In the

Supreme Court of the United States

HARRY ROADEN,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

No. 71-1134

Washington, D. C.
November 14, 1972

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COMMONWEALTH OF KENTUCKY,

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

The above-entitled matter came on for argument at 11:07 o'clock a.m.

BEFORE:

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

APPEARANCES:

PHILLIP K. WICKER, ESQ., 120 North Main Street, Somerset, Kentucky 42501, for the Petitioner.

ROBERT V. BULLOCK, Assistant Attorney General, The Capitol, Frankfort, Kentucky 40601, 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: We will hear arguments next in No. 71-1134, Roaden against Kentucky.

Mr. Wicker.

ORAL ARGUMENT OF PHILLIP K. WICKER, ESQ.,

ON BEHALF OF THE PETITIONER

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

The single issue in this case arises out of the conviction of the petitioner in the Circuit Court of Pulaski County, Kentucky, following a jury trial for violating Kentucky's obscenity statute, which is Kentucky Revised Statutes, Chapter 436, Section 101. Petitioner was convicted under Subsection 2 of that statute, which may be found on pages 3 and 4 of the Brief for Petitioner.

The facts in this case are simple and for the most part undisputed. On the night of September 29, 1970, the Sheriff of Pulaski County, Kentucky purchased a ticket to Highway 27 Drive-In Theatre, which was managed by the petitioner. The sheriff viewed the entire film being exhibited that evening, which was entitled "Cindy and Donna."

Immediately following the exhibition of the film, the sheriff proceeded to the projection booth of the theatre and there arrested the petitioner on a charge of violating of violating this statute, and seized the film. At the time

the arrest was made and the film was seized, there was no warrant in the hands of the sheriff issued by any magistrate. No magistrate had viewed the film. There were no descriptive affidavits furnished to any magistrate. Admittedly, there was no hearing of any kind before a judicial officer, adversary, or ex parte, to focus on the question of obscenity. The sheriff, upon viewing the film, ex parte and on his own made a determination that the film was obscene and such ex parte determination on his part led to the arrest and seizure of the film.

Q If on Monday night the sheriff went with the local magistrate, a person authorized to issue warrants, and the magistrate observed the film and then on Tuesday morning issued a warrant, would that satisfy your claim?

MR. WICKER: No, Your Honor.

Q You would want an adversary proceeding in which you could appear to try to persuade the magistrate that there was not probable cause to believe--

MR. WICKER: That is correct, Mr. Chief Justice. That is correct.

Q You are going to try out the issue of obscenity in the warrant-issuing proceeding?

MR. WICKER: We would ask a meaningful opportunity on the part of the petitioner to be heard to counter the judgment of the local law enforcement officer that the film

was obscene.

Q Would the issue then not be probable cause but obscenity vel non of the film?

MR. WICKER: I think the issue would be probable obscenity of the film.

Q Probable cause.

Q I don't see why in your case--maybe you are concerned about impairing the success of the next case, but taking your case alone--I don't see why you need to contend that the Constitution requires an adversary hearing. You simply, I should suppose, need to contend that the Constitution requires that there can be no seizure except by warrant issued by a magistrate, a neutral and detached magistrate, on the basis of probable cause. And yet all through your brief you talk about an adversary hearing being required.

MR. WICKER: Your Honor, we believe the issue of obscenity is so sensitive, and this Court has said that it is separated by only a dim and uncertain line, and that separation calls for the use of sensitive tools. We believe that it is required here.

Q Do you think it is more sensitive than searching a private home?

MR. WICKER: Yes.

Q Under Kentucky law, do you have an adversary proceeding to get a search warrant to search a private home?

MR. WICKER: No, Mr. Chief Justice.

Q Mr. Wicker, I thought--perhaps I am wrong--in Marcus and A Quantity of Books, both of which involved magazines, as I remember, I thought we held the proceeding, even though it is a warrant proceeding, had to be one in which there was determination not of probable cause but of the obscenity vel non of the material before they could be seized. Am I wrong about that?

MR. WICKER: Mr. Justice Brennan, my reading of the Marcus and Books case convinces me that adversary hearing pertains to probable obscenity. You wrote the opinion.

Q That does not prove too much.

Q Then what would there be to try if the determination was a determination vel non of the obscenity? What do you need a further proceeding for? Is that by way of appellate review or trial de novo?

MR. WICKER: There would be no need for any further proceeding if it were determined that there was not probable cause to believe the film to be obscene.

Q I am taking the other tack. If the magistrate issues the warrant on a showing which must reach the level of a determination of obscenity rather than probable cause or probable obscenity--

MR. WICKER: There would be no need for further trial in that case, Your Honor.

Q Then you might be into trial the next morning after a showing of the film, might you not? Would that be res adjudicata of the issue?

MR. WICKER: No, Your Honor.

On the day following the arrest of the petitioner and the seizure of the film, the sheriff took it to the grand jury of Pulaski County and an indictment was returned, charging the petitioner with the offense of which he was convicted. The petitioner three days later pleaded not guilty and the case was set for trial on the 20th of October. On the 12th of October the petitioner moved to suppress this film as evidence and to dismiss the indictment, contending as he does here today that the film was illegally seized in violation of due process of law, because there had been no adversary hearing prior to the seizure. The motion to suppress and dismiss the indictment was overruled and petitioner's trial began. And petitioner at the trial again objected to admission of the film in evidence and renewed his motion to suppress. The trial court overruled. The issue was again raised before the Court of Appeals of Kentucky, and that court affirmed the conviction on June 25, 1971, and denied rehearing.

At no point prior to the seizure, did the petitioner or anyone in his behalf have an opportunity to contest the judgment of the sheriff that this film was obscene. So,

thus is presented the single issue of whether in the absence of a prior adversary hearing the seizure incident to arrest of allegedly obscene material is a violation of due process of law.

Q Mr. Wicker, as I read the opinion of the Kentucky Court of Appeals, the commissioner who wrote the opinion said that during the trial of the action you conceded the obscenity of the film; is that a correct statement?

MR. WICKER: Mr. Justice Rehnquist, we maintain that that is not a correct statement of the closing argument, and we think that a fair reading of the closing argument will disclose to this Court that that was trial strategy. And even if the Court concluded that there was a concession made in the closing argument, we nevertheless maintain that all material, regardless of its eventual characterization as obscene or non-obscene, is clothed with the same procedural safeguard until there has been an adversary hearing.

Q Would not an adversary hearing have been pretty much of a charade in this case if when you first got your chance to have an adversary hearing in the trial you conceded the obscenity of the thing?

MR. WICKER: We did not concede the obscenity, but for the protection of material that is non-obscene, whether this material turned out to be obscene or not or whether it was conceded at any time during the trial, we do not think

it is important. We think it was clothed with the same procedural safeguards as non-obscene material until the determination in an adversary hearing.

Petitioner in his contention here relies on the opinion of this Court in Marcus v. Search Warrants of Property, A Quantity of Copies of Books v. Kansas, and Lee Art Theatre v. Virginia. And the gist again of petitioner's contention is that discretion to see allegedly obscene material cannot be confided to law enforcement officers without some safeguards for the protection of non-obscene material. And a seizure without a warrant, such as occurred in this case, there were no safeguards at all to prevent the suppression of non-obscene films which are protected by the Constitution. And because First Amendment rights are involved here, the sheriff of Pulaski County, Kentucky had no discretion to say that a crime had been committed in his presence. A state is not free, this Court said in Marcus, to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences of constitutionally protected speech, and the line between speech unconditionally guaranteed and speech which may legitimately be punished is finely drawn. It is dim and uncertain, and separation of the legitimate from the illegitimate calls for the use of sensitive tools.

So, here we have an ex parte non-judicial

determination of probable obscenity by a law enforcement officer in the field. The sheriff acted as judge in a sense and nowhere was there any procedure designed to focus searchingly on the question of obscenity. This film had shown for two nights prior to the seizure. There was no emergency or danger to the community which compelled the seizure without at least a warrant or some prior judicial scrutiny. The test of obscenity as laid down by this Court in the Roth case is so difficult to apply that it must be made judicially.

To permit unbridled discretion in law enforcement officers to apply such tests amounts to a vague and standardless delegation of judicial power. We believe that Marcus and Books require the courts of law to make the determination that there is probable cause to believe the film obscene, and this only after a meaningful opportunity to be heard in an adversary proceeding. Police officers in the field are not equipped to apply the test and separate the legitimate from the illegitimate. While police officers may be properly trained experts in the detection and proper identification of the usual paraphernalia of crime, they do not enjoy such a status with respect to the determination of literature and movies.

Q When a policeman on the beat witnesses conduct which he regards as obscene and defends particular

ordinances or statutes, does he not have to make a judgment then and there whether there is probable cause to make an arrest and take the person into custody?

MR. WICKER: That is true in most cases, Mr. Chief Justice, but not in the area of First Amendment rights.

Q Suppose the man says that he is picketing for something or other but is engaging in a lewd and obscene exhibition in that process, carrying a picket sign at the same time. Does not the policeman have to make judgments constantly?

MR. WICKER: I do not believe that a police officer in the field is capable of applying the Roth test with respect to obscenity.

Q A policeman in these circumstances is not making any final determination, is he?

MR. WICKER: But once he makes this determination and seizes the film, then there is the danger that non-obscene material has been restrained.

Q Mr. Wicker, would it make any difference in your position if your client had had a cuplicate film and could have continued to show it to the public?

MR. WICKER: Mr. Justice Powell, I believe that any requirement that a theatre owner keep two films on hand is burdensome and--

Q That was not my question. Assume he did have

a duplicate film so that there was no prior restraint and he could have continued to show it. Would your position be different?

MR. WICKER: I still feel that the petitioner's Fourth Amendment rights were involved and that even the seizure of one film imposes a restraint, whether it is one film or a dozen films. That particular film was restrained.

Q If your client had operated a bookstore with a hundred books and only one was seized for the purpose of evidence at a trial, I take it your answer would be the same.

MR. WICKER: My answer would be the same, Mr. Justice Powell, because we believe the First Amendment makes no reference to quantity, that it affords one book, one film, the same protection.

Q Mr. Wicker, returning for a moment to the question I asked you earlier, I call your attention to page 37 of the Appendix in what was apparently your argument to the jury at the bottom of the page 37. You say, "If the film which you saw yesterday was all that was on trial here, I would not be here. I would not be good enough to tell you at the outset that in behalf of Mr. Roaden I am not going to get up here and defend the film observed yesterday nor the revolting scenes in it or try to argue or persuade you that those scenes were not obscene."

I take it that is what the commissioner referred to.

MR. WICKER: Yes, it was.

Q I would certainly be inclined to think that supported his suggestion that you had conceded it.

MR. WICKER: We maintain, Mr. Justice Rehnquist, that we did not concede the obscenity of the film, that this was trial strategy. The jury which saw the film and came back to the courtroom was ready to--if Kentucky law had permitted it--would have hanged this man. They would have given him the death penalty. We felt like there was no chance of persuading this jury that the film was not obscene.

Q How is your situation different in this case with that argument than if you had been defending a man on a first degree murder charge and you argued to the jury that yes, undoubtedly he did kill the victim but it was an accident and therefore it should be a manslaughter verdict and not a first degree murder verdict? Is this any different? If so, how is it different?

MR. WICKER: Your Honor, I do not believe there is much difference in that. The jury had to make two findings. First, is the film obscene? And, second, was the defendant guilty of showing an obscene film? And we concentrated on the second thing, the conduct of the defendant. We felt we did not have much chance in convincing that jury that this film was not obscene.

Q Does it make any difference to your argument

whether it was obscene or not?

MR. WICKER: No, it does not, Mr. Justice Marshall.

Q Just for my information, was it obscene or not?

MR. WICKER: Mr. Justice Marshall, I do not believe that that film was obscene when compared with other films which have been held not to be obscene.

Mr. Chief Justice, I request to reserve the remainder of my time for rebuttal.

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

Mr. Bullock.

ORAL ARGUMENT OF ROBERT V. BULLOCK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BULLOCK: Mr. Chief Justice, Members of the Court, may it please the Court:

The question as has been stated before the Court, in the absence of a prior adversary hearing, Is a seizure incident to arrest of allegedly obscene material a violation of due process? Our answer, of course, is no.

Let me go into, if I may, a few of the facts that may not have been fully brought out before. On September 28, 1970, the Deputy Sheriff of Pulaski County observed approximately 30 minutes of the film "Cindy and Donna" from a vantage point outside of the theatre at a road nearby. Thereafter, he reported to his superior, the Sheriff of Pulaski County. The next evening, as was noted, on September

29, 1970, the sheriff accompanied in this case by the Commonwealth Attorney, who is the chief prosecuting officer for that district, paid admission for entrance into the theatre for showing of the film. After a viewing of the entire film--the entire film--the sheriff proceeded to the projection booth and arrested the petitioner, Mr. Roaden, who was at that time changing the cartoon, I believe it was, on the projection theatre. It was upside down. The sheriff seized the film incident to the lawful arrest.

The following day, on September 30th, the matter was presented to the grand jury, who returned the indictment, a trial on the merits of the case was had, and a verdict was entered October 21, 1970. There are certain facts in this case that are somewhat peculiar. We take issue with my Brother Wicker concerning whether the film's obscenity has been acknowledged. The petioner obviously acknowledged the obscenity of the film, as was earlier noted. And during the course of appeal through the courts he has not seriously contended otherwise.

To answer your question, Mr. Justice Marshall, in our opinion, the film was obscene in this case.

The petitioner in this case also moved--

Q While you are talking about the film, when was this film returned to him, if ever?

MR. BULLOCK: When is it or has it been?

Q Yes.

MR. BULLOCK: It is in the custody of the Court of Appeals, sir.

Q Until this day?

MR. BULLOCK: Until this day, yes, sir. Of Kentucky.

Q You do not have any First Amendment problems with that, do you?

MR. BULLOCK: No, sir, because even to this day--and this was my next point--petitioner has not moved for the return of the film. He has moved for the film which was admittedly obscene to be suppressed in evidence, but he has not moved for a return of this film so he might later show it, copies of "Cindy and Donna."

Q He did not give it to you. You took it.

MR. BULLOCK: That is correct. For use as evidence.

Q Did you also give it back to him?

MR. BULLOCK: I would say that the burden would be on petitioner to move for its return.

Q Now will you answer my question; have you offered to give it back?

MR. BULLOCK: No, sir.

Extreme caution, we maintain, was used to safeguard against the abridgement of petitioner's constitutional right. The chief prosecutor for the district accompanied the sheriff

in this case at the time of arrest and seizure and presumably he would have had the opportunity to advise the sheriff on the probable cause. As I have noted, the grand jury the next day affirmed and confirmed the fact that there was probable cause, and they returned an indictment. In this case I mean to emphasize the fact that the trial of the case was completed some 22 days after the original arrest and seizure. There was a determination within that period of time.

We maintain that the seizure of the film was incidental to a lawful arrest for a crime which was committed in the officer's presence and that the reason for the seizure of this film was for its use as best evidence of the commission of the crime and not for the purposes of suppressing ideas or First Amendment rights.

As noted by our Kentucky Court of Appeals, this is the way we are differentiating, we have differentiated, the Marcus and Quantity cases which we interpret to be for the purpose of suppressing and destroying evidence. I might also add that the Kentucky statutes specifically permit a peace officer to arrest without a waxrant for a misdemeanor that is committed in his presence.

And also in answer to an earlier question, I would say that in many instances a police officer must make a quick judgment concerning an obscene situation. And the peace

officers in most instances, in all instances, are law-abiding officers; they are sworn to a particular duty. The material here, which was a film, differs from books and pamphlets--

Q Mr. Bullock, in the Marcus case the police officer there involved went to the various newsstands and picked up a copy of each of the magazines involved, did he not?

MR. BULLOCK: Yes, sir.

Q And then he went before a magistrate on sworn complaints in which he stated that each of the newsdealers, and I am quoting, kept for the purpose of sale obscene publications, did he not? And then on the basis of that, the circuit judge issued the six warrants which were then executed.

MR. BULLOCK: Yes, sir.

Q And we held that that procedure did not comport with constitutional due process in light of the First Amendment implications involved, did we not?

MR. BULLOCK: Yes, sir.

Q How is the procedure here differ any from what was done there? You say this was incident to a lawful arrest.

MR. BULLOCK: Yes, sir.

Q This was a seizure, similarly nobody was

arrested at that time. Because that was, as you pointed out, a suppression here.

MR. BULLOCK: Right.

Q But other than that, how was there any difference between the two procedures? Why does the seizure of the operator make that any different from due process and First Amendment context?

MR. BULLOCK: I think there might be two answers to that, sir. First, the case we're involved in here was a crime that was committed in the officer's presence. And, second, we are dealing with a film as opposed to a book. There is a big difference in a film. Films can be altered quickly. They can be changed. Certain objectionable portions can be quickly taken out of the film.

Q Our point is not whether a state may have a procedure to seize a film to prevent its being altered. Our question is, is it not, whether the state may have a procedure for seizure of the film itself without first determining its obscenity; that is the question, sir.

MR. BULLOCK: Yes. I am not sure I understand your question, sir.

Q What we are concerned with here is whether you can issue a warrant, as was done in this case, was it not, on probable cause.

MR. BULLOCK: There was no warrant, no, sir.

Q No warrant. Just an arrest?

MR. BULLOCK: There was an arrest in the officer's presence.

Q And the question is whether you can do that without having a determination of the obscenity vel non of the motion picture.

MR. BULLOCK: And we maintain that you do not have to have the prior adversary hearing or determination vel non ahead of time. What you need is determination of probable cause. In this case, the sheriff made that determination.

Q And this is on the ground that there is a difference between films and magazines.

MR. BULLOCK: That is part of it, yes, sir.

Q I gather that there have been a good many cases that have held the other way; most of them, I gather.

MR. BULLOCK: There have been a number of cases in the lower courts, especially in district courts, that have held you could have seizure and then they have been sometimes overturned. A number of state courts the same way. They have been overturned. But there are still some cases left.

Q Marcus and A Quantity of Books did not hold that you could not seize one copy for the use as evidence, did they?

MR. BULLOCK: Not to my recollection, no, sir.

Q They just held that you could not take out of circulation that entire series of publications.

MR. BULLOCK: That is correct, yes.

Q Of course, taking one copy out of circulation of a movie might take the entire showing out of circulation.

MR. BULLOCK: As we maintain, Mr. Justice White, in our brief, we feel that it is not unreasonable to require in certain circumstances a second copy to be kept, if there is a probability or a possibility that this is an obscene movie.

Q If you were going to have a hearing about obscenity, you could have given them a subpoena to bring it to that particular hearing and otherwise leave it in circulation. If all you are really trying to do is to have the evidence available at the hearing, unless you think there is really some substance in the alteration theory.

MR. BULLOCK: I believe there is substance in the alteration theory, yes, sir. I also believe that there is some substance in the difficulty in which we face where an operator may remove that film and send it to another state very quickly, because most of these films are on a schedule of--

Q If the operator had two films, you would not argue that the state could seize both copies in the face of Marcus and Quantity, would you?

MR. BULLOCK: No, sir. The one film for evidentiary

purposes only.

Q That is the question.

MR. BULLOCK: That is the question.

Q If that is the only print, that is too bad for the exhibitor.

MR. BULLOCK: If that were the only print, then in that case I would suggest that a motion whereby maybe some security could be given that the film would be returned in its original shape for use in the trial could be--some limitations could be put on it.

Q Do we know here whether there is more than one print? I guess Mr. Justice Powell asked you that already.

MR. BULLOCK: I can state outside the record, to my knowledge, if it please the Court, it is showing here in town.

Q In Washington?

MR. BULLOCK: In Washington, yes, sir.

Q You need not name the theatre. [Laughter]

MR. BULLOCK: It is my understanding that it is showing. Let me put it that way.

Q Has that one been cut or anything?

MR. BULLOCK: I have not seen it, sir, in Washington. I could not tell you.

It could be contended that there could be other

evidence, such as oral statements, admitted to show the obscenity of a particular film.

Q What would be wrong with having the magistrate and the sheriff and the prosecutor go and see the movie on Monday, issue the warrant Tuesday, and go out and seize it then, if a non-adversary proceeding would satisfy Kentucky law and the Constitution? There are a number of "ifs" in there.

MR. BULLOCK: Yes. The Kentucky law, though, says that it is proper to seize the evidence incident to a lawful arrest, and there was a proper arrest. And it is my understanding the question before the Court is whether there is a need for a prior adversary hearing. And it is, of course, our contention that it is not necessary.

Q Even if there is not a need for a prior adversary hearing, you would lose if the Constitution requires a determination by a neutral and detached magistrate, would you not?

MR. BULLOCK: That is correct.

Q If there is just simply a requirement without a warrant.

MR. BULLOCK: Except that in this case there was not just a share. There was also the chief prosecuting attorney for that district, was present.

Q But he is not a neutral and detached magistrate.

MR. BULLOCK: He is going to be the one that will be charged with bringing the prosecution--obviously, since the monkey will be on his back, so to speak, he would have reason to make certain that there is probable cause before making--

Q He is the prosecutor.

MR. BULLOCK: Yes, he is the prosecutor.

Q Why not give him the right to issue a search warrant while you are at it?

MR. BULLOCK: We could possibly do that too.

Q Are you kidding?

MR. BULLOCK: No, I thought you meant ask for a search warrant. I misunderstood you.

Q Is there anything in the record to show any expertise on the part of either of these two men in the field of what is and what is not obscenity?

MR. BULLOCK: The record, Mr. Justice Marshall, shows that the sheriff had been a sheriff for some ten years. It shows that he was familiar with the statute. The fact is he quoted it during the trial on the issue. He knew what the statute was, and I think a man of common intelligence can determine what is prurient if this material taken as a whole appeals to prurient interests and is without redeeming social value. This is not a determination, a final determination, on the matter. It is a determination of probable--

Q It is a final determination as to whether or not the film is going to be seized.

MR. BULLOCK: That's correct.

Q Without a search warrant.

MR. BULLOCK: That's correct.

Q So, that is final.

MR. BULLOCK: Yes, sir, but of course if it is not obscene--

Q And there is absolutely no expertise over and above any other citizen in this county in the field of obscenity.

MR. BULLOCK: Of course, if it is not obscene, it would be returned.

Q My question is, Does he have any expertise in the field of obscenity over and beyond every other citizen in the county?

MR. BULLOCK: There is no showing in the record that he has any expertise other than being a law enforcement officer.

Q Then how did he know that a crime was being committed?

MR. BULLOCK: Because he could observe the situation that is occurring and come to the conclusion that it did appeal to prurient interests.

Q Then under the law of Kentucky, I imagine

that anybody in the theatre could make a citizen's arrest.

MR. BULLOCK: Not for a misdemeanor, no, sir.

Q You do not think so.

MR. BULLOCK: No, sir.

Q Mr. Bullock, do you suppose these jurors had any particular expertise when they returned a verdict of guilty?

MR. BULLOCK: I was going to mention that, sir. It would appear to me that if a jury can make a determination that a particular film is obscene, this would likewise be true for a peace officer, at least as far as probable cause is concerned.

Q Would it not follow as a matter of course that if lay jurors can do it, a peace officer can do it on the lesser standard of probable cause, whereas the lay juror has got to find it beyond a reasonable doubt.

MR. BULLOCK: Yes, sir, that would be my point.

Q Was this a drive-in?

MR. BULLOCK: Yes, sir, it was a drive-in which, without getting into the Rabe or Robey case, at least the deputy sheriff was to the side of the movie theatre and was observing it from a post outside of the--

Q Meaning where, a bridge or something?

MR. BULLOCK: No, it was a little street or road to the side of the drive-in theatre.

Q And he could see it from the street?

MR. BULLOCK: He could see the nude scenes that were going on from that area, yes, sir.

I might also point out the difference between the films and the books, is that you can purchase books for use in evidence; whereas, in the case of a film being shown in a drive-in theatre, you can't very easily purchase that for use in evidence. And, as we say, the film is the best evidence and it would provide a fair basis for a decision of the Court, not only for the prosecution but also for the defense. Because obviousy if we are talking about certain isolated segments, this is not enough to satisfy the definition involved in Roth.

So, the film itself, taken as a whole, must be obtained in order to make a decision in this case.

I would also point out that the ideas that are conveyed in "Cindy and Donna" are probably not of such a nature that it would be a tremendous abridgement of First Amendment rights. "Cindy and Donna" is basically a business proposition. It is not like a book like, say, Mein Kampf or Story of London or something that might be of necessity that the information immediately reach the public.

Q Was the officer on that sidestreet there just by happenstance or did he go there with a purpose?

MR. BULLOCK: I am not sure it is in the record.

Yes, he was told by the sheriff to keep an eye on the place.

Q On this place?

MR. BULLOCK: On this place, yes. It had been showing for two days prior to the seizure.

So, we are saying that absent a pattern of harassment or in an attempt to suppress ideas, the seizure of obscene material incident to a lawful arrest is beneficial to justice, both for the presecution and the defense.

Since this Court has stated in Roth and later in Reidel that obscenity is not protected by the First Amendment, there is no basis for placing hurdles in front of law-enforcement officers in the prosecution of their duties. This film as we say, was admittedly obscene. It is not allegedly obscene. It is an obscene film. Requiring an adversary hearing, as suggested by petitioner, would put law-enforcement officials in an untenable position of trying to enforce laws which this Court and the Commonwealth of Kentucky say are lawful, while putting obstacles for the best means of doing so in the way of the law-enforcement officers. In this respect I think it is important that we enforce white-collar crime--laws against white-collar crime just as much as we do crimes of violence.

Obviously, if you can get by with white-collar crimes such as obscenity or consumer protection or

environmental laws, this breaks down a respect for the judiciary and the law-enforcement officials, if they can see this going on here. And yet a man who does a crime of violence is immediately placed in custody and tried.

As we noted earlier, the petitioner did not move for return of his material. We feel that it can be assumed that his purpose for his motion, which he made before the Court, was for the purpose of suppression of an obscene film to avoid prosecution. There was a speedy review of the action taken by taking the matter before the Grand Jury of Pulaski County the next day.

Your Honors, if it please the Court, I would like to state that in an attempt not to overstate my case in my brief I may have understated my case on a particular point. On page 11, I stated: "Although a failure to indict by a grand jury would not have assured petitioner of his release or the release of his film, the fact that it went before the grand jury was a showing of good faith."

I would like to correct any ambiguity there by saying that pursuant to the Kentucky Rules of Criminal Procedure, 5.22, if a defendant is not indicted by a grand jury, he must be released. However, a subsequent grand jury could later indict him. This is Marcus v. Bradley, 385 Southwest Second, 165. A failure of a grand jury in this case to indict would have resulted in the release of

petitioner, the immediate release, and he would have remained free absent a subsequent grand jury indictment, and presumably his film would have been released with him. I might add that if this film was not released, he could have made a motion to the court for its release and if the lower court refused to do it, a writ of mandamus would be a proper remedy before our Court of Appeals. This was indicated in the case of Johnson v. Commonwealth, 475 Southwest Second, 893, which was decided subsequent to the case before this Court.

There was a speedy trial in this case, the 22 days. This was done in order to jealously guard petitioner's rights. This Court recently in U. S. v. Thirty-Seven Photographs held that where there was seizure of allegedly obscene material by custom officials, there would not be an undue hardship if the forfeiture proceedings were commenced within 14 days and completed within 60 days of their commencement. This would allow a total of 74 days from seizure to decision. In our present case before our Kentucky Court of Appeals, there was seizure on September 29, 1970, an indictment the following day, and the trial was concluded on October 21, 1970. This was some 22 days after the arrest and seizure, and I submit to the Court that this is significantly less than the 74 days that was indicated in the Thirty-Seven Photographs case.

Q Is there any evidence in this record as to what it cost to rent this film and how long it would have taken him to get a substitute film?

MR. BULLOCK: No, sir, there is no showing in the record. I would assume it could be done fairly easily and without a whole lot of cost.

Pulaski County, Kentucky is not like New York City or some of the big cities. Pulaski County, Kentucky is essentially a rural area; requiring an adversary hearing would, in my estimation, penalize rural areas. For instance, in Pulaski County there is one circuit judge who covers two counties. There are other lesser judges, but our main judge is a circuit judge and he covers two counties.

Q Who issues warrants?

MR. BULLOCK: Magistrates, I believe, can issue--

Q Do you have them?

MR. BULLOCK: We have a county judge too.

Q Yes, but I mean, do you have available magistrates? So, if a warrant had been required here, I gather there would have been an available magistrate.

MR. BULLOCK: On a warrant situation, I would suppose this is probably true.

There are not, however, judges that are quickly available to be able to go and have a prior adversary hearing before this film, which we submit is fugitive in

nature. It can be shipped to another state and lost, the evidence lost of the commission of the crime.

In conclusion, Your Honor, we submit that the Commonwealth has used careful procedures to protect petitioner's constitutional rights. We are basically talking about a Fourth Amendment case and not necessarily a First Amendment case. The prior adversary hearing situation, which has been interpreted by many of the courts, is simply not a workable solution. It will not work. What is needed is a firm determination by this Court that a peace officer can make arrest and seizure of the film when that arrest and seizure is for the purposes of using in evidence the material. For these reasons, if it please the Court, we respectfully request that this Court affirm the holding of the Kentucky Court of Appeals. Thank you, Your Honor.

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

Mr. Wicker, do you have anything further?

MR. WICKER: Yes, Your Honor.

REBUTTAL ARGUMENT OF PHILLIP K. WICKER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WICKER: As to the expertise of the Sheriff of Pulaski County, in this case if a comparison is made of the sheriff's reading of the Roth definition of obscenity, which he copied from the Kentucky statute as shown on page 17 of the Appendix, a comparison of that with what the statute actually

says as shown on page 3 of the petitioner's brief, formidably illustrates that the sheriff could not even read the definition of obscenity much less purport to comprehend it.

For instance, he copied, "To the average person applying to a temporary standard," when the statute says, Applying contemporary community standards."

I wish to make the point that the petitioner also contends that his Fourth Amendment rights have been violated in this case. The prosecution would distinguish the Books and Marcus cases by saying that in those cases large quantities of books were seized, while in this case only one copy of a film was seized. We say that this distinction is not legally significant because the single film is equal in disseminative power to a large quantity of books; it is equal to the entire stock of a newsdealer or to the entire inventory of a newsdealer.

Q That is the state's position here, that one exhibition reaches many, many people. Are you supporting the state's position on that score?

MR. WICKER: The restraint imposed upon this exhibition deprives many people of an opportunity to see the film, to receive the expression and the ideas contained therein.

Q But if it is obscenity, do you concede that they are not entitled to exhibit it and people are not

entitled to receive it? If it is obscenity.

MR. WICKER: Again, Your Honor, the determination is so sensitive under the Roth test that there is no other way to determine obscenity. I say that it cannot be delegated to local police officers in the field. And it is not any answer to say that just one copy of the film was seized. The effect of the seizure, of one seizure and one prosecution, can proceed ripple-like outward from its source, and we say that the First Amendment affords national protection, that its scope extends beyond Somerset, Kentucky.

Another point made by the prosecution is that they apprehend that if an adversary hearing is afforded, that the film might be kept out of the jurisdiction, edited or altered before the adversary hearing could be concluded. And they say that the adversary hearing just will not work. We might point out that these fears can be met by protective orders of the magistrate, subject to the sanction of contempt. To give an example, in Texas the legislature has expressly authorized protective orders to prevent a film's removal from the jurisdiction or alteration. And a knowing violation of these orders is made a separate defense. And courts have consistently indicated that conduct designed to subvert or bypass the administration of justice will not be permitted merely because obscenity litigation may involve the sensitive procedural tools of the First Amendment.

The Report of the President's Commission on Obscenity and Pornography points out that legislation can be drafted to require an exhibitