?

Q Do you see any difference between that and the situation in a closed theater that does not admit children?

MR. DWYER: Yes, I do. I think the State could properly --

Q You do admit the difference?

MR. DWYER: Yes. I think the State could properly legislate in that area, what has been called the area of obtrusive display legislation.

Q And this Court has said so.

MR. DWYER: Yes, indeed, it has. And why the States have not more clearly picked up that opportunity and acted upon it before now, I don't know. A few have. We have a --

Q New York did it.

MR. DWYER: New York has; Arizona has. But I think it's still a minority of States that have. Our State could and should, but hasn't. And that's the fatal defect in the presenct prosecution.

Q Well, are you conceding then that the State of Washington could have legislated so as to prevent the showing of this film in the manner in which it was shown, with the exposure to people outside the drive-in?

MR. DWYER: There was nothing shown in the record here, Mr. Justice Rehnquist, that there was in fact any exposure to people outside the drive-in. There was no evidence

that anybody outside the drive-in saw the film or complained about it or was affected by it in any way. But we do concede, and I think there's no contest, that a State can legislate in the obtrusive display area by enacting a clearly, narrowly, specifically drawn statute which could apply to drive-in motion picture theaters as well as billboards, newsstands, and other types of displays.

Q To cover a situation such as your State Supreme Court found to exist here, where at least the people in these houses were exposed?

MR. DWYER: Yes. I believe such legislation could be enacted, and in the report of the President's Commission on Obscenity and Pornography there is even a model statute to that effect.

Q Well, then, is your complaint here basically a Lanzetta vs. New Jersey type of complaint, that you weren't given fair warning of what the State intended to punish criminals as?

MR. DWYER: That is one of our basic complaints, yes, indeed, it is, because nothing in the statute gave Mr. Rabe any notice that he could be prosecuted on any theory for showing a non-obscene film under certain circumstances, such as an outdoor exhibition.

Q But then you also -- that isn't your only complaint?

MR. DWYER: That's not our only position, but we further contend that in expanding the obscenity statute as it did, so as to sweep this picture within its ambit, the Washington Supreme Court has rendered that obscenity statute void for vagueness in the application. Because it has punished the exhibition of a film on the ground of offensiveness or obtrusiveness, words which recur throughout the opinion, with no definition, no substantive standard whatever to guide either this defendant or any other exhibitor in the future as to what he could or could not exhibit at an outdoor theater.

The prime danger of the many dangers we see in the Washington opinion is that the court there expressly says that even though it is enforcing a general obscenity statute it does not have to be guided by the Roth definition of obscenity.

That, we believe, cries out more than any other single element in the case for a reversal.

The court, in our view, has misread this Court's decisions in Ginzburg, Mishkin, and Redrup, and has engrafted an ill-defined or completely undefined common law crime upon the existing obscenity statute, rendering that statute fatally vague and uncertain.

Q Mr. Dwyer, if I might take you back for a minute. On page 71, the findings of fact, it says that: "That said Park-Y Drive in faces a residential area ... and an overpass

providing a clear view of the screen to residents of the area and passing motorists."

MR. DWYER: There's not question, Mr. Justice Marshall, that some residents, had they been home and watching, could have seen that screen from outside the theater. There is also no question that passing motorists could have seen the screen.

The Washington Supreme Court eliminated --

Q Can't I assume that where there's an overpass, there're some people on it?

MR. DWYER: Well, there might or might not be. I don't think such an assumption can be made in a criminal prosecution, no.

Q But this is a finding of fact here.

It says that the overpass is there, and it's clear enough for them to see it.

MR. DWYER: Yes. And that's true. There's no contest about that, that if there was someone there, the screen would be visible.

Q Well, do you say, then, that the State legislation must be so narrowly drawn as to require proof on the part of the State that someone was actually on this overpass or in this house seeing it, rather than the reasonable probability that it might occur?

MR. DWYER: I would think so. I think that's required by this Court's decision in the Cohen case last year, for

example. And by the language of the Redrup case, both of which speak in concrete terms of an actual assault upon privacy as a precondition for prosecution under these circumstances. I would think it would not be enough to prove, for the State to prove that work was displayed under circumstances where it might have given offense to someone.

Q Well, you don't need to go that far, however, here. There was no such statute of any kind, that's your point here.

MR. DWYER: Exactly.

Q And whether, how much power the State might have under the police power, it could require a drive-in to be so many feet away from any residences or to put up fences, or to put it where the light and the noise and the traffic wouldn't bother people, or the content of the movie wouldn't bother people. Those are all questions that would arise if there were any such statute here.

Here there's simply no statute, no such statute of any kind.

MR. DWYER: And that is the fatal defect of the prosecution, as we see it; yes.

Q Well, back to my point, now maybe I can get agreement. On page 81, in the opinion of Judge McGovern: "On both occasions, teenage and younger children were observed by the officer to be watching the motion picture from

various points outside the theater fence."

MR. DWYER: That is correct, but the opinion --

Q You agree with that.

MR. DWYER: But the opinion goes on to say that the presence of those juveniles cannot support the conviction of the petitioner because, at the time in question, the State had no statute directed to the protection of juveniles.

Q I'm just getting the facts for my own self as to whether that picture was available for children to see. that's one point I'm interested in.

MR. DWYER: The answer is that the record shows that there were people of minority age at that fence watching at least parts of the picture. That's correct.

Q Well, that's what I was trying to get at.

MR. DWYER: That's entirely correct. The Court, in Judge McGovern's opinion, goes on to say, though, that although Washington has since passed a juvenile type statute, it had none at the time and therefore the presence of those juveniles cannot support the conviction; that the same analysis should have been applied to the privacy argument, in our view. That also should have required a statute.

I think it's perfectly clear that this motion picture is not obscene under the Roth definition. It has a predominant dramatic appeal, a very strong story, a story that's been often told and retold in many different versions.

It is well within the contemporary standards of candor. The motion picture critics and others in recent years have praised and made important, and the attendance of audiences have made important, many films which are no less candid than this in the portrayal of sexual matters. And indeed in the court below there was no competent evidence, even, that this film exceeded current standards of candor in any respect.

As to the third element, redeeming social value, this film has a moral message, and it has social value according to at least the six impressive defense witnesses who testified at the trial.

I would not tell the Court that this film is one of the best films ever made, obviously it's not. But in First Amendment litigation the tests are almost always made as to materials which most of us would not prefer to see but which are nonetheless protected.

Q Is it here so we could see it?

MR. DWYER: It's here, Mr. Justice Douglas. I saw it in the Court's viewing room yesterday for the first time.

Judge Matthews of the New Jersey court was correct in describing it as a "work of art", those were his words. The question of whether it's a pleasing work of art is really one of taste, and not of obscenity law. One man's vulgarity is another's lyric, as the late Mr. Justice Harlan said for

the Court in the Cohen case. And that remarks applies, we believe, to this motion picture.

Now, here the Washington Court and the prosecution virtually concede what I've just said; namely, that the film is non-obscene. That they claim it was obscene as shown, because scenes in the movie were visible from a few nearby houses, and they postulated that the privacy of the persons in those houses was necessarily invaded by the visibility of this motion picture.

The Court goes on to say that it does not have to judge the material for obscenity vel non one way or the other.

Now, all of this necessarily implies that a different standard exists for outdoor theaters as compared to indoor theaters. Yet neither the court nor the prosecution has suggested what that standard might be.

The exhibitor is told, in effect: You may be prosecuted under the obscenity statute for showing a non-obscene film, but it's up to you to guess at which film.

If the analysis of the Washington Court were applied across the board to all motion pictures, many, and I believe most films could be condemned and their dissemination punished under the obscenity statutes on the basis of very short isolated single images that may be on the screen for a matter of seconds.

And any such rule would be a license to suppress

almost any film.

The outdoor theaters are an important medium of expression in the United States. One of the amicus briefs shows that about 25 percent of the nation's theaters are outdoor theaters at the present time.

The potential effect of this decision, unless reversed, on those theaters would be chilling and suppressing, to say the very least.

The court's opinion below, as I say, lapses into such terms as "offensive displays", "offensive expression", "personally distasteful", and so on. All of which reveal that the decision below renders the statute standardless, devoid of standards. And I believe the State reinforces the truth of that point in its brief, when it suggests that exhibitors should be guided by the unofficial industry rating system in deciding what they should or should not exhibit, on pain of criminal prosecution.

It's suggested in the State's brief that the motion picture production code ratings should put an exhibitor on notice that if he shows an X-rated film in a manner deemed obtrusive, he can be prosecuted. But certainly the invocation of an unofficial standard like that, and we're not even shown what the standard is, or standards, plural, are in this record, cannot take the place of a legislatively enacted standard of criminal liability.

The Washington Court has read Ginzburg and Mishkin, Redrup, and the Fannie Hill case, A Book vs. Attorney General, as authorizing an abandonment of the Roth definition for obscenity.

That, we suggest, is a patent and obvious misreading of those cases. In Ginzburg, in ruling that pandering could be considered in an evidentiary way as to whether material was obscene or not, the Court expressly said that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged.

A Book vs. Attorney General was to the same effect. Mishkin merely held that the predominant prurient appeal can be addressed to a deviant sexual group rather than the majority.

In Redrup, I believe the court has misread, first of all, in that per curiam decision where the Court reversed a number of convictions, it pointed out that three elements were not present: namely, there was not present a statute directed to juveniles; there was not present a showing of invasion of privacy; and there was not present any showing of pandering under the Ginzburg case.

Redrup, in our view of the case, left it open for the States to legislate as to juveniles and to legislate for the protection of privacy. And that invitation to the States had been extended much earlier. Jacobellis vs. Ohio contains a

similar virtual invitation to the States to legislate as to juveniles, but holding, as the Court has often held, that material cannot be punished under general obscenity laws because it's unsuitable for minors. That was the holding of Jacobellis, and the same rule should apply where the argument is based on privacy, as distinguished from minors.

We have no doubt that the State can validly legislate in this area. But, as the Court pointed out last year in the Reidel decision, the task of restructuring the obscenity laws is the task of those who write and amend statutes and ordinances, and not the task of the courts.

Washington here has bypassed that legislative procedure, and by treating their obscenity statute as they have done, they have converted into a statute with indefinite standards for the restriction of speech and therefore void for vagueness under Winters vs. New York.

And as the Court held in the Interstate Circuit case in 1968, the purpose of the statute, which in that case was the protection of juveniles, does not mean that the standard of specificity for First Amendment purposes is relaxed. Vagueness is fatal whether privacy or minors or some other object is involved.

Just last week in the Popachristian vs. Jacksonville case, the Court held an ordinance void for vagueness, both because it fails to apprize the citizen and because it invites

arbitrary and erratic arrests. And both of those reasons condemn the Washington statute here, as it's been transformed by the lower courts into a weapon for punishment of speech.

The second basic reason for reversal, which we cite, is that this petitioner was given no fair warning that he could be prosecuted in this fashion. There was only one law on the books, that was the general obscenity law. That law necessarily told him that this picture was constitutionally protected, and that it could be exhibited with legal safety.

The statute said nothing at all about anyone's right to privacy, and, in fact, our State Supreme Court has not even recognized a common law right to privacy until the day of this very decision.

So nothing told Mr. Rabe that he could be prosecuted for exhibiting a non-obscene film at a drive-in, the screen of which could be seen from a distance.

The State, in effect, convicted him of an ex post facto common law crime. And the ruling below runs afoul of Cohen vs. California, reversing a conviction in a speech context, because there was no statute putting the appellant there on notice that certain types of conduct or speech would not be tolerated in certain settings or times or places.

As in Bouie vs. Columbia, the decision here is an unforeseeable one and retroactive judicial expansion of precise statutory language, and therefore the conviction deprives

petitioner of due process.

It's worth noting also, I think, that even had there been such a crime on the books, there was no evidence that the petitioner committed it in the sense that there was no showing that anyone's privacy was in fact invaded. As the Court held in the Cohen case, the presumed presence of unwitting viewers or listeners should not be sufficient to give rise to criminal liability.

Q Well, then, you're saying that the State does, indeed, have to show that actual persons viewed from outside the theater, juveniles or people who didn't want to, in order to make this a criminal offense?

MR. DWYER: I think in order to prove that offense, yes, that they must first define the offense with particularity in the statute, and then prove that the statute was violated by an actual exhibition which absolutely invaded privacy or caused offense in that sense.

Q Well, Mr. Dwyer, since we're talking about a statute that doesn't exist, I don't see why you have to take any position one way or the other as to what it could constitutionally provide. Your point is there is no such statute of any kind, isn't it?

MR. DWYER: Exactly, Mr. Justice Stewart, that's --

Q You don't need to -- it's very possible that a State could provide that nobody should have a drive-in

theater within 200 yards of any residence. But there is no statute of any kind in this case; that's your point, isn't it?

MR. DWYER: Yes, that is our point. And the case can be decided without reaching, at all, the questions of what the States constitutionally could do, because here they've done nothing.

Q Right.

MR. DWYER: The third basic reason for reversal, which we urge to the Court, is that the petitioner's motion to suppress the film should have been granted. The film was seized as evidence on the basis of a John Doe type of arrest warrant. That warrant was issued on the basis of the uncross-examined testimony of one police officer at an ex parte hearing. The magistrate did not see the film, but merely heard the police officer.

The proximate result of that was that this print was suppressed for an entire year, through the trial court stage of the proceedings.

Q Couldn't your client have gotten another copy of the film from somewhere?

MR. DWYER: That is not shown in the record, Mr. Justice Rehnquist, but I can advise the Court that as a general rule it is not easy at all to obtain a substitute print when a print is seized, and particularly in a location like Richland, Washington.

Each print of a motion picture is expensive. Each one is made in a laboratory, and prints are then dispersed around the United States for first-run and then second-run, and so on. And at any given time there may be, if it's a major motion picture, there may be a few hundred prints in the country; but each one is committed to exhibition at certain times and places by contracts between the distributor and the exhibitors.

This motion picture obviously is not a major motion picture, and it would have been that much harder to get a print. I think, as a practical matter, he could not have done so.

Q In other words, he wasn't enjoined from showing it, he was prevented by the film being out of his possession?

MR. DWYER: Yes, he was. And our position is that a seizure for evidentiary purposes, in effect, is identical to an injunction and it's suppressing the material to --

Q Are you claiming violation of the Fourth Amendment or the First, or both?

MR. DWYER: Well, we claim both, but the emphasis in our brief has been on the First Amendment, because, as we read A Quantity of Books v. Kansas, and Marcus v. Search Warrant, the First Amendment requires, where the materials received are communications materials as opposed to narcotics or guns or contraband, where they're communications materials, the First

Amendment requires an adversary hearing as a precondition of seizure.

Q As compared with other types of materials where ex parte warrants may issue?

MR. DWYER: Yes. Exactly. Upon a showing of probable cause in other connotations.

Q But no case here has applied Marcus to a film yet?

MR. DWYER: Not yet. Six Circuit Courts have done so, and --

Q Lee didn't talk about adversary hearings, did it?

MR. DWYER: Lee did not talk about it. Lee merely held that the hearing there did not focus searchingly on the question of obscenity.

Q There was no search warrant at all here, was there?

MR. DWYER: There was no search warrant --

Q It was an arrest warrant.

MR. DWYER: Merely an arrest warrant --

Q And the search was incident to the arrest?

MR. DWYER: Yes.

Q And the -- so if the arrest was valid, you say the search should still be invalid because it's in the First Amendment area?

MR. DWYER: Yes.

Q And we should not apply ordinary Fourth Amendment law?

MR. DWYER: This is in the First Amendment area, and special law has to be applied, and the Court has so held as to books, in A Quantity of Books v. Kansas.

Now, it's been argued that a distinction should be made between seizure for purposes of destruction and seizure for purposes of evidence, but --

Q But you wouldn't say that in Marcus that an adversary hearing would have been required to seize one copy of a book, of which the distributor had a thousand?

MR. DWYER: I think so, yes. Because, in the first place, how was the fact established that he has a thousand copies, if there's no adversary hearing?

I think ex parte hearings have to be completely distrusted where communications materials are at stake, and seizure is the object of the State.

In actual practice at the lower court levels, that is particularly vital because so many Justices of the Peace are ill-informed on First Amendment law, and if there's not an adversary hearing, they tend very readily to authorize the seizure of books and motion pictures just on a showing of offensiveness or disagreeability to them. And the only sound protection, in my view, is the protection of the adversary hearing.

Q Well, you don't -- you would say, if it turns out that there were a thousand copies in the store and only one was seized, the burden on First Amendment rights is such that there should have been a prior adversary hearing?

MR. DWYER: Well, I think there should have been, because, to reach that result, the only way to reach it is either to hold an ex parte hearing, in which case one runs the appreciable risk, as the Court said in the Kansas case, that a de facto prior restraint will occur. Or to have an adversary hearing. And one such issue in the hearing could be the quantity of duplicates available.

Q Whit if a policeman on the street in New York City walks into a store and sees, is an eyewitness to the sale by the proprietor of the hardest imaginable kind of pornography. Couldn't he just arrest that person on the spot, assuming that New York has a valid criminal statute covering that situation?

MR. DWYER: I think he should not be able to, Mr. Justice Stewart, because the policeman's idea of what constitutes hard-core pornography --

Q Well, I'm assuming it's the -- your idea as to the worst possible thing you could imagine.

MR. DWYER: I would still say, even if it's my idea, a court should determine in an adversary hearing before that material is seized. Otherwise the protections are forfeited. It's a matter of method and procedure, I think, rather than an

assumption in advance that a certain type of material, or certain item of material is obscene and not constitutionally protected.

As a matter of procedure, the only safe way to proceed is the adversary hearing method, and I believe it can be squared practically with the demands of law enforcement.

Thank you very much.

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

Mr. Ludwig.

ORAL ARGUMENT OF CURTIS LUDWIG, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The motion picture "Carmen Baby", displayed on a large outdoor screen, is obscene. Its dominant theme appeals to the prurient interest in sex, and the court below has so held.

Now, considering the use, the manner of display, the Washington State Supreme Court, following a careful review of the decisions of this Court, properly and justifiably found this movie obscene.

The Washington state Court --

Q Had there been a civil determination prior to that time?

MR. LUDWIG: No, there hadn't, Mr. Justice Douglas;

none at all in my jurisdiction regarding this movie or any other, to my knowledge.

You asked earlier about the standard in Washington regarding punishment or penalties in general. I know of no other reported cases concerning obscenity sustaining a conviction in our case, in our jurisdiction, other than State vs. Rabe.

Q Mr. Ludwig, I read Justice McGovern's opinion as finding the picture only partially obscene. I didn't read him as finding it obscene in the traditional sense of an entire judgment on the whole film. Am I wrong?

MR. LUDWIG: I think Mr. Justice or former Justice McGovern's opinion was probably the best written brief submitted, more or less, to this Court, in a way. What he said was that the dominant theme of that movie appealed to the prurient interest in sex and in the context of its display it was obscene.

That court, and in their opinion, indicated, or were obviously not judging the obscenity in the abstract. The declaration of obscenity was aided by a specific set of circumstances involving outdoor display of a movie which, the opinion says, had a dominant theme appealing to the prurient interest.

Now, I like to distinguish this --

Q But the court said, Judge McGovern's opinion at least said that if we were to apply the strict rules of

Roth, the film "Carmen Baby" probably would pass the definition of obscenity test.

MR. LUDWIG: Yes, Your Honor. I am aware of that, and I was going to try to lead into how I feel he interpreted that, or how I interpret that.

