In the

# Supreme Court of the United States



SAUL HELLER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

No. 71-1043

Washington, D. C.
November 14, 1972

Pages 1 thru 55





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IN THE SUPREME COURT OF THE UNITED STATES

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| SAUL HELLER, Petitioner, | : | |
| v. | : | No. 71-1043 |
| THE PEOPLE OF THE STATE OF NEW YORK, Respondent. | : | |

Washington, D. C.
Tuesday, November 14, 1972

The above-entitled matter came on for argument at 1:01 o'clock p.m.

BEFORE:

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

APPEARANCES:

IRVING ANOLIK, ESQ., 225 Broadway, New York, New York 10007, for the Petitioner.

LEWIS R. FRIEDMAN, Assistant District Attorney, 155 Leonard Street, New York, New York 10013, for the Respondent.

# C O N T E N T S


| ORAL ARGUMENT OF: | PAGE |
|---|---|
| Irving Anolik, Esq., For the Petitioner. | 3 |
| Lewis R. Friedman, Esq., For the Respondent. | 29 |


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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1043, Heller against New York.

Mr. Anolik.

ORAL ARGUMENT OF IRVING ANOLIK, ESQ.,

ON BEHALF OF THE PETITIONER

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

In this case, Your Honors, just to orient the Court briefly, on July 29, 1969, Inspector Smyth went to the Garrick Theatre in Greenwich Village and saw a movie, which is the subject of litigation before this Court, "Blue Movie," and apparently felt it was obscene. He then communicated with the prosecutor's office. And on July 31, 1969, together with Judge Arthur Goldberg, no relation to any judge of this Court, he returned to the theatre, and Judge Goldberg and Inspector Smyth saw the film again.

At that point, after the film was completed on the 31st of July, Judge Goldberg forthwith signed a search and seizure order, without a hearing of any sort whatsoever, and also issued warrants for the arrests of Mr. Heller, petitioner here, and two other employees of the theatre. As it turned out, of course, two of the three arrests should never have occurred, because before the beginning of trial by concession of the District Attorney, those two arrests--

those two individuals were dismissed in the case, because they should never have been arrested.

The issue as to whether or not there should have been an adversary hearing is preserved in this record. It is the position of the petitioner that in a First Amendment situation that we have here, the general rule appertaining to search and seizure cannot be followed, that an adversary hearing is essential to protect vital First and Fourteenth Amendment rights.

Q You mean an adversary hearing to determine obscenity vel non?

MR. ANOLIK: That is right.

Q Not just probable cause.

MR. ANOLIK: No. To determine obscenity vel non. That is correct.

Because first of all, we do not have a clear and present danger here as we might if a person possessed munitions or narcotics, something of that sort. Indeed, we know from various cases and even from the history of this case before the New York courts, that there was sharp disagreement as to whether this film was even obscene, and we do not, unlike the prior case, do not for a moment concede that this was obscene. In fact, we do not think it was. And indeed in the intermediate appellate court, the Appellate Term of the Supreme Court, the decision was two to one, with

Justice Markowitz dissenting, and the New York Court of Appeals, the Chief Judge and another judge dissented and held or said that the film was not obscene. So, we have a real sharp issue as to obscenity, but I want to pass to what I consider to be an even more paramount issue.

The problem that we face here is that once this film was seized and the print taken--

Q Was it the only print?

MR. ANOLIK: Yes, the only print.

Q Does that appear clearly in the record?

MR. ANOLIK: No, it does not. It does not appear clearly in the record.

Q Then how do you assume it?

MR. ANOLIK: I can only say you asked a question and it has been told to me. The District Attorney has taken the liberty toward the end of his brief to go outside the record to tell you what his experience has been with respect to subpoenas, and I ask this Court to accept it or reject it.

Q Like the picture in the previous case, is this also showing in Washington?

MR. ANOLIK: I really do not know. I really do not know. However, let us assume, Justice Brennan, that arguendo it is the only print, because I do not want to go--

Q You do not think that makes a difference?

MR. ANOLIK: It makes a difference--no, I do not

think it makes a difference at all.

Q The only print what, that is in existence?

MR. ANOLIK: Apparently the only one in existence.

Q Could there not be another question whether there is more than one print that might be available to this man?

MR. ANOLIK: Apparently there was no other available to this man, but we have an overriding problem here.

Q Is that clear in the record?

MR. ANOLIK: No, it is not clear in the record. I am asking the Court to assume arguendo, however, that that is the--

Q You appreciate why we are asking those questions. You recall in both A Quantity of Books and Marcus the end result there was to take everything right out of circulation.

MR. ANOLIK: I know that. However, we maintain that the seizure of a film must be equated with the seizure of a mass quantity of books.

Q Why, if there is another film available?

MR. ANOLIK: Let us assume there is another film available, Justice White. The deterrent effect of an immediate arrest for showing that other film casts a chilling effect and an impossible burden.

Q Marcus and Quantity did not hold that the man could not be arrested right then.

MR. ANOLIK: I realize that.

Q That issue has been up many times.

MR. ANOLIK: I realize that.

Q Why is there any more chilling effect in connection with movies?

MR. ANOLIK: Because of the fact that movies can be shown to a large audience. In other words, it is the size of the audience that must be the criterion and not the item. The District Attorney, indeed, in his brief says on page 35 that this Court should consider the seizure of a film equated to the seizure of one book, and we do not subscribe to that and indeed the--

Q And yet you would not even have to argue if the record showed that actually this was the only print in existence.

MR. ANOLIK: Unfortunately that was never actually developed in the record. I did not try the case. It was not actually developed in the record, Justice Brennan. But to say that another print of the film is available I think actually begs the issue here, because it is the adversary proceeding, the adversary hearing, that we are addressing ourselves to at this time, and we think that is a very important issue and we are leaving aside for the time being

whether or not it is even obscene.

Q If this were in fact the only copy of this film in existence, would that not be such a unique proposition that it would have been made the subject of some inquiry at the trial?

MR. ANOLIK: Perhaps it would, Mr. Chief Justice.

Q Are there very many films of which there is only one copy in this area?

MR. ANOLIK: No. I would say that it is quite unusual for a film to be produced where there is only one print. That is quite unusual.

Q Is this the kind of film that--

MR. ANOLIK: This is a low-budget--

Q I mean, does it run the ordinary booking procedures?

MR. ANOLIK: As far as I know, it was shown in only one theatre in New York. This was not syndicated through a number of theatres. It was only at the Garrick Theatre that this was being shown. Apparently it was a low-budget picture. The quality of the film is not even good. I think that is conceded in the record.

