In the

Supreme Court of the United States

MARVIN MILLER,

Petitioner,

vs.

CALIFORNIA,

Respondent.

No. 70-73

Washington, D. C.
November 7, 1972

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPPEME COURT OF THE UNITED STATES

MARVIN MILLER,

Petitioner,

v. No. 70-73

CALIFORNIA,

Respondent.

Washington, D. C.,

Tuesday, November 7, 1972.

The above-entitled matter came on for argument at 10:06 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
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 Petitioner.

MICHAEL R. CAPIZZI, ESQ., Assistant District Attorney, County of Orange, State of California, P. O. Box 808, Santa Ana, California 92702; for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: For counsel in today's cases, I want to state what I indicated yesterday morning: Mr. Justice White is unavoidably absent, but reserves the right to participate in the cases argued today, on the basis of the records, briefs, and the tape recording of the arguments.

We will hear arguments first today in No. 70-73, Miller against California.

ORAL ARGUMENT OF BURTON MARKS, ESQ.,

ON BEHALF OF THE PETITIONER

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

We are back again before the Court, since January of this year, to reargue the matter and to discuss with the Court what one of my colleagues described as the continuing saga of life in the pits, or what goes on in the lower courts, because we don't know what, actually, this Court is saying with respect to the pornographer.

The second proposition that we have for this Court is that a person charged with the crime of obscenity should have, perhaps, as much rights accorded to him, or her, as, let's say, a parolee who is having his parole revoked or perhaps a juvenile who is being declared a delinquent.

Perhaps I can explain.

As I said, there is a continuation of horrors. In January, I described to the Court what happened in this case, what a defense lawyer had to do to go through a trial or proceeding in order to at least have, attempt to have some kind of hearing as to whether or not the material was constitutionally protected. This included pretrial hearings, in which evidence is presented by the defendant, none by the prosecution, and a complete denial of any real hearing or real, in my opinion, understanding by the trial judge as to what the issues were.

Since that time, to give you an example of what occurs in the courts below, because of the erratic, if I may say, types of decisions which emanate from the higher courts and perhaps the visceral reactions that occur with various judges, is -- I've been in three trials since I've seen you, and this Court, in Weiner vs. California, held certain material to be protected vis-a-vis Redrup.

Now, the Weiner materials were found in San Diego, and they involved some motion pictures and some film. So I had two trials in Los Angeles, in which I attempted to have the judge take some recognition of the materials in Weiner, so there could be a comparison of what was protected and what was not protected.

Now, the interesting proposition is that the prosecution --

QUESTION: Was this a jury trial?

MR. MARKS: No, we waived jury.

The interesting proposition in the first trial that I had was that the prosecution had an attorney who was reasonably experienced in the pornography field. This prosecutor was unwilling to admit to the court, as were the police officers who are really the experts, because in Los Angeles they have a vice squad with pornography experts that travel through the State, and they know what's going on in the State, and they refused to admit that the materials in my case were the same as the materials in Wiener, and, as a matter of fact, refused to take judicial notice of the fact that they were the same, and there was simply no way to get the Wiener materials from San Diego to Los Angeles, because they had been introduced into another case in San Diego, to try and persuade a second judge that the materials were the same and therefore protected.

QUESTION: As I get it, then, the point of your argument is that, when you said you waived jury trial, you used that?

MR. MARKS: In the last -- well, the first case I did, because the judge that we finally got was, in my opinion, sophisticated enough to understand what was going on.

QUESTION: Well, was that a matter of trial tactics

in defending cases like this, you ordinarily prefer a bench trial?

MR. MARKS: No. Absolutely not. No. Because if -- you're allowed to have the procedures which the California State allows you to have, you have -- you should have, under Noroff?, a real pretrial hearing to determine whether or not the material is obscene or not.

QUESTION: Which then ends the whole case?

MR. MARKS: Which would end the whole case, but the unfortunate proposition is, as I was going to point out, is that the judges simply don't follow the law. They don't -- perhaps it's merely a matter of buck-passing, and, as former President Truman said, the buck's got to stop some place.

QUESTION: But I take it, if there's a determination of obscenity at this pretrial proceeding, that is not conclusive, of course, at the jury trial, is it?

MR. MARKS: Well, that's a very interesting question. Of course not. Of course, that --

QUESTION: In other words, you may still argue to the jury the non-obscenity of the material, right?

MR. MARKS: Of course.

QUESTION: Yes.

MR. MARKS: Yes, sometimes what the judges feel or believe is -- and there's some California case law to that effect, although it really does not seem to be appropriate,

because ordinarily we're talking about a misdemeanor case in obscenity. The only time you get into a felony case is when it is bootstrapped into a felony by virtue of the charge of conspiracy, which makes it a felony, or because the person has a second offense.

Now, if you have a misdemeanor trial, there is no such thing as a preliminary hearing. So the California Supreme Court gave misdemeanance in a pornography case, essentially what might be called a preliminary hearing through the Noroff case, in which you're entitled to have a hearing to determine whether there's obscenity.