As I started to indicate, I'd like to make a distinction between State of Washington vs. Rabe, the opinion in the court below and this Court's opinion in A Book vs. Attorney General.

I set out on page 9 of our brief a short excerpt from that opinion. It was expressly indicated by Mr. Justice Brennan that that material was judged in the abstract, and that it was expressly pointed out that circumstances of production, sale, and publicity are relevant to a determination of obscenity.

The petitioner here has continually referred to the film as non-obscene. That's the language of his brief; that's his comments to the Court today. He suggests in his reply brief, on page 1, and he suggested to Your Honors today, that we practically concede that non-obscenity.

On the contrary, the respondent urges, and the court below determined that it is in fact obscene. Petitioner's conviction under the State's obscenity statute rests solely on that determination.

Now, what the court below and what Justice McGovern

said in his opinion was simply that in an abstract determination the film would probably pass the Roth-Memoirs definition of obscenity. The opinion below suggests, in paraphrasing, that some might find it not utterly without redeeming social value.

But in the contents of its display in the outdoor theater, foisted off on the nearby residents, it was in fact obscene.

In that particular regard, I have noted with interest the Morality amicus curiae brief which urges that the "utterly without redeeming social value" is not part of the test for obscenity established by Roth.

However, we need not reach that issue here. In my view, whether social value is or is not a part of the test should be important only in an abstract determination of obscenity.

I say that because, assuming that Morality is wrong in their amicus brief, and assuming that "utterly without redeeming social value" is a part of the test, and assuming for the moment that "Carmen Baby" has some redeeming social value, that social value is certainly going to be lost or obscured to those unwitting, unwilling viewers of this outdoor display.

Now, petitioner Rabe completely overlooks that fact. And he suggests in his brief, on page 20 that if the house-

holder took time to watch the entire film, it would presumably be restored to constitutional protection.

Now, that's really a novel, unique idea. Picture, if you will, a homeowner who views an erotic scene, very offensive to him. Now, Petitioner would ask him to go ahead and view the rest of the scene so the petitioner's constitutional rights would be protected. He views a little bit, but they ask him to go ahead then and watch more of this offensive material.

It hasn't been argued orally today, but it was quarreled somewhat in the brief that the Washington Court, if the lower court and the Supreme Court were permitted to consider this film "Carmen Baby" as the residents, as the arresting officer outside the screen, or perhaps the younger children had, without the sound track. Now, if that's the way it's being displayed to those people outside the theater, why should he quarrel with us judging it in that same vein? If you don't have the sound track, if you're displaying it without a sound track, then it should be judged without a sound track.

For these reasons I say, whether or not social value is a part of an abstract determination should not be a deciding factor in this case.

This is an outdoor display of a motion picture with a dominant theme appealing to the prurient interest in sex; a

movie with erotic sexual scenes, respondent urges that such a set of circumstances is amply sufficient within the guidelines of this Court to establish the obscenity of this display.

Q What decisions of this Court do you rely on?

MR. LUDWIG: Your Honor, we rely on those mentioned by Justice McGovern, the Ginzburg case, the Mishkin case, the Redrup case, and numerous other decisions I think of concurring opinions of Chief Justice Warren, cited in the brief in one case, wherein he stated that it was not the film that was on trial but the defendant; it's not the film but the manner of use in display.

Q Well, here there was no -- there's no claim on your part, as I understand it, no evidence that there was anything like the so-called pandering that the --

MR. LUDWIG: No pandering, no, Your Honor.

Q -- Court found in Ginzburg; is that true?

MR. LUDWIG: Yes, Your Honor, I think the prime reliance by the Washington Court in the opinion was Redrup: an assult on individual privacy.

Q What they're assuming is that your statute doesn't prohibit that.

MR. LUDWIG: Our statute, Your Honor, prohibits the showing of obscene material.

Q Right. And you --

MR. LUDWIG: Within --

Q -- indicated that this movie had one of what this Court has held are the three requisite elements.

MR. LUDWIG: And I think this Court, Your Honor, in all respect, has also held that in certain settings these things may be obscene, whereas they would not otherwise be obscene in the abstract.

Perhaps some would find social value in Mr. Ginzburg's material, or some social value in Mr. Mishkin's material, or perhaps, if there was not an obtrusive display, some would find social value.

In an abstract determination, we're saying it may probably pass; but in the context of its use and exhibition, it's obscene to those viewers.

Q Well, you may think so, but as I read the opinion of Mr. Justice McGovern, or Judge McGovern, he didn't, he said there was one of the elements, but -- well, I've already read this, it's on page 90 of the Appendix.

MR. LUDWIG: Yes, Your Honor.

Q Said this doesn't meet the criteria of Roth, didn't he?

MR. LUDWIG: Yes, and as I understand it, he's thinking of Roth judging this film in an abstract setting and not in the context of its outdoor obtrusive display.

Q And you don't have any statutes or ordinance that covers it, --

MR. LUDWIG: No, Your Honor, we do not.