Q Is this a Warhol?

MR. ANOLIK: It is a Warhol film, but it is not like some of his others which are being syndicated around town, such as "Heat" and things of that sort. This is a

different type and this was apparently issued through a corporation of which he was one of the owners of the stock.

Q There would not be much profit in it if there were only one copy, would there?

MR. ANOLIK: There probably would not be. There may have been copies on the West Coast; that is a possibility. That is a possibility. But, nonetheless, the seizure here amounted to what we considered to be a violation of the First Amendment. The problem that arises, of course, is that the film itself is seized, and it is true that the District Attorney argues that a motion to suppress can be promptly made. But he casts a burden the defendant to make such a motion and says that were the burden otherwise--in other words, if an adversary hearing had to be held before you could see the film, then a defendant could delay such an adversary hearing and delay justice. But you can turn that right around. The District Attorney asked this Court to assume that the District Attorney or other prosecutor would never delay such a proceeding. That is not at all evident. We are not dealing with New York County alone. We are dealing with an overriding consideration here. There could be delay on the part of a prosecutor. But more important than that, when we deal with the First Amendment situation such as this where we have a theatre with 299 seats--and this, incidentally, is a closed theatre, this is not a theatre such as in Rabe

or in the Roaden case where maybe you can see something from the road. Mr. Heller, who testified--who happens to be an attorney, incidentally--testified that there was a sign in the lobby of the theatre that the film was marked "X," that no one under 17 would be admitted and indeed he said they, including him, enforce the rule that no one apparently under 18 was admitted. There was no complaint received by any member of the public. This was a situation where the police apparently protecting some unknown and anonymous person or arrogating to themselves the right of censorship over a film decided to look at films and "We're going to seize this film." That's about the size of it.

And we maintain that the problem of not holding the adversary hearing in essence means that the prosecutor can arrogate to himself the right to seize film and to put the theatre out of business, because most theatres book films let us say for three, four days, a week or so. It is not that easy once the film is seized suddenly as happened here, to suddenly get another replacement film. It is quite difficult, in fact. The arrest of the personnel is quite a traumatic effect as indeed two of the three arrests here should not even have occurred. And the net result is that not only do you have an economic loss to the owner of the film, but you have a tremendous economic loss to the movie house, the exhibitor.

Let us consider the situation where a prosecutor perhaps not as liberal as some decides that a particular movie is offensive. That prosecutor, if he follows the procedure here, can hand pick a judge--and, incidentally, there is nothing in the record here one way or the other as to how Judge Goldberg was chosen to come down to court. So, we have a right at least to speculate that maybe this judge was hand picked, brought down, and he issued this forthwith warrant.

If Judge Markowitz, for example, who dissented in the Appellate Term, had been used as the magistrate, there would not have been a seizure, there would not have been an arrest. Indeed, this case might not even have been up here. So, we have that dangerous situation in a First Amendment case, whereby the District Attorney can decide, perhaps subject to certain ethics of course--and we do not maintain that all prosecutors necessarily have the ethics of the New York County District Attorney's Office. But the fact remains that the magistrate came down there and forthwith issued this search and seizure order and arrest order.

Q Do you know whether that is a standard procedure?

MR. ANOLIK: I understand that since this situation has occurred and in view of Bethune Amusement Park in the Second Circuit and Astro Films in the Second Circuit and,

indeed, decisions in the Sixth Circuit Court of Appeals, I believe the procedure in New York County is that they do get adversary hearings now, apparently recognizing it is a serious question as to whether they should or should not. This is the case which apparently would crystallize whether or not they should continue doing it, but I am sure Mr. Friedman will be able to speak more authoritatively as to what the actual procedure is.

But, be that as it may, in the brief of the District Attorney he says that Judge Goldberg and Inspector Smyth did not see or do not recall seeing signs that this was restricted to people over 17 years of age and that the film was marked "X." Mr. Heller testified under oath that that was in fact the case, and there is nothing to contradict that in the record. Merely the fact they did not recall seeing it certainly is not contradiction.

Q Is there testimony in the record of Judge Goldberg and Inspector Smyth or is that just in the brief?

MR. ANOLIK: That is in the record.

Q It is in the record.

MR. ANOLIK: Judge Goldberg testified and so did Inspector Smyth testify. As a matter of fact, Justice Rehnquist, there was an attempt to cross-examine Judge Goldberg as to what criteria he used to determine why this was obscene and, indeed, perhaps to determine if he was

even familiar with the standards laid down by this Court in Roth and other cases. Because I do not think we have a right to assume that lower court judges necessarily are always conversant with the standards laid down by this Court. In an adversary hearing, at least these matters could be called to the attention of these jurists to determine are you in fact judging this seizure by the standards set down by the Supreme Court of the United States or some visceral reaction that you are motivated by.

Q Your concept of an adversary hearing then would be where the counsel for the defendant would have a right to cross-examine the magistrate?

MR. ANOLIK: At least to cross-examine the complainant, be he a magistrate or Inspector Smyth.

Q I take it that Judge Goldberg here was not a complainant; he was basically in the position of--

MR.ANOLIK: He was the magistrate who issued the search warrant; that is correct.

Q You are saying that in your concept of an adversary hearing, defense counsel would have a right to cross-examine someone sitting in Judge Goldberg's position?

MR. ANOLIK: No. I would say that the party at least who is in the role of the complainant--the problem with this case, Justice Rehnquist, is that Judge Goldberg became a prosecution witness, so to speak, in this case, saying that

he determined that the film was obscene. And to that extent, having become a witness at the trial, counsel at least tried to determine what standards he had applied, and they did not permit cross-examination as to that question.

I am not saying that necessarily in all cases I would say that where a detached impartial magistrate issues a search warrant that you have a right to cross-examine him as to why he did it. If I am interpreted as saying that, I did not mean to imply that, Justice Rehnquist. I am saying that at least as a complaint in this case, Inspector Smyth--at least to that extent,cross-examination at least should be permitted and an opportunity to call to the attention of the magistrate the precedent and the holdings of this Court and perhaps the courts of New York as to what the definition of community standards are, what the definition of obscenity is, under the Roth test and other tests. That at least should have been permitted and ought to be permitted in any First Amendment situation case. That is our position.

Q Is a copy of the search warrant in the Appendix here? I do not seem to be able to find it.

MR. ANOLIK: I thought it was reproduced.