Now, some judges believe that this only means probable cause.

QUESTION: Are misdemeanor cases tried before juries?

MR. MARKS: Yes. Some judges believe that this obscenity issue and determination means only probable cause to believe it's obscene, so that it will go in front of a jury. That is not my understanding of the law, but there's no clearcut decision on that proposition.

In a felony case, if you happen to have a felony, then you have a preliminary hearing and in that preliminary hearing there is a probable cause situation, to believe that a crime has been committed.

Again, there is a case out of California called

Luros, which says that the grand jury does not need any evidence to make a determination of probable cause so that the matter can be brought before the petit jury for a trial.

But then we have, again, this intermediate Noroff step, which supposedly is supposed to have the judge independently make a determination of obscenity.

It's always been my expression or opinion that the proof of the prosecution as to obscenity in a pretrial hearing has to be also beyond a reasonable doubt because if it's not obscene, it can't be prosecuted.

But, as I say, this leaves the law in a state of flux, and nobody really seems to care. I was talking about the trial, but what happened was the Wiener -- the two defendants had been arrested in practically the same situation, they were the type of defendant that you will ordinarily find in, as far as I can determine, 90 to 95 percent of the cases which come before this Court or before any obscenity court, i.e.,a bookseller, a motion picture operator, somebody who is in business, not the skulking pornographer who goes out into the alleys, and calls in the little kids and says, "Look at the dirty pictures"; he's there, he has a store, he has a business, he has a movie theater, he invites no one in except by the advertisement. Generally, if you take a look, for instance, you open your Washington, D. C., newspapers and there's advertising for what's known as adult films. And it

doesn't pictorially describe what's being shown, it gives the title and the persons who are the, let's say, the aficionados or the ones who want to go to the theaters, know what's going to be shown in the theaters by the fact of the title and the place of the theater, and they go and see it.

But I'm talking about the client, the person who is in business. He is operating a store. He buys film. He buys books, and he sells it to the persons who come in. Ordinarily there's no such thing as pandering, as was described in Ginzburg, simply a police officer walks in, sees a piece of material that he doesn't think is worthy of his consideration, either makes an arrest on the spot -- although that is now out in California -- but generally will go back and make an affidavit that he saw a dirty book or a dirty picture, and he will describe why it was dirty, and then some magistrate will sign a search warrant and he will go in and seize that. Sometimes --

QUESTION: He doesn't buy the book and then take that to the magistrate?

MR. MARKS: Sometimes they do, but very seldom. Apparently there's no enough funds given to the vice squad to purchase this type of material. They have other areas.

They generally go in and they look at the pictures.

My two clients happened to have arcades on Main Street, where you have peep shows, and little motion picture

theaters. The police officers went in, saw the films, went back, describe what they saw or what they thought they saw, gave the affidavit to a magistrate, who authorized the seizure. They came back a few days later, seized the film, took it to the police station, then had an arrest warrant issued. Both clients were charged with felonies because they had a prior misdemeanor.

QUESTION: -- prosecution or for destruction, or both?

MR. MARKS: Evidence.

In the first case, the judge, after I had waived jury and after I had been able to present an expert who had seen the Wiener material and seen this material which was called simulated, testified it was exactly the same. And I presented to the judge a list of cases, and showed him how the material was exactly the same. Finally read the material and, lo and behold, after an entire trial in which the police officers had testified in their expertise as to what was obscene and not obscene, and my expert had shown the comparison between Wiener material and these materials, the judge granted my motion to dismiss on the grounds that the material was constitutionally protected and returned the films to me.

The next case was exactly the same, it was another person who had an arcade next door. I went in to the second

judge, who had never had a pornography case, never had an obscenity case, but of course knew what was obscene and not obscene, tried to persuade him that this case that I had today was exactly the same case as the case I had yesterday, and that in fact the ruling of the judge before was res judicata, because it wasn't an acquittal, it was a declaration of protected material.

The second judge --

QUESTION: Why would that be res judicata under California law, if the same people weren't parties to it?

MR. MARKS: Well, it would at least be collateral estoppel under Ashe vs. Swenson, because the prosecution has to be estopped from continuing to prosecute something which they must know is protected. It was the same district attorney's office.

QUESTION: With the same defendant?

MR. MARKS: No, no, a different defendant, but the same material.

Now, somewhere along the line, if a defendant or a person in a criminal case, who is charged with a criminal offense, must have the opportunity of saying, "Lookit, I am protected". Isn't that what "scienter" means? Doesn't scienter mean that the person is doing something which he thinks is all right, or, conversely, if you want to prove that he had a mens rea the offense, he had to know, or at

least have reason to believe that the material which he was selling or exhibiting or purveying was not protected or in the realm of hard-core pornography.