Q -- whether there are obtrusive displays.

MR. LUDWIG: We had at that time, and we still have, we had a general obscenity statute. It has been changed; the only material change is protection for minors and juveniles.

Q Mr. Ludwig, is it your contention that when you're dealing with people who are unwilling viewers or with juveniles that the type of material which the State may proscribe need not necessarily meet all three of the obscenity tests?

MR. LUDWIG: I think this Court has indicated that in a case for concern of juveniles you need a statute expressing that limited concern, but I don't think this Court, as I've reviewed the opinions and decisions, has said that you need a special statute to prohibit pandering, that you need a special statute to prohibit what Mr. Mishkin was doing, or that you need a special statute to take care of the obtrusive display that was not present in the cases reversed by Redrup. There's no --

Q Well, let's assume that this movie was -- I haven't seen any movies lately, but -- "Goldilocks and the Three Bears", and that the light and the noise and the traffic bothered householders; that the showing of the movie bothered the nearby householders. Could you get a conviction under this ordinance?

MR. LUDWIG: Not an obscenity conviction, Your Honor.

Q Well, you did with this movie, which your court has found is not obscene.

MR. LUDWIG: On the theory that because of the contextual setting they said it was --

Q Because it bothered the nearby residents, you say, or potentially, or might have.

MR. LUDWIG: Because, as this Court has said perhaps in the recent case of Cohen, whatever else may give rise to the State's broader power to protect or interfere in this field, it must be in some way erotic. The lights, the noise, those are nuisance matters, unless you have --

Q And I presume that your State could legislate against those nuisance matters, could it not? Don't you think?

MR. LUDWIG: Yes, I presume it could, Your Honor, but I wonder if we buy and accept petitioner's argument wholeheartedly that we're talking about a fundamental First Amendment guarantee, if he's right, then how can we restrict a constitutional guarantee by statute? I don't think we can.

Q Well, I don't think there's any claim here that a constitutional guarantee issues if you show a bright light in somabody's window or to make a lot of noise --

MR. LUDWIG: No; I'm sorry. I misunderstood that.

Q Well, aren't you saying, Mr. Ludwig, that when you're dealing with obscenity in the context of juveniles, or

in the sense, in the context of unwilling viewers, it may have a broader definition?

MR. LUDWIG: It may have. Yes, Your Honor, that's our feeling, that in a blatant, obtrusive display of an erotic sexual scene, that maybe all we need is the dominant appeal to the prurient interest. And I think the other cases have so indicated.

Perhaps we're here on a case of first impression, and we're pleased to be here on that basis.

Petitioner here also quarrels, though, with the language of the opinion below in reference to the display as offensive.

Now, I think using the descriptive term "offensive" does not depart from the precedents, it does not involve any change in the law. The use of the term "offensive" is simply a further descriptive word. It is obscene, according to the opinion of the court below, and obscenity is offensive to most Americans.

Now, this was recognized in the report of the Commission on Obscenity and Pornography, we cite it at page 12 of our brief. The reply brief of petitioner points out that we maybe didn't cite it all, and that the Commission also recommended a particular legislation for this problem.

Now, that's very simple, and very easy to understand. The report of the Commission on Obscenity and Pornography were

simply being consistent.

They further recommended removal of most obscenity statutes. Naturally, if we followed their over-all recommendations, then we wouldn't even have the general obscenity statute, and we would have to legislate a particular statute to correct this problem of offensive, obscene displays, which they recognized and found as a matter of fact.

Q This conviction was under 9.68.010(2), was it?

MR. LUDWIG: Yes, Mr. Justice.

Basically, this case, the opinion below relying on Redrup, I think taking the over-all obscenity picture with all of the cases that we've had before this Court, this case recognized the right of privacy in a situation where we shouldn't have to judge this film in the abstract but judge it on its effect and its manner of display, the use and conduct of the exhibitor.

This case presents a problem of protecting the individual's right of privacy, not the --

Q Was this film -- did they sell tickets to children to see this film?

MR. LUDWIG: It's not in the record, Your Honor. There is testimony in the record from Mr. Rabe that when he had a film there for adults only, he hired an off-duty policeman to check identification. But, as I reviewed the transcript, the record before the Court, I can't say whether he's testifying

about this particular film or a previous one.

Q But there isn't any evidence, I suppose, either, then, that this film was designed for any other group than adults?

MR. LUDWIG: No, there is not, Your Honor. The record is void on that regard.

Q Or any other group than just average adults?

MR. LUDWIG: That's correct, Mr. Justice.

Q In the first paragraph of the opinion, on page 81, as I read it, the court states that Rabe was "exhibiting the motion picture 'Carmen Baby' and had imposed no age restriction upon the paying audience."

How do you construe that?

MR. LUDWIG: I'm sorry, Mr. Justice, I --

Q This is on page 81 of your Appendix. the opinion of Judge McGovern.

Q The third line of the second paragraph.

MR. LUDWIG: All right. My recollection is not accurate, because I'm sure the Washington Court, in writing this opinion, had the statement of facts before it, and accepted that as in the record.