Q Perhaps it is. I was wondering what Judge Goldberg did find. He did not find that this movie was obscene as a matter of fact. What did he recite, that there was probable cause to believe that--

MR. ANOLIK: That if it would follow the usual search warrant situation, it would say probable cause to believe that a search warrant should issue, and he applied a Fourth Amendment standard to a search and seizure situation. That is what would obtain here. And that is the situation which no doubt motivated Judge Goldberg. We maintain that a Fourth Amendment standard may not be applied in First Amendment situations such as this.

Q Mr. Anolik, when you talk about adversary hearing, what do you conceive this to be? I gather that certainly one element has to be that there has to be a judicial determination that the film is or is not obscene.

MR. ANOLIK: That is correct.

Q And for that purpose, what kinds of proof would the city have to adduce and what kind of proofs and defense would you adduce? Would this be a full-scale trial?

MR. ANOLIK: It would certainly be a full-scale hearing.

Q I asked full-scale trial.

MR. ANOLIK: Oh, yes.

Q When you are talking about a determination vel non, I suppose nothing short of that would suffice, would it?

MR. ANOLIK: I would say not.

Q What does that mean, that you could introduce

all kinds of expert testimony bearing on--

MR. ANOLIK: Yes.

Q And the city would have to have also--this is the city, is it?

MR. ANOLIK: This is the State of New York, Your Honor, for the County of New York.

Q The state would have the burden of proving obscenity in the first instance?

MR. ANOLIK: That is correct.

Q And by what, preponderance?

MR. ANOLIK: I would say they would have to prove it by the standard appertainable to a criminal prosecution.

Q Beyond a reasonable doubt?

MR. ANOLIK: That is right. Beyond a reasonable doubt. I do not think preponderance--

Q You mean that because the object of seizing the film is to get evidence to support a criminal prosecution?

MR. ANOLIK: The object of seizing the film here is to in effect take the film away, out of the possession of the individual. While it is true that is evidence, we maintain they must proceed by subpoena, and of course with a subpoena you can make a motion to quash a subpoena. But in a First Amendment situation, we would ask for nothing less than a full adversary hearing.

Q I understand that. I am interested in why

you suggest it has to be beyond a reasonable doubt. Is it that it is connected with a possible criminal prosecution or even if it is not, you would still say it had to be beyond a reasonable doubt?

MR. ANOLIK. No. If it is an innunction, then I would say a preponderance of the credible evidence might be sufficient.

Q What you are saying is that there must be a full-scale adversary criminal trial to determine whether there should be a full-scale adversary criminal trial.

MR. ANOLIK: I would say that the standard that you would use--

Q Is that not what you are arguing?

MR. ANOLIK: In effect, I would say, although it seems to be rather tautological to say that, I would say in effect that would have to be our position.

Q There is no escape from it, is there, on your position? You want a trial to see whether there should be a trial.

MR. ANOLIK: I would say that perhaps we could use a different standard, because as I understand it, a standard as to, for example, a fair preponderance might be sufficient to see that at least some gross miscarriage of justice has not occurred.

Q Then you are backing away from your response

to Justice Brennan.

MR. ANOLIK: I would be prepared, as I say, to at least reanalyze the standard of proof in view of the way you have set the question, Mr. Chief Justice. I would be willing to at least see--

Q Do not let my questions mislead you. I just want to hear your answers.

MR. ANOLIK: It is my position, as I say, that nothing less than a full adversary hearing where proof beyond a reasonable doubt is obtained should be had.

Q I take it that if the tryer applied the beyond-a-reasonable-doubt standard and determined obscenity and then a criminal prosecution ensued, you would still insist the state had over again in the criminal trial to prove obscenity beyond a reasonable doubt.

MR. ANOLIK: I would say that, of course, would seem to be a situation where you would have a jury trial perhaps on a different scale, because there you would be trying an individual.

Q The standard for the decision of the jury would have to be obscenity beyond a reasonable doubt, would it not?

MR. ANOLIK: Yes, but the point is in the one case you are judging the film itself. In the other case you are judging whether he promoted obscenity. It is a little bit different standard there, because at Section 235.05 it deals

with promoting obscenity. So, it is a little bit different standard that we are dealing with.

Q Mr. Anolik, assuming that they follow this procedure and they seize the man who is shoing the film, who is the owner and he is also the operator, and you have this full-adversary hearing and you lose there and you have a second trial--you have the trial--and you waive the jury, please tell me the difference between the first hearing and the second.

MR. ANOLIK: The first hearing would determine whether the film itself--

Q I am talking about what happens.

MR. ANOLIK: What happens? In the first hearing there would be a determination as to whether the film itself is obscene under appropriate community standards.

Q In my case there is no question that the man showed it.

MR. ANOLIK: That he showed the film? Oh, no doubt about that.

Q In the second case what other evidence would you put in that he showed the film?

MR. ANOLIK: No, no, I think that we---

Q What else would you put in?

MR.ANOLIK: I think you would have to show that he had knowledge and intent.

Q To do what?

MR. ANOLIK: To show an obscene film. In other words, we maintain that there is at the basis of a criminal statute at least that degree of due process which would require the state to establish that this man knowingly and willfully--

Q The state showed they went in the place and they found the man up in the place in the projection room running the camera and they also saw him picking up the money and there was nobody there but him. Now, what else do you have to show?

MR. ANOLIK: I think you would have to show some intent.

Q How?

MR. ANOLIK: That, for example, this man in good faith believed this was not an obscene film because--

Q He has already testified at the other hearing.

MR. ANOLIK: He has testified, that is right. But he was not the subject of the other hearing.

Q Oh, he was not.

MR. ANOLIK: We maintain that it is the film itself which is the criterion of the other hearing.

Q Suppose in my hypothetical they start this adversary hearing the day after the picture is shown,

adversary hearing, and the other hypothetical is they start his trial on the merits the day after the hearing, the difference being what?

MR. ANOLIK: The difference being that in the one case--

Q I mean practical difference.

MR. ANOLIK: Yes. In the one case we are testing out whether or not the film itself should have been seized, whether or not it is in fact obscene. Let us assume the court then decides that contrary to the position of the defendant, that they hold that the film was obscene. The issue then is, Did he promote--if he pleads not guilty, it may be that he was found in the projection room, it may be that he was found taking money, but that would not automatically presume him guilty. Having pled not guilty, he would be entitled to a trial as to his own role.

Q What I am worried about, is this not just like some narcotics cases when you as defense counsel lose the motion to suppress, you lose your case?

MR. ANOLIK: No, I would not think so. Because in narcotics cases, there again there has to be some element of criminal intent and knowledge, because frequently a person found in possession of heroin and there is a chemical analysis and there is absolutely no doubt that the matter is heroin and that he was found with it and he sold to an agent;

that does not mean he is not entitled to a trial on the merits.