But these booksellers don't know that, because they get a decision from Redrup, of protected material, and then down it comes to the lowest court and sometimes even the highest court, and they say, We don't believe it; nobody could hold anything like that to be protected.

QUESTION: Don't you have a provision for an in rem proceeding in California? Proceeding against the material as such, which would be res judicata, vis-a-vis the State, as against the material?

MR. MARKS: No. There is the aspects of it blowing in the wind, but it's not legislative, it would be judicial because of some recent decisions that came out of the district court, three-judge court, in the Central District of California, stating that perhaps the search and seizure statutes which we have, and the 1538.5 of the Penal Code which allows for a traverse to a search warrant, although it doesn't meet the Freedman requirements or the Blount vs. Rizzi requirements of a fast hearing provided by the State. At least one court has said that's sufficient hearing, and you can probably traverse the search warrant on the basis that the material was not in fact obscene and couldn't be seized because that's the law in the State of California also.

If it's protected, it can't be seized.

But the big problem is, how do you get word to the judge that it's protected?

QUESTION: Well, if you did have a panel judgment in that kind of a proceeding, I suppose, then, it would be res judicata that that particular material was protected, wouldn't it?

MR. MARKS: It ought to be.

QUESTION: Yes.

MR. MARKS: But what happens is that the judge will say, as he did in the second case, first of all, I don't -- these aren't exactly the same materials, so therefore they must be different, and you can argue all day long that one portrayal of an act of sexual intercourse is very much like another act of sexual intercourse.

QUESTION: Well, you're not talking, then, about precisely the same film, an absolute duplicate, you're talking just about similarities?

MR. MARKS: I'm talking about two films that if you put them back to back and took away the faces of the actors, it would be impossible to describe any difference in what was portrayed in the screen.

QUESTION: But the films, presumably, at least, were sold under different titles or produced by different producers?

MR. MARKS: Right. Some of them may have different titles, but there just is no way -- I recall the old saying, "you've seen one, you've seen them both". You've seen --

QUESTION: So that determination with respect to the one would not help you very much, would it?

MR. MARKS: Well, it's got to help somebody.

QUESTION: Unless it's a copy of precisely the same film, you wouldn't have.

MR. MARKS: Well, that, I guess, is the big problem. Because if I see a magazine that shows a picture of a naked woman, with her legs spread, what's known in the trade as a "beaver shot", and this Court has said that's protected, and I see another magazine with a woman with her legs spread and a beaver shot with a different title and a different woman, I would like to be able to tell my client: it's all right to sell that, because it's been held protected.

But some courts will say, Why, that's ridiculous, it's a different woman, and it's a different camera angle, and it's a different magazine, so how could the material be protected?

One of the most beautiful cases in point, and it was handed to my brother, Mr. Shellow, who will be arguing later, is the case of Wisconsin vs. Simpson, out of the Wisconsin Supreme Court, filed October 31, 1972, and in that case they had, from what I can determine, magazines with nude

persons together, and nothing more, and here is some of the holdings of the Wisconsin Supreme Court -- and, incidentally, I had brought it along and now I don't seem to be able to find it;in the recent article, the most recent edition of the New Yorker Magazine, there's a little cartoon and it shows two gentlemen in black robes strolling along and one of them is saying, "If it turns me on, it's smut".

So that's about what has happened with the Wisconsin Supreme Court. Here's what they say:

"Described magazines are not as a matter of law not obscene." This was the contention raised. "Appellant argues that these magazines cannot be found obscene because only nudity is depicted, and not sexual activity. Given non-obscenity for non-sexuality, argues appellant, these complaints are not sufficient because they do not allege obscene depictions of sexual activity. In support of his proposition, appellant asserts several Redrup reversals, and certain language in State vs. Amato." They go down.

"This court, in Court vs. State, resoundingly rejected the contention therein presented, that this court is bound by the decisions in other courts regarding whether similar magazines are obscene or not." And they put some quotes: "the subjective nature of the material, as well as the subjective conduct of the respective defendants requires an individual analysis in each case."

A complete rejection by the Wisconsin Supreme Court of what this Court said in Redrup, that certain material is protected. They say, We'll tell you whether or not it's protected; we'll tell you whether or not we viscerally have that feeling.

Another example of the type of reaction you get from the lower courts: The question is, Was the introduction of the magazines into evidence without further evidence sufficient to prove their obscenity beyond a reasonable doubt?

And they say: This Court has repeatedly held that obscenity is not so aloof a concept as to require expert testimony. There is nothing here that warrants any further consideration of that question, and the evidence in the form of the magazines themselves was clearly sufficient to prove obscenity beyond a reasonable doubt.

Do you know how this case went to trial? They took the magazines and threw them in to the jury and said: This is what the man is selling, and, remember, these are magazines of a man and a woman in the nude -- and that's all they're doing -- and the court is saying, We will ignore everything, and we're going to our own way. What do you do?