Q What page is that?

Q Page 81.

MR. LUDWIG: Page 81 of the Appendix.

Q And then on page 96 and 97, the same opinion

of the court explicitly refused and found it impossible to ground its decision on the fact that this film was exhibited to minors, did it not?

MR. LUDWIG: Yes, Your Honor, because they were relying substantially on Redrup, and I think Redrup stood for the proposition that to protect juveniles you had to have a specific limited statute; whereas the Washington Court and respondent feels that Redrup also stood for the fact that you didn't have to have such a statute where you're concerned with a blatant and obtrusive display that affects somebody else's privacy.

Petitioner argued in his brief --

Q Well, is it your position that this is just as though they set up in a park downtown, across the street from an elementary school, and the showing allowed juveniles to walk in to see it? That is, allowing it, showing it in circumstances where juveniles could not be precluded from seeing it. Are you suggesting this showing was inviting them to see it?

MR. LUDWIG: I see no effect one way or the other, Mr. Chief Justice, if it's shown outdoors in a manner where unwitting, unwilling, or even willing youngsters can see it, whether it be in a drive-in theater or in a park, whether they are admitted by choice or whether they're able to see it free of charge. I see no distinction there.

Concerning the right of privacy, petitioner suggests that that's dependent on statute for its existence, and it cites our court below as saying that we had not even recognized the common law right of privacy.

But the opinion goes on to point out, and respondent submits, that the right of privacy is as fundamental a constitutional right as any other constitutional right, just as fundamental as the right of free speech.

Q Well, of course, the constitutional right of privacy is assertable only against government, isn't it?

MR. LUDWIG: I think a strict interpretation of the Ninth Amendment may be.

Q Well, of the Constitution, of the whole Constitution, the right of privacy, if it's a constitutional right, insofar as a constitutional right, it's assertable only against government, State or Federal. Any other right of privacy is a matter of tort law, is it not? And it's a private action.

MR. LUDWIG: A nuisance action, Mr. Justice.

Q Yes.

MR. LUDWIG: Perhaps, I think the State if they have a criminal statute prohibiting obscene or obtrusive displays has a right to protect that right as well as other rights for the people. Stanley vs. Georgia, Griswold vs. Connecticut represent that right, I think, --

Q Well, that's a right against intrusion by government. That's the constitutional right.

MR. LUDWIG: I understand that, Your Honor, and I accept that. But I think, in answer to the petitioner's saying that it's not a right dependent on statute, I think it's a constitutional right, a common law right he's talking about; and I think the State or the Sovereign State of Washington owes the protection of those constitutional rights.

In effect, what, it seems to me, is a balancing of rights; a balancing of the individual's right of privacy, the homeowner's right of privacy against the producer of the motion pictures' fundamental right of free expression. The right of privacy is just as sacred to the homeowner as the right of free expression is to the producer.

And, interestingly, I think this case can be decided by recognizing that right of privacy, protecting the homeowner's right of privacy, without denying or discouraging the movie maker's right to produce and display what he wishes.

Q What is the homeowner's right of privacy? Not to be disturbed by the picture there, the noise, or just what is it?

MR. LUDWIG: I think, Mr. Justice Marshall, the homeowner's right of privacy is to be free from obscene, erotic, sexual scenes.

Q Where in the world do you get that from?

MR. LUDWIG: From the State's general obscenity statute, and from the case of Roth, which says obscenity is not constitutionally protected.

Q But you recognize that you don't have a State statute, that's what I'm talking about.

MR. LUDWIG: We have a general --

Q The State could very well, I understand Mr. Dwyer to admit that the State could pass such a statute, and say you can't show these where they'll be seen by unwilling people. But you haven't passed the statute. You only have the one statute, which, obviously -- well, how long has this statute been on the books?

MR. LUDWIG: Our general obscenity statute, Your Honor, is an old statute, it's not included --

Q Well, I was getting ready to say, it was before drive-ins?

MR. LUDWIG: I think it may have been.

Q Would you assume --

MR. LUDWIG: We have amended it now to protect juveniles.

Q Yes, but wouldn't you assume so? And so the whole point is that the statute -- you haven't passed such a statute, and you want to --

MR. LUDWIG: Mr. Dwyer's --

Q -- use the old statute to apply to the inter-

ference of the right of privacy of the person that lives across the road. And his answer is you could do it by statute, but you can't do it without the statute.

Now, what's your answer to that?

MR. LUDWIG: Your Honor, I think the general obscenity statute is sufficient. Mr. Dwyer has been kind enough to tell me that our general obscenity statute is dated perhaps 1909.

But other people have convicted under general obscenity statutes, with guidelines and decisions from this Court.

I think the general obscenity statute is neither vague nor overbroad, applied to an obtrusive display of a motion picture, foisted off on residents, if the dominant theme of that material appeals to the prurient interest in sex.

Q Well, why would the motion picture have to have that dominant theme? If the motion picture, the noise and light of which bothers householders, why couldn't you convict somebody under the statute for that kind of invasion of privacy? Because it's been found that this movie is not obscene in the constitutional sense.