Q As a practical effect.

MR. ANOLIK: As a practical effect? I'll say this, that I have seen cases, Justice Marshall, where there have been disagreements or acquittals of defendants, notwithstanding the fact that in a motion to suppress they lost the case cold.

Q I would not push you to number them.

MR. ANOLIK: No, there are not too many of those. I would have to agree, there are not too many of those because you were taking the narcotics field. But why do we not take some other situation where we are not dealing with anything as dramatic as narcotics, where we are dealing with something, perhaps the possession of an unloaded gun or the possession, for example, of material--

Q I limited mine to that because I do not think the others apply. I am unconvinced of the difference between these two. I am only limiting my questions to, Do you insist that they be beyond a reasonable doubt?

MR. ANOLIK: Your Honor, as I said, if you noted, I was willing to backtrack a little bit on that aspect. I would say that I perhaps should adopt a standard of a fair preponderance for that purpose and insist upon beyond reasonable doubt for the purpose of trial. As I say, upon analysis, Justice Marshall--and if you would give me an opportunity perhaps to amend my rather adamant position

previously, that perhaps upon reflection a preponderance test should be used in the initial hearing and reasonable doubt in the trial proper. That would be perhaps a more reasonable situation. But an adversary hearing, however, of some sort must of necessity be held, we maintain, to protect a First Amendment right.

Q Mr. Anolik, how do you visualize this adversary hearing? The movie would have to be there, would it not?

MR. ANOLIK: The movie would have to be there, but the point is this: It should not be in the possession of the District Attorney, because let us say that we won the suppression hearing; they said it should not have been seized. Under New York law, the District Attorney could appeal that and retain possession of the property until it goes through the appellate process. He is not required to return that film, because that is true in all search and seizure cases. The District Attorney can appeal forthwith if he says he cannot proceed with the case. And, therefore, he retains possession of that until it goes through the full appellate process. We do not have a concomitant right of appeal if the suppression is not granted, because we would have to either plead guilty and then appeal or else we have to go through a full trial and then appeal from a judgment of conviction before we could appeal that question.

Q That brings me back to my question. How do you visualize that the prior adversary hearing would work? Would there be a subpoena first?

MR. ANOLIK: Yes, a subpoena. And we maintain the subpoena is perfectly all right because there is a contempt power behind it.

Q A subpoena duces tecum.

MR. ANOLIK: That is correct, for the film.

Q To the theatre owner.

MR. ANOLIK: That is right.

Q To produce the film, and that immediately would take the film away from the projection booth and deprive all these people of their First Amendment rights to see it.

MR. ANOLIK: Just for one day, not for weeks or months or years, just the one day, just for the purpose of showing it, and it is immediately returned.

Q You are suggesting that the hearing has to be within a matter of hours after the subpoena?

MR. ANOLIK: They would have to schedule a showing under subpoena. You are to bring the subpoena at 10:00 a.m. on Monday or whatever it might be for the purpose of showing it to the court. They bring it there at that time, they show it to the court, and they take it right back to the theatre.

Q Then when you come to the day of trial, how is the state going to meet its burden of proof of showing that

the film brought it at the trial is the same film they had at the preliminary--

MR. ANOLIK: Mr. Chief Justice, that is true of any situation where you have subpoenaed records. As I understand it, subpoena does not entitle--

Q You can make copies; you can do a lot of things.

MR. ANOLIK: It is not that easy. It has to be taken to particular labs; exhibitors do not have the facilities to do that. And also why should we imply bad faith on the part of any citizen without proof of that? Why is it that the District Attorney can do no wrong? The District Attorney might doctor it up, for all we know, if he has it in his possession. Why should we assume that he would not do that? I mean, if this is custodia legis in the hands of an individual, it is his property, why should he be deprived of it?

Q I suppose there could be ancillary restraints on its return against tampering with it and so forth.

MR. ANOLIK: Absolutely.

Q Which would subject the exhibitor to contempt--

MR. ANOLIK: Not only contempt, perhaps forgery prosecution, of offering a forged document. I mean, I think there are a lot of inhibitions that can be done. Six Circuit Courts of Appeal have held that adversary hearings should be held.

Q I have not quite finished my question. Your submission is that there be a subpoena and that the Constitution requires that the hearing be very, very prompt after the theatre owner shows up in response to the subpoena duces tecum--

MR. ANOLIK: That is correct, right.

Q --and then let us assume that the magistrate, after the adversary hearing, finds that this probably is or this prosecution has sustained its burden of proving by a preponderance of the evidence that this is obscene, and then what happens?

MR. ANOLIK: Then, it is true, he is going to be deprived of his film. He is going to be deprived of his film.

Q I would have thought you would say that the Constitution requires that nonetheless the film be returned to the theatre until or unless there has been a criminal conviction.

MR. ANOLIK: I am sorry. Did you say before the criminal conviction? I misunderstood your question.

Q I am talking about this adversary hearing that you say the Constitution requires. I am trying to find out what it is from you.

MR. ANOLIK: If it is only after the adversary hearing, they would have to wait for a conviction on the

merits, we would maintain, before that was done.

Q So, although there is a finding by the magistrate that the preponderance of the evidence shows that this is an obscene film, then you say that after such a finding the Constitution requires the film be returned to the theatre.

MR. ANOLIK: Your Honor, we would have to say, to take a consistent position, that until there is a finding of guilt by a court, that the film, it being a First Amendment property right we are dealing with, should not be seized at all. We do not believe that a clear and present danger situation requires that it be seized.

Q All these cases and these briefs talk about an adversary hearing, and I have a very great deal of trouble visualizing what--

MR. ANOLIK: We would use a standard of a fair preponderance of credible evidence.

Q Then there is a finding that by a fair preponderance of the evidence the film is obscene. Then you say the Constitution then requires the film be returned to the theatre?

MR. ANOLIK: That is correct.

Q Immediately or very promptly.

MR. ANOLIK: As promptly as possible.

Q And then if the case comes to trial, then

what happens?

MR. ANOLIK: Again through subpoena it is displayed to the court and until there is a finding of guilty, it should not be seized.

Q It is subpoenaed, though, and then displayed to the finder of the fact, the jury or the trial judge.

MR. ANOLIK: That is correct.

Q And then, assuming it is a criminal trial, the man may be punished but the film never does get seized, does it?