Well, --

QUESTION: As I recall, and correct me if I'm wrong, you urged us on a prior argument that Younger v. Harris was wrong and that we should overrule it. You maintain that point

now or --

MR. MARKS: Absolutely.

QUESTION: -- did I --

MR. MARKS: Absolutely. I mean, assuming that you can find some judges in the district courts, the Federal District Courts that will follow the law of this Court, because you don't always follow that either. I was continuing my saga of horrors, with which this Court is very familiar,with the case where there were 20,000 rolls of film seized in Southern California, and the district courts held they couldn't be seized, it was unlawful, and Judge Hanson of the Superior Court said, pooh on you, in effect, and it went to the court of appeals; Judge Hanson was never held in contempt, of course, because judges are immune from that sort of thing. And it went through three or four or five respective courts, finally came up to this Court, which affirmed the district court three-judge ruling, and finally the films got back after five or six months, at the most; an extraordinary waste of time, in my opinion.

Getting back to the initial premise of my argument: Can't we give a defendant in a pornography case the same due process of law that we give a juvenile or that you give a parolee? Can't he have a hearing, such as you said in Moralcy, can't he have the same presumption of innocence, that is to say,in Winship, you said: due process says that

each element of the offense must be proved by competent evidence beyond a reasonable doubt.

Well, we have three elements of the offense, we actually have four. They were stated in this Court in Roth, they were stated in Memoirs, and it was just recently approved by this Court in Raid vs. Washington, which approved Roth and Memoirs, as to the three elements. And the three elements are very simple: Does it go beyond contemporary standards? Does it appeal to the prurient interest? Is it utterly without s ocially redeeming value?

Doesn't the prosecution have the burden of proving those elements, First Amendment elements, beyond a reasonable doubt under the Fourteenth Amendment, so the defendant can have a hearing and a trial on it? And don't they have to present evidence, competent evidence?

I say that due process says they do.

The fourth element is even more elusive, and that's t he scienter element. Smith vs. California said you've got to know what you're doing. The basic element of due process of law is that you have mens rea, criminal intent. These people are businessmen. Maybe they're in a dirty business that you don't like, but, nevertheless, they are in business. They don't want to violate the law.

QUESTION: Do you understand Smith v. California to stand for the proposition that the seller must know what's

in the books that he sells, or, alternatively, that the seller must know that what is in the book he sells is illegal?

MR. MARKS: I say that he must know what's in the book is illegal or probably illegal, because if you just say you know what's in the book, then you get into the wildest speculation: does that mean that he knows there are some pictures of nude people? Does he know it's sexually oriented?

The Bible is sexually oriented, if you take some passages.

What do you have to know about the contents of the book? I think you have to know, or have some reason to believe, that he knows that this has gone beyond that which is legally protected.

QUESTION: That goes a little further than what the opinion in the Smith case actually said, doesn't it?

MR. MARKS: Well, it goes a little bit further, but it has to be a logical and rational extension of that scienter requirement, because if you don't have that scienter requirement, you might as well overrule Smith vs. California and say: anybody who sells a book or who shows a motion picture that deals with sex is subject to arrest and prosecution under some standards which were slightly less than standards which are afforded to most other criminals.

I say, finally, there's an instruction that used to be given, and it still is at times, that says, in the Federal Court, to the jury: If he's guilty, say so; if he's not guilty, say so.

I say in this instance, if you're going to give us some standards, and you're going to say that the First Amendment applies to the States, say so. And if you're going to tell the courts below that they can't seize material without having an adversary hearing or some sort of hearing afforded to the person, say so. And if you're going to say that they can't prosecute without having a hearing or some determination as to material, say so. But at least give us a chance.

QUESTION: Mr. Marks, what you're proposing is that there be required, before there may be a criminal prosecution, some kind of civil proceeding at which the definitive determination whether the material involved is or is not obscene; is that what you're talking about?

MR. MARKS: Exactly. An injunctive type of proceeding.

QUESTION: Which would be conclusive.

Well, what about the -- how does that apply in pandering situations?

MR. MARKS: I think that if you are -- first of all, I have never seen a case in Ginzburg which has that type of pandering. I think that that case is out in left field and will never happen again. But if it does happen again, this

Court has found ways to get around what has otherwise been apparently restrictive rules of law. If the person is pandering, and he knows it, the law allows for it. There is room for all those -- that type of exception.

Thank you.

QUESTION: Mr. Marks, under your theory, would it be permissible for the State to deal with a particular book or a particular movie in an in rem proceeding, and given a favorable result to them on the obscenity issue, bind anyone from thereafter who used it in the State on the issue of whether or not that was obscene?

MR. MARKS: No, I think what they must be -- the only thing that they can bind the defendant on in a separate question is scienter. After that hearing, no other defendant can go about and say, I didn't know it was protected because the law presumes that everybody else knows the law.

QUESTION: So that even though the new defendant was not a party to that proceeding, he can't defend on the ground that it was not obscene?