MR. LUDWIG: Well, Mr. Justice Stewart, I think noise and light is other than erotic sexual scenes, and I go back to Cohen v. California, where -- the exact words escape me, but, whatever else may give rise to the State's broader power to regulate and proscribe this type of conduct, it must be in some

way erotic. And this is erotic.

Q Well, I guess -- thank you.

MR. LUDWIG: Petitioner says that it is a vague, a guideless and ex post facto decision, that there are no guidelines. Clearly it's no more an ex post facto or retroactive decision than this Court's opinion was in Roth, when it judicially defined obscenity as material dealing with a prurient -- or dominant theme appealing to the prurient interest in sex.

And as to guidelines that fail notice, the statute gives the notice when it proscribes obscenity. The previous rules of the Court set the standards and convey sufficient warnings.

I said in the brief that perhaps the rating may be the standards, and that's not accurate; as an afterthought, I see that that isn't a precise legal guideline. The guideline should be whether the dominant theme appeals to the prurient interest in sex. And the X-rating, perhaps as a practical matter, would be of some further value or notice to the distributor that it very well may have a dominant theme which appeals to the prurient interest.

Q Why didn't your court also base its judgment on perhaps the special appeal of this film to children, or the special offensiveness of it to children?

MR. LUDWIG: Your Honor, I think perhaps they could

have. But --

Q Well, they said they couldn't.

MR. LUDWIG: But we had, since the prosecution was commenced, --

Q I understand that, but --

MR. LUDWIG: -- amended the statute.

Q All right, you amended the statute, but they said that under the state of the statute, as the statutory law then was, they could not base it on its effect upon children because the law, the obscenity law wasn't tailored specifically with respect to children.

MR. LUDWIG: Didn't express a limited concern for juveniles, as was suggested by Redrup, and Redrup was a case that they were relying on.

Q Yes, but how could it base its decision on its effect on adjoining homeowners, when the statute wasn't tailored with specific concern to them?

MR. LUDWIG: Well, as I read Redrup, it didn't require a special statutory concern. It merely said, in none of the cases was there a claim that the statute in question reflected a specific and limited State concern for juveniles.

Q So you're suggesting that you don't agree with your court, then?

MR. LUDWIG: No, I do, Your Honor. I think they relied on Redrup, and for this reason; and then it goes on to

say: In none was there any suggestion of an assault upon individual privacy by publication, in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.

On one situation it required a statute, on the other our court felt it did not in Redrup.

Q Well, quite apart from Redrup, what do you think about ordinary due process of law? Cole v. Arkansas.

MR. LUDWIG: I'm not familiar with Cole, Mr. Justice.

Q Well, a variety of the cases that say that a criminal statute has to give fair notice both to the citizenry and to the law enforcement officers and to the judges as to what it is that's illegal.

MR. LUDWIG: I think we do give fair notice by our statute proscribing obscenity and then defining obscenity as material dealing with -- having a dominant theme appealing to the prurient interent; and then saying that other things are relevant in the determination of that obscenity.

Q Well, I've just read your statute, and it doesn't say any of those things.

MR. LUDWIG: I know. The statute is a general obscenity statute, Your Honor.

I have just a moment left, and the most important part of this case, as it appeals to a prosecutor and of most concern to law enforcement agencies, involves the procedure for

seizure of evidence. This Court's cases of Marcus and of A Quantity of Books, and Lee Art Theatre are the only cases, I think, on point of seizure of this type of material. They are logical and clear. They present no problem. They are cases which were decided on the basis of the nature and purpose of the seizure.

Lee Art Theatre was a case of seizure for evidence, and does not support the proposition that a prior adversary hearing is necessary; only that a warrant or seizure requires more than a conclusory affidavit of an officer.

The confusion seems to arise in the lower courts from the failure to recognize a basic distinction, a distinction between seizure and its suppression, as Marcus and A Quantity of Books in seizure aimed at securing evidence.

Metzger, decided in 1968, prior to Lee Art Theatre, seems to appreciate the distinction. Interestingly enough, that was the first Circuit Court case on this point, and said a prior adversary hearing was necessary. But that was a case where they had seized four copies of a film, the same film, for prosecution. And they said you can't do that. Four copies as distinguished from one for evidence is quite a distinction. The court ordered them to deliver that one.

And from there on out, other courts have followed that, other courts have suggested other alternatives.

Q Well, what do you think about a seizure that

has the practical effect of suppression?

MR. LUDWIG: Your Honor, I think Lee Art Theatre said that it should be made on a judicial determination, designed to focus searchingly on the question of obscenity as did Marcus.

Q Without an adversary hearing?

MR. LUDWIG: Yes.

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

Mr. Dwyer, did you have anything further?

MR. DWYER: My time expired, Your Honor.

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

Thank you, Mr. Ludwig.

The case is submitted.

[Whereupon, at 2:45 o'clock, p.m., the case was submitted.]