MR. ANOLIK: Eventually, if it is deemed to be obscene after a trial on the merits, beyond a reasonable doubt, then I presume they could seize it because technically it would be contraband. It would technically be contraband at that point.

Q Mr. Anolik, suppose it were feasible for a copy of the film to be reproduced promptly, say by an independent lab under circumstances that would assure that there was no tampering with the film and that your client therefore could have the original back in 24 hours, say. Would that satisfy your First Amendment position?

MR. ANOLIK: I would say so. You mean, like a videotape or something of the film?

Q Yes.

MR. ANOLIK: Yes, that would probably satisfy it.

Q This would avoid having the duplicate trials that you were discussing.

MR. ANOLIK: That is correct.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Friedman.

ORAL ARGUMENT OF LEWIS R. FRIEDMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The state has, as this Court has held many times, a valid important interest in the prosecution of obscenity and in the enforcement of the obscenity laws. And that is a state interest which may be vindicated in any number of ways. The state has a number of alternatives open to it. And the Court has also held that if there is an important governmental interest which might incidentally limit protected speech, that the Court must weigh the interest of the state on one hand and the procedures used so that the incidental effect can be minimized, and that it is this type of balance that must be decided in any given situation. And what have we here?

We have here a situation where the state has chosen to use its penal statutes, its penal provisions, which impose a penalty for the prior showing of the film. That is, they do not aim at the future showing but only at the showing

that occurred at some point in the past, at some act defendant has already performed. And in the course of enforcing this valid state interest of imposing the penalty for the past showing, the state of necessity must have evidence. And in order to obtain evidence, there are two choices at this stage. The state, in the case of a film, must have--can have testimony of someone who has seen the film and testifies to its contents, or it can have the film. If a person who has seen the film tries to testify, the problems of proof are in many cases overwhelming, and I believe that as the summary of evidence which we have given in our brief indicates, any testimony concerning "Blue Movie" would have been very hard to discern by the trial of the fact. It is a type of movie which can be seen in its entirety--I am sorry, which must be seen in its entirety--as the only way to ascertain what this movie is. The description is very difficult to do and even counsel with a great deal of leisure have had difficulty attempting to summarize it in any useful form.

Given this problem, why should the state be relegated to less than the best available probative evidence of a crime? Why must the state rely on secondary evidence, which is really in a case of this sort worthless. Because in this case, I would submit, that a finder of fact would have had an almost impossible task in figuring out what "Blue Movie"

was about.

They say the state has chosen the penal sanction, and I mention that because that distinguishes in large part many of the prior cases in this Court where states have tried a civil injunctive remedy--that is, where the state has attempted to prevent future showings. What we are doing here is enforcing our right against past showings. It is true--

Q You did take the film out of circulation.

MR. FRIEDMAN: Your Honor, the film did not have to be withdrawn from circulation in order to--

Q You seized it, did you not?

MR. FRIEDMAN: We did seize the film and in partial answer of a question Mr. Justice Marshall had asked before, the film is currently in this Court's custody actually. It was delivered to the Court by the District Attorney. We still have the film.

Q Would it not have been enough for your purposes to subpoena it for the trial?

MR. FRIEDMAN: Your Honor, the subpoena route is not as simple, I submit, as has been suggested by my adversary. The subpoena rule has raised many serious Fifth Amendment problems where the prospective defendant is subpoenaed to produce a document in his possession, which is incriminating. And, as a practical matter, we have been subjected to collateral proceedings every time we ever tried

the subpoena route.

Q By the time of the trial, the film would have finished its showing and been out of the jurisdiction anyway.

MR. FRIEDMAN: That is correct. And I think the contempt power is not a very effective one, for this reason. As has been mentioned several times here, films are on a schedule of circulation. And if the current distributor has a contract right which limits his right to possession to a very limited period of time, he may well have a defense to any contempt procedure.

Q Ordinarily does he get more than one print?

MR. FRIEDMAN: The individual distributor generally would have one print, although--

Q Is that the sort of distribution method this film was subject to?

MR. FRIEDMAN: Your Honor, I presume that each person who had this film had one print in his possession. The record does not tell us. But that more than one print exists I think is just facing the facts of commercial distribution of any film.

Q I know, but that does not mean much if there is not a second print available to this exhibitor, does it?

MR. FRIEDMAN: We do not know if there is a second print available to this exhibitor. We do not know what the

terms of his distribution agreement were. He never put any of this in the record, Your Honor.

Q Let us assume that there were two copies readily available to him and you could have one of them but he could go on showing the other. If all you want is evidence, just having one copy but letting the other one show would satisfy your need, would it not?

MR. FRIEDMAN: Yes, it certainly would, Your Honor. There are a number of situations where films have shown in several theatres, even within the city, and we have seized one print for evidence. But the problem is this and it is a very practical problem: The seizure of that first print will effectively tell any defendant who is represented by competent counsel that perhaps he ought not to show the film in the future but not because we are preventing it but because practicality of law enforcement is that the penal sanction having been invoked as to one showing, the man runs a risk of subsequent prosecution as well as subsequent seizure.

Q What is the significance of that?

MR. FRIEDMAN: The point is, Your Honor, that the mere fact that the film is not shown again, even if he had a second print available, it would necessarily be because the state would seize it but because the man might be well advised not to show it.

Q That is a little different situation than when you effectively preclude him from showing the film.

Q Each exhibition is a new crime, is it not?

MR. FRIEDMAN: That is correct, Your Honor. I do not recall offhand the situation where we have actually prosecuted multiple counts for every repeated showing. But I can bring to this Court's attention a case which is currently pending in the courts of New York County in which we have started a prosecution, and this prosecution was started by the same route as was used here, the issuance of a search warrant on August 17, 1972. On August 18th, the judge who ordered the seizure directed the film to be returned to the distributor. That film is in the hands of the distributor. It has never been produced in court to this date. It was on the calendar for yesterday. It was not produced yesterday. The distributor is showing it since the time of the seizure. I believe published reports have shown that about $400,000 in gross has been taken in in this picture. It is a film showing at several theatres in New York. The prospect of the defendant being charged with multiple counts has maybe not dissuaded him, although the statute of limitations has not yet run in that case.

Q I know, but from Marcus and Quantity, until you decide obscenity, you are not supposed to take effective steps to preclude circulation, are you?

MR. FRIEDMAN: Your Honor, but the problem is this--and that is why I refer to this case involving a film called "Deep Throat," which I believe is referred to in one of the briefs for amicus curiae in this matter, motion in brief which has not yet been accepted by the Court, in that case the defendant has no incentive in conducting a hearing. There is no interest on this defendant's part to have this case come to a hearing at all.