MR. MARKS: Oh, he can defend on the ground that it's not obscene, because -- I would say this, as long as your procedure is going along, you'd obviously have to have an in rem proceeding with the right to appeal by whoever is appealing. But the question of scienter, knowledge as to whether it's obscene, would be withdrawn.

Because, don't forget, in an in rem proceeding you have a judge sitting there, and the judge can rule on the -- I think that the only thing a judge can rule on is whether or not the book is not obscene. If he rules that he will not make such a finding that the book is not obscene, that it is not protected, then notice is given to the world, as it were, to the criminal defendants, that this may be the subject of a prosecution.

Because he can't foreclose by saying that the book is obscene. The right of a criminal defendant in a case to have a jury trial on that issue.

QUESTION: Then the kind of in rem proceeding you contemplate binds the State but not the defendant?

MR. MARKS: Absolutely. And that's the way it should be.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Capizzi.

ORAL ARGUMENT OF MICHAEL R. CAPIZZI, ESQ.,

ON BEHALF OF THE RESPONDENT

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

With respect to the in rem proceedings, I would suggest that it is not the answer for, as Mr. Justice Brennan has suggested, it doesn't solve the question raised by the pandering concept enunciated by this Court and adopted in

California by statute. Nor does it take into consideration the definition which this Court has given to obscenity, namely that to be obscene it must -- we must apply contemporary standards for customary limits of candor. And as I suggested last January, when the case was argued before this Court, contemporary standards, if they are contemporary, they are going to change, maybe from day to day, certainly from month to month or year to year. And we're going to have to constantly reexamine that same book to see whether or not it's obscene, applying contemporary standards, not the standard that would apply six months ago when the hearing was held.

With respect to the knowledge that is necessary, I suggest that the only knowledge necessary is the knowledge as to what is in the book. To require that the person disseminating the material must know that the material is obscene would be to totally insulate the distribution of this type of material from any sort of criminal prosecution.

QUESTION: Mr. Capizzi, I gather that your argument, because of the aspect of that it must be contemporary, according to contemporary standards. That might be an argument against a particular conclusion of non-obscenity be binding on the State where the same material was involved later. But what about the argument that in any event, before there should be any criminal prosecution there ought to be a judicial determination of obscenity or no -obscenity

before that proceeding continues?

MR. CAPIZZI: Of course I anticipate another problem that that would raise, and that in a civil proceeding the burden of proof is by a preponderance, whereas in the criminal proceeding it would be by beyond a reasonable doubt.

So there would be another disparity there.

In effect, at the present time --

QUESTION: So that if a finding were in the particular case involving the dissemination by a particular defendant, would it matter if the determination were that it is not obscene, applying a preponderance test?

MR. CAPIZZI: Well, in effect in California, as Mr. Marks has suggested, we have what borders on that sort of procedure. It's not a civil proceeding as such, but it's preliminary determination of the constitutional question, the mixed question of law and fact, as to whether or not this material is --

QUESTION: Well, except as I understand Mr. Marks, at least as to some judges, they apply a probable-cause test. They don't, in fact, make the ultimate determination of obscenity or non-obscenity, as I thought he told us. At least some judges.

MR. CAPIZZI: Some judges, I feel possibly do that. They feel that --

QUESTION: Well, what would you -- if you had such

proceeding at all, do you think that it should stop with a probable-cause determination or should it go on to the make the ultimate determination?

MR. CAPIZZI: I think the initial question should be a probable-cause determination if we are, in fact, going to have that determination. But I would suggest that that determination that's made by the trial judge is the same determination that is facing this Court in each obscenity case. And that if we adopt a sufficiency of the evidence test, that that initial determination doesn't necessarily have to be made.

That is to say, is it protected in the constitutional sense as a matter of law; and, if not, then the person is going to stand trial. But merely treat it as we would any other case: hold the trial, and then, at the conclusion of the trial, in review, determine whether or not there's sufficient evidence to sustain the conviction beyond a reasonable doubt to a moral certainty.

QUESTION: Well, of course, I gather so far, at least, our cases have indicated that you don't approach this on a sufficiency of the evidence basis, it's a constitutional determination, and we have a finding, to make the determination up here.

That's the way we've handled it so far, haven't we?

MR. CAPIZZI: Yes. I don't know that there is

really that much difference, however, between a --

QUESTION: Well, I think there's a considerable difference. In a negligence case you determine sufficiency of the evidence, we don't determine negligence up here. But in obscenity cases we do. It's a constitutional determination. Don't we?

MR. CAPIZZI: Well, that's true, but it's a matter of either it is or it isn't, rather than it is by degree.

QUESTION: I don't understand why, if you're going to have a civil proceeding, which is to consider the obscenity of the material for which the defendant is being prosecuted, why you shouldn't go all the way through and have a judicial determination that it is or isn't obscene. Instead of just a probable-cause determination.