We have made every effort, Your Honor--this matter has been on the calendar on six occasions by my count, and yet we cannot force the case to a hearing. But why? Because the exhibitor who is commercially exploiting the film will not in any way cooperate with prosecution. And I think that some of the suggestions made by my adversary are perhaps suggestions of fantasy, because there is no cooperation. There is a reported case in the official reports which we cite in our brief in which an adversary hearing was attempted in New York County. That was our last attempt, and that also went on for six weeks.

Q I thought Mr. Anolik suggested to us earlier that because of some decisions of the Second Circuit, you are actually providing adversary--

MR. FRIEDMAN: Your Honor, I believe three have been held.

Q How many?

MR. FRIEDMAN: To my recollection, there have been three.

Q What form did they take?

MR. FRIEDMAN: The first one was in 1970. It went on through the summer. We served the defendant a notice of an adversary hearing to be held the next day. The upshot of that was that six weeks later--

Q Before whom, a magistrate?

MR. FRIEDMAN: Before a magistrate. Six weeks later there were three days of testimony given by defense experts. Two weeks after that, the judge handed down an opinion. And six weeks after that there was a motion for reargument on the question of the prior adversary hearing. Our experience in that case led us to litigate this case through the state courts--

Q You say there have been two other instances?

MR. FRIEDMAN: Yes, Your Honor.

Q Are they different or are they the same?

MR. FRIEDMAN: One terminated in an Article 78 mandamus proceeding. It never went to a full hearing.

Q What kind of case did the state put in in this first case?

MR. FRIEDMAN: The film.

Q Nothing but the film?

MR. FRIEDMAN: Nothing but the film.

Q And then rested?

MR. FRIEDMAN: And then rested.

Q And then the defense put on expert testimony, is that it?

MR. FRIEDMAN: That is correct. The third case referred to is "Deep Throat," which has not yet come to a hearing. We have tried. Indeed it is this problem that faces us in the Second Circuit which prompted our office to, in response to the certiorari petition, to suggest that the Court hear this case.

Q If there is a due process right to some kind of hearing, adversary or otherwise, do you suggest that that right can yield to the fact that some judges in New York do not get on with the trial of their cases?

MR. FRIEDMAN: Your Honor, our proposition is this. The state stands ready to give the man an adversary hearing immediately forthwith on the seizure. At the time of the seizure, the man is brought before a magistrate. If he wants a hearing, he can have a hearing because the state's whole case is available. That is, the film is before the Court.

Q Why do you not have the hearing? The judge will not schedule it and hold it, is that it?

MR. FRIEDMAN: No, Your Honor, I think Justice Harlan in his dissent in Quantity of Books remarked that 11 days was a reasonable time for defendant to request to prepare

a defense.

Q I guess he is entitled to some time.

MR. FRIEDMAN: He is entitled to time. And the question of how much time. He is entitled to counsel, to preparation--

Q That is for the state judges, not for us, to decide.

MR. FRIEDMAN: Your Honor, if the First Amendment mandates an adversary hearing, then I submit that what we have is the Sixth Amendment mandating a delayed adversary hearing.

Q What about that procedure, does it still obtain in New York, the one we had in--what was it, King--

MR. FRIEDMAN: Kingsley Books.

Q Kingsley Books.

MR. FRIEDMAN: Yes, Your Honor, it is now--

Q Did that not require a hearing within a day or something or a procedure within two days?

MR. FRIEDMAN: That is correct, Your Honor. That procedure was not applicable to films in the first instance.

Q Yes, I know, but--

MR. FRIEDMAN: It is now.

Q Oh, is it now?

MR. FRIEDMAN: It has been amended to be applicable to films. To my knowledge, no proceeding under that section

has been--

Q As I recall, that requires a hearing within what, one day or something?

MR. FRIEDMAN: Yes, Your Honor, and as the cases before this Court have indicated, those hearings also go on for months, that although the hearings are required, the defendants request time; and in Kingsley Books they consented to the injunction pendente lite to provide time to prepare. But our experience with obscenity defendants has not been that of dissent to delay.

Q If they ask for more time and the court grants it, that is too bad for the state, but that is it, isn't it?

MR. FRIEDMAN: Well--

Q Are not films subject to a different approach, in any event, to licensing?

MR. FRIEDMAN: Not in New York currently.

Q In advance.

MR. FRIEDMAN: Not in New York currently.

Q I know, but constitutionally that could be--

MR. FRIEDMAN: The court has said yes, although I believe the current state of the law has been to--they have been repealed, I believe, in every state but I am not sure, as a result of this Court's decisions which have cut down the procedure.

Q We never said in Freedman that there could not be--

MR. FRIEDMAN: No, Your Honor. But in Freedman the Court said that a temporary removal of a film from exhibition for a limited period, pending rapid state proceedings was permissible.

Q why does that not still obtain?

MR. FRIEDMAN: In a case of this type--and that is what I see here--this man has shown the film in the past. He has not been prevented from showing it in the first instance, as in the censorship case. He has shown the film for several days.

Q But if you take the other approach and prevent him from showing it in advance, then there is some pressure on him to get on with the hearing, and then it is the state that starts dragging its feet.

MR. FRIEDMAN: That is correct, Your Honor, except that in these instances, and all we can speak of is the experience, and I think that the experience has indicated that the state is ready to cooperate and conduct a hearing. But to follow out the analogy on the censorship case, in a censorship situation, a limited period of delay, however short, the cases may differ, but a limited period is permissible. That is all that the state is really seeking here, is prior to a judicial hearing--

Q Now that you have amended that Kingsley Books statute, is there any reason you do not resort to that instead of this type--

MR. FRIEDMAN: The first answer, Your Honor, is that the amendment, I believe, became effective in August of 1972.

Q That is a good reason.

MR. FRIEDMAN: Secondly, I have been told that the effectiveness of the Kingsley Books statute is somewhat limited because it is in a book situation. It had been a very cumbersome procedure to serve and hold in abeyance--

Q It is an injunction procedure, is it not?

MR. FRIEDMAN: It is a purely civil injunction procedure which is now contained in the Civil Practice Act, the Civil Practice Law and Rules. It is no longer part of the criminal procedure statutes in New York. But in a situation here, we are only asking for a seizure for a limited period, a very limited period, until there can be a hearing. We wanted a speedy hearing, because there is no reason for these cases to remain in the court structure at all. If the film is seized inadvertently--and really that is what we are talking about, we are really just talking about the possible effect on the First Amendment if a film is improperly seized in the first instance. Those films should be returned to circulation forthwith. But if a film

is properly seized after a hearing, a state may hold it. Even under A Quantity of Books, after a full adversary hearing or in a case of this sort, after a trial, the state may validly maintain custody of the film. Indeed an injunction could issue after a trial such as in this case.

Q If there is a determination of obscenity, that takes it outside the First Amendment.

MR. FRIEDMAN: That is correct.

Q Therefore, it can be treated as--

MR. FRIEDMAN: As contraband or--

Q Whether it is contraband or not--

MR. FRIEDMAN: --or nuisance or whatever the appropriate rubric might be under the particular jurisdiction. But the point is here there has been a hearing.

Q Is there anything that prevents you from going--I am talking about the District Attorney--from going from judge to judge through about 30 judges till he finds one that agrees with him? Is there anything to stop that?

MR. FRIEDMAN: Your Honor, there is nothing to stop it; but there is nothing to stop it in any search warrant case. In any case in which the court has multiple judges who have concurring jurisdiction, there is nothing to prevent judge shopping for the purposes of trial. Somehow or other a judge must be selected. As a practical matter, the only thing I understand New York law would require is that if there

were multiple applications for a search warrant, he must indicate to the magistrate you apply to the history of the prior application. That is, each magistrate must know that you have gone to someone before.

Q You testified--I think I heard you correctly--that if it is found out that it was obscene, then that makes everything all right.

MR. FRIEDMAN: I would not justify judge shopping, Your Honor.

Q No, but I mean--

MR. FRIEDMAN: Except as a necessity--

Q What prompted my question was once the hearing does determine that the picture is obscene, however it was seized and under whatever conditions, that is nothing at all.

MR. FRIEDMAN: Well, to the extent that--

Q Which is not my idea of search and seizure.

MR. FRIEDMAN: No. No. The question is what is before the magistrate on a question of search and seizure. And in New York the magistrate has seen the film, which is all the evidence there really is, from the prosecution's point of view.

Q For a minute on search and seizure, if you make an illegal search and you find a million pounds of the purest of heroin in the world, the fact that it is pure heroin does not protect it, does it?

MR. FRIEDMAN: Not at all, Your Honor.

Q Do you want to make that true here too?

MR. FRIEDMAN: Your Honor, we are not trying to vindicate a search by what--

Q But you are vindicating the procedure of property which allegedly is under the First Amendment protection. Allegedly.

MR. FRIEDMAN: Allegedly, Your Honor, but we have in this case--and I think it is realistically true in all of these cases--we have had a search and seizure where a magistrate has seen the evidence and has found the film to be obscene. Now, there is some question as to what he found, and I just would quote from the judge who issued the warrant, and this appears in the record: "I had seen the film and it was and is my opinion that that film is obscene and was obscene as I saw it then under the definition of 'obscene.' " That is in quotes, Section 235.00 of the Penal Law.

Q That is obscene under the state law of New York.

MR. FRIEDMAN: Under the state law of New York, Your Honor, and I think as we set forth the state statute at the outset of our brief, I think the Court will see that that is as close a paraphrase as the legislative draftsmen were capable of doing of the threefold task this Court has announced in its prior decisions on obscenity. The state

statute is--

Q My silence does not give approval, but go right ahead.

MR. FRIEDMAN: Your Honor, I think that that question is one which can be seen from the statute itself, that the state has codified what it--

Q Well, why should we have this hearing other than the fact that it takes time?

MR. FRIEDMAN: Why not hold the hearing, Your Honor?

Q Yes. Other than the fact that it takes time.

MR. FRIEDMAN: After a magistrate has seen the film, we run a substantial risk, and it has been mentioned several times today, of alteration of a film. We run the risk of a film disappearing, as it will, and these are not imaginary. I think there are some concrete examples referred to in our brief where it has occurred. And the remedies of contempt are not very practical if the film itself is gone and the original version is not available for comparison. The hearing process itself will have to be held sooner or later.

Q Why go through any hearing? Why do you not just go and seize it? You did go through the trouble of getting a magistrate.

MR. FRIEDMAN: That is correct, Your Honor.

Q If all you say is true, why did you worry about getting a magistrate?

MR. FRIEDMAN: Your Honor, because the Fourth Amendment requires that there be a neutral and detached magistrate who ascertains that there is grounds for seizure, and this Court has suggested in Marcus that the First Amendment is read into that, which might suggest that the magistrate must have as close to firsthand knowledge of the material to be seized as possible in order for him in his judicial role to make that decision. That is why the magistrate is required in this seizure as in any other.

Q And this man has been without this film for how long now?

MR. FRIEDMAN: At this stage three years.

Q What?

MR. FRIEDMAN: Three years and four months, to this date.

Q And that does not give you any problem?

MR. FRIEDMAN: Your Honor, there has been a final adjudication beyond a reasonable doubt that this film was obscene. And given that final adjudication, ended 48 days after the seizure, the state may validly seize and hold that film. It is not protected once--

Q Forever?

MR. FRIEDMAN: I would see no reason why not.

Q Would that apply to a book?

MR. FRIEDMAN: The solo copy of the book that is seized, certainly.

Q It would apply to a book even if it was the only book, it was the only copy?

MR. FRIEDMAN: That is correct, Your Honor, and a final adjudication of obscenity has been made.

Q Then it could be kept forever?

MR. FRIEDMAN: That is correct.

Q Or as a matter of fact destroyed?

MR. FRIEDMAN: That is probably true, Your Honor.

Q And that gives you no First Amendment problems?

MR. FRIEDMAN: No, Your Honor, as long as the state has--

Q Do you mind if it gives me some?

MR. FRIEDMAN: That is why we are here. The problem is that the Court has held that the First Amendment does not protect obscenity, and at some stage a decision must be made in one form or another whether a matter is obscene or is not. And in this situation, we have a finding beyond a reasonable doubt by, in this case, a non-jury trial, a three-judge trial, and that is a final judicial determination of the obscenity of the film. Of course, it is subject to review on appeal and where the film returned or destroyed is a

practical matter, the Court would be unable to review it. It is for that reason that the film, as I say, is in the custody of the Court Clerk's Office at the current time. But once that determination is made--

Q We would not have that problem in the case we had earlier, because if somebody destroyed it, we could just go down the street here in Washington to see it.

MR. FRIEDMAN: If it is the same film, Your Honor, and I believe the Attorney General from Kentucky indicated he had not seen it to see if it is the same film.

Q That is right.

MR. FRIEDMAN: And I would submit that if the Court chooses to see "Blue Movie," it would be very difficult to ascertain if this was the same film.