MR. CAPIZZI: If there is such a civil proceeding provided for by law, that may very well be what would be necessary.

QUESTION: I thought you said California has something like that.

MR. CAPIZZI: Well, there is a determination that's made by the judge as to whether or not this matter is constitutionally protected, in the question of law. As I suggested, the question that this Court determines every time an allegedly obscene book or obscene matter is presented to it for review.

QUESTION: Well, it's just that I thought Mr. Marks --

MR. CAPIZZI: It's not --

QUESTION: -- suggested that practice is different, at least as it's carried on by some judges in California.

MR. CAPIZZI: Well, I will concede that the practice does differ among the judges, the trial judges.

QUESTION: Do you distinguish between probable cause standard and a civil preponderance of the evidence standard? Are they different in California?

Isn't, by its very nature, a probable cause or a preponderance of the evidence a balance of the probabilities; and how is that different from a probable-cause test?

MR. CAPIZZI: I'd say it's probably similar. The two --

QUESTION: They both fall short of the standard of "beyond a reasonable doubt", don't they?

MR. CAPIZZI: That's right. However, in the procedure that California follows, if we required proof beyond a reasonable doubt before we could get to a jury, we would, in effect, be denied a jury trial; and if we proved it beyond a reasonable doubt to the judge, why is a jury trial necessary? Or if he rules -- no matter how he rules, one party to the proceeding is being denied the constitutional right to a trial by jury.

So I think we have to first determine whether or

not this particular matter justifies going to trial. That's the procedure that's followed in California at the present time.

That's the procedure that was followed in this case, contrary to the suggestion propounded by Mr. Marks, there was a determination by the trial judge shortly after the arrest in this case, a determination that this was not constitutionally protected matter. That took place in May of 1969.

Mr. Marks attempted to appeal that to the appellate department of our Superior Court and the appellate department of the Superior Court concluded that the trial judge was correct and this was not constitutionally protected matter.

And it was after that decision by the appellate department of the Orange County, California, Superior Court that the decision of the L.A. Municipal Court, which is a written opinion, and relied upon by Mr. Marks, was signed.

So if there is a doctrine of res judicata or collateral estoppel, that applies in this case, the initial decision was the judge who heard the matter in this case and concluded this was not constitutionally protected material.

And the trial judge in Los Angeles County should have been bound by that determination as opposed to Orange County being bound by the later decision of the L. A. Municipal Court judge.

The case was tried, evidence was produced, and the

jury was instructed on the basis of a Statewide standard for customary limits of candor, and it was on appeal for the first time that appellant suggested that a nationwide standard should be adopted and applied. This was after he had produced evidence and concurred in instructions to the jury that a Statewide standard should be applied.

QUESTION: That's the phrase that's used in California generally in jury instructions and court opinions, that the measure is the customary limits of candor?

MR. CAPIZZI: Yes, the material must go substantially beyond applying contemporary standards, it must go substantially beyond customary limits of candor.

QUESTION: Of candor?

MR. CAPIZZI: Yes.

QUESTION: "Candor" means honesty.

MR. CAPIZZI: Honesty, frankness, purity.

QUESTION: Is that test used in other First Amendment areas in California?

MR. CAPIZZI: Yes. As to all allegedly obscene material, that's the test that is applied to determine whether or not it is --

QUESTION: But beyond obscene materials, in any other case involving a First Amendment claim, if it goes -- if it's too honest, is it illegal?

MR. CAPIZZI: No. I think it is a term that is

exclusively used for obscenity.

QUESTION: It seems to me rather an unfortunate phrase to use, that's all.

MR. CAPIZZI: Well, it's a phrase that is enacted, by statute, following decisions of this Court.

QUESTION: The more honest it is, the more unlawful it is?

MR. CAPIZZI: Well, --

QUESTION: I think that's what the word "candor" means.

MR. CAPIZZI: There are various --

QUESTION: Forthright.

MR. CAPIZZI: -- definitions, I believe, propounded by the dictionary. Purity is one of them; frankness is but one definition that is used. However, simply because someone is frank or honest does not necessarily insulate that conduct or speech.

And I think a similar area would be libel if it's done maliciously, even though it might be honest.

Let's say truthful.

I suggest that the Constitution does not require that a nationwide standard be adopted. If we're to say that the limitation of the States is through the Fourteenth Amendment, and the due process clause of the Fourteenth Amendment, the implication is that the States may deprive its

citizens of life, liberty, or property, if due process is followed or complied with. And due process in the past has not required that each State have identical laws for depriving its citizens of liberty.

The different States provide varying types of conduct as criminal, and it seems that it should be no different for each State to have a slightly different definition as to what constitutes obscenity than it is to have a slightly different definition as to what constitutes burglary or any other crime.

QUESTION: I don't know that anybody has made a claim that burglary is protected by the First Amendment.

MR. CAPIZZI: No, but it involves conduct, and it involves freedom of action. If each State must have an identical definition as to what constitutes obscenity, how can we avoid the conclusion that the definition of any crime must be the same from State to State? Because, in obscenity, we're talking about the freedom of speech; in any other criminal conduct we're talking about freedom of action. And I suggest that freedom of action is likewise a very, very basic concept.

QUESTION: Well, one's in the First Amendment and the other isn't.

MR. CAPIZZI: The other is in the --

QUESTION: There's nothing in the Constitution that

says you have freedom to steal or commit burglary or murder or --

MR. CAPIZZI: No, but freedom --

QUESTION: -- mayhem or assault and battery. But there is something that says you have the right of free expression and free speech.

MR. CAPIZZI: No, but freedom to do what we wish, and the States proscribe certain conduct as not being permissible. Likewise, from State to State, if we're talking about he due process clause of the Fourteenth Amendment, should we not have different definitions as to what constitutes obscenity?

The fact that -- well, in addition to the constitutional argument, I suggest that practicality suggests that a nationwide standard is simply not possible.

In Denver, dancers wear pasties and G-strings. In Southern California, they wear nothing. What is the standard?

Or, to further illustrate it, let's assume for the sake of the illustration that east of the Mississippi the dancers wear pasties. West of the Mississippi, they don't wear pasties. What is the national community standard for limits of candor?

How are we going to average or determine something that's not subject to determination?

From a practical point of view, it would be very

easy for the appellant in this case to determine the standard in the various localities. Much easier than it would be for him to determine the standard on a nationwide basis. The whole is made up of the parts, and while the parts may be readily identified, simply by identifying the parts you can't necessarily arrive at a description as to what the whole is.

If we were to adopt something that was acceptable to the nation as a whole, we would probably have something akin to what we see on TV, something that's acceptable for dissemination indiscriminately into any home and to anyone who might see it. Which is, in effect, what we have in this case. It was mailed, unsolicited, into the home where anyone within the home might open it and see it.

Thirdly, I would suggest, with relation to the earlier comments, that judges, in determining obscenity matter in the constitutional sense, are determining a question of law. And the local judges are not capable of determining what the national standard for limits of candor is.

How are they going to determine what the limits of candor, nationwide, are? Experts? Experts might be fine for the trial judge, but if we have conflicting experts, how is the appellate judge to resolve the conflict?

The basic principle that the trier of fact can determine credibility because he views the witness is absent

when the appellate judge is looking at the cold record.

Further, as attorneys and judges, I think it's easy for us to accept the proposition that speech acceptable in one location is not acceptable at another. We describe things one way in the office to contemporaries, partners, and associates, which description, if used in court, would probably subject us to contempt. Why?

If location is not important, why can't we speak the same way in the courtroom that we can speak in the office?

I think obviously that in that situation we recognize that the limits of candor, honesty, frankness, differs from place to place. Because we have two different communities in effect, the office and the courtroom.

And the same is true from city to city, county to county, --

QUESTION: You mean you're less candid in the court than you are in the office?

[Laughter.]

MR. CAPIZZI: Well, no, Mr. Justice Marshall, but we use different terms sometimes to describe the same thing in court than we do in chambers, in the office, or sometimes out of court. And I think the reason is not simply a question of honesty, because both descriptions are honest and frank and describe the same thing. But it's the language that's used that's acceptable in one location and not acceptable in

another location.

The test then, as submitted, that the States are free to adopt whichever community they choose, whether it be local, State, or national, for determining customary limits of candor. In this case the State chose the Statewide community, and it's submitted that the evidence amply established that that community was -- the standard for that community was exceeded, the evidence amply established that the material predominantly appealed to a prurient interest, and although Mr. Marks says he hasn't seen a case since Ginzburg that involved pandering, I would suggest that this case itself may very well involve pandering.

These were brochures containing a number of scenes from the book they purported to advertise and very little of the text of the book is there, only the most graphic depictions of sexual activity,selling predominantly the prurient appeal of the books as opposed to whatever social value they may or may not have.

QUESTION: Mr. Capizzi, did I understand you to say that in California you attempt to apply a State standard?

MR. CAPIZZI: That's correct, yes.

QUESTION: How is that any more easily applied than a national standard?

MR. CAPIZZI: It's not, I would concede. It's extremely difficult to establish. In adopting the Statewide

standard, the State court said that an expert must be used to establish what that standard is, or to assist the trier of fact in determining that standard.

QUESTION: I suppose a jury, however it's instructed, is going to apply what it regards as a standard,to wit, a local standard, isn't it?

MR. CAPIZZI: It's possible, although they're administered an oath and asked to follow the law, and presumably they do follow the law.

QUESTION: In any event, you are conceding that what might be the standard in a northern California county might not coincide with the standard in Los Angeles?

MR. CAPIZZI: Oh, most definitely. Yes.

QUESTION: Well, you're in effect stuck with what the Supreme Court of California is going to rule on that point.

MR. CAPIZZI: That's correct.

I'm suggesting that the Constitution does not make that standard impermissible, and the Constitution would likewise permit of a local standard if the law of that State indicated a local standard.

In other words, the State itself is free to adopt the standard which it sees fit, and neither of the three standards, local, State, or national, violate the Constitution as applied to the States through the Fourteenth Amendment.

QUESTION: Going back to Mr. Justice Blackmun's

question to you about the jury acting independently, isn't the jury permitted to credit or discredit any evidence that it wants to?

MR. CAPIZZI: Most definitely.

QUESTION: And particularly isn't that true about expert testimony?

MR. CAPIZZI: That's correct. Most definitely. Simply because the expert testifies doesn't mean the jury has to accept that which he relates to them, if he disbelieves that witness.

But, responding further to the question, the State-wide standard is difficult to determine or to prove or to provide experts on. Extremely difficult. A nationwide standard, requiring experts to establish, would be virtually impossible to do. Especially in view of --

QUESTION: Have the courts undertaken to define Statewide standards of what constitutes negligence or reasonable care? Or do they leave that to juries on a case-by-case basis?

MR. CAPIZZI: I believe that's left to the juries on a case-by-case basis, yes, Mr. Chief Justice.

QUESTION: Would it be fair to say that it's possible to have one type of a verdict in Northern California in a homicide case and a different type of verdict on substantially the same evidence in some other part of California?

MR. CAPIZZI: No question about it. Yes.

QUESTION: That's the nature of the jury system, isn't it?

MR. CAPIZZI: That's the nature of the system; that's correct.

Further, with respect to the third element that's required in California by statute, and that's the issue of utterly without redeeming social importance, I would like to emphasize the redeeming aspect of social importance and ask that that not be treated lightly or dropped from the full phrase. It seems to be glossed over on occasion or completely eliminated. But if the phrase is to have meaning, then the redeeming aspect of utterly without redeeming social importance must be emphasized.

Everything, as suggested by Justice White, has some value to society, whether we learn from it, hopefully, and if that is the test, strictly social importance or social value, then nothing is going to be obscene. But we must have -- it must be utterly without redeeming social importance.

We would ask that the Court reject the necessity of determining obscenity in the constitutional sense on a piece-by-piece basis, and adopt a sufficiency of the evidence test as applied in other cases.

No matter which test is adopted, it's submitted that the material in this case is patently offensive and substan-

tially exceeds any conceivable standard or limits of candor. And for that reason we would submit the judgment should be affirmed.

Thank you.

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

Mr. Marks, do you have anything further? You have two minutes left.

REBUTTAL ARGUMENT OF BURTON MARKS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MARKS: Very briefly. Thank you, Mr. Chief Justice.

I say this: I may have some disagreement as to whether probable cause hearing is different from a preponderance of the evidence hearing, and I personally feel that Chapman vs. California would militate or necessitate a beyond a reasonable doubt hearing.

But that's not the point. The point is: give us a hearing, and let us work it out. That's what happened before.

Give us a hearing, let the person have his chance in court, not in a criminal prosecution which was never meant to apply to a First Amendment case.

QUESTION: As I understand it, though, you're not talking about "giving us a hearing", in your words, with respect to the precise material involved in any particular

case, but sort of generically, with respect to material generically. Is that right?

MR. MARKS: Give us a hearing which will bind the States, so that they can't continue to harass and prosecute for the same type of material --

QUESTION: The same type of material, not the same material?

MR. MARKS: No, the same type.

QUESTION: And that's where one --

QUESTION: Who is going to decide whether it's the same type?

QUESTION: Exactly.

MR. MARKS: Well, somebody knows it when they see it, and you can look at it and there's no question.

QUESTION: Isn't that what you're doing now, jury by jury?

MR. MARKS: If you are doing it jury by jury, you're doing it on a proposition that one type of material has already been declared to be protected, and you can't even bring that type of evidence in some cases before a jury or before a judge to estop.

QUESTION: But are you saying any more than that in some courts, before some juries, a verdict might be manslaughter, that on the same evidence might be second-degree murder. Is that -- I take it, as a lawyer, you'd acknowledge

that that does happen?

MR. MARKS: Oh, that has happened, but that isn't what I'm saying.

Perhaps what I'm saying is that the defendant has to have a chance to know before he can be put before the jury and made to do something. And the State should give the opportunity and they should be forced to produce the evidence by an impartial State, not the police officer testifying as the expert, but impartial evidence before an impartial judge. That's what we want.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:00 o'clock, a.m., the case in the above-entitled matter was submitted.]

am

MR. CHIEF JUSTICE BURGER: Senator Kuchel, I overlooked thanking you, as we did once before, for your willingness to accept the designation in this case and to appear and argue it and for your assistance to the Court.

MR. KUCHEL: Thank you, Mr. Chief Justice, I was highly honored to receive the invitation.

- - -