Q Does the New York statute have any permission for destruction of material when finally adjudicated obscene?

MR. FRIEDMAN: Not that I am aware of, Your Honor.

Q I am just interested--after the adjudication, what is the basis upon which you are entitled to keep the material?

MR. FRIEDMAN: Your Honor, to return it at any stage creates as many problems as the retention of it.

Q Usually these statutes provide for its destruction.

MR. FRIEDMAN: There may be a statute in New York,

Your Honor, that I am unaware of. I just indicate that to my knowledge there is none; and, as a practical matter in a case which--

Q You mean--

MR. FRIEDMAN: If the film is gone, the precedential value of the case is very often gone with it.

Q Is there not some statutory provision under which you keep it?

MR. FRIEDMAN: The statutes are vague at best as to the right to retain or destroy evidence at the expiration of a case. As a general matter, heroin is fungible and not necessarily valuable after a case is disposed of. It is generally destroyed.

Q You do not return it to the defendant.

MR. FRIEDMAN: We certainly do not return heroin to the defendant.

Q But if you do destroy it, you do not know whether that is done under statutory authority or just--

MR. FRIEDMAN: I presume there is a statute regulating the police property clerk which governs that. But as a practical matter, I think the Court is aware there is a substantial problem in obscenity cases of the bar or anyone else knowing precisely what the item that has been adjudicated is, and that the objects are usually retained for as long as it is possible to keep them in some form of intact state or

another so as to provide that insight for further study. So that in most cases, and certainly in most obscenity cases, the material that has been seized has been held for years and years.

Q Is there not some place in Brooklyn that has a "library" on it; is it the federal or the state?

MR. FRIEDMAN: I believe the State of New York was in the process of setting one up. I do not know if they actually did. The value of a library of obscenity--

Q I did not mean to use the word library.

MR. FRIEDMAN: I think that is the way it has been popularly described.

Q That is right.

MR. FRIEDMAN: But the point we face here is that the state's effort that New York has adopted of requiring the magistrate to actually see the material is one which walks, we think, in fair middle ground between the seizure by an untrained officer who sees a film and then seizes it, and a procedure where perhaps, if the state is lucky, a hearing can be held prior to the time the film is removed from the jurisdiction and the adversary hearing approach in the limited cases in which we have tried it has been very unsuccessful. And I do not blame the judges in New York for this purpose. It is in fact the nature of the obscenity business, which puts the incentive of delay and obstruction on the defendant.

Q Who is in charge of the calendar in New York?

MR. FRIEDMAN: Your Honor, it is the judges, but the defendant's Sixth Amendment right to counsel is generally what has been interjected, and I think not unjustifiably, where counsel needs time to prepare. Certainly he needs time to prepare. He has to see the film. He has to get experts. Experts have to be contacted. They have to see the film. A lengthy period of time is required. If a full-fledged hearing, as Mr. Anolik has suggested, be held, if that is what an adversary hearing is--and, Mr. Justice Stewart, I do not think anyone has really defined what it is, because the courts just simply say either one is needed or it is not and leave it to the states to work out what they were. But if a hearing is required, then the problem of delay is forced into the hearing process by the Sixth Amendment, if nothing else, not even bad faith. It may even be good faith. But there must be delay.

Q If it were the other way, then the state could seize and hold, pending what you say is necessarily a period of time for preparation.

MR. FRIEDMAN: If the person who had custody of the film requires a time for preparation, if he wants the time, then should the state return it to him during that period, and that is the practical effect of the question, because we are ready for a hearing once the film has been seized and is

before the court.

Q I suppose you might say too that although frequently defense counsel in criminal cases will want delay in the actual trial of the action, they may not insist on delay for a preliminary hearing.

MR. FRIEDMAN: No, they may or may not, depending on how it suits the strategy of the particular defense. But the question is whether the state must be put in a position where delay is a matter of right, and I think that the Sixth Amendment would make it a matter of right. So that it is particularly appropriate in this instance where in a movie case the state's only proof is the film. More than the film would not be required, we submit, and that can be held at the movie theatre when the man is arraigned promptly. We have courts operating from nine in the morning until midnight every day; hearings can be held. But who should have the burden of initiating it after a judge has seen the film and has made a determination? Because we submit that it is the judicial presence and not the adversary's presence which is the crux of what this Court has tried to say in Marcus and A Quantity of Books. That is, there must be a magistrate who has made a specific determination on a specific film, and as to whether he must hear argument or not we cannot tell.

Q I suppose the word "adversary," appeared first

in Marcus--

MR. FRIEDMAN: Yes, Your Honor.

Q --ordinarily connotes, does it not, a contest?

MR. FRIEDMAN: Yes, but the problem of how much of a contest--even the Court of Appeals in this case, in its opinion, seemed to treat it as being a question of argument as opposed to a question of proof.

Q What you are doing now, with the magistrate going to the theatre, that is nothing in the way of a contest.

MR. FRIEDMAN: That is correct, Your Honor. But it does bring the--

Q To that extent, if the principle of Marcus and Quantity of Books applies in this situation, to that extent surely your procedure is deficient.

MR. FRIEDMAN: If it is a full contest at that stage which is required.

Q Here there is no contest at all.

MR. FRIEDMAN: That is correct.

Q Whatever the contest may be, I just suggested that I think Marcus and Quantity of Books does suggest there has to be some contest.

MR. FRIEDMAN: Your Honor, the reading the New York courts have taken I think is a reasonable one. And that is that the Constitution in the seizure of possibly protected material requires more than an officer's statement as to

probable cause. And if a magistrate bringing the judicial mind to the question of obscenity has made a determination which for all intents and purposes must be a prima facie determination, not--

Q And an ex parte one.

MR. FRIEDMAN: It may be ex parte--

Q That is what it is.

MR. FRIEDMAN: It may be ex parte but that does not necessarily make it deficient, because in deciding the questions of obscenity there are no questions of fact in the sense of an informant type of search warrant case. It is not a factual determination. It is inference determination, an inference from basically a conceded fact; that is, the film is conceded to be here. From that film, what inference can be drawn? And to require the defendant's presence with counsel and conceivably experts and we really do not know what else at this stage, would be an unreasonable burden of a valid state interest, a valid state interest which this Court has upheld in saying that the prosecution of obscenity laws may be continued. So that we submit that the New York practice under which a magistrate sees a film prior to the issuance of a warrant for allegedly obscene material is constitutionally sufficient.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

[Whereupon, at 2:06 o'clock p.m. the case was submitted.]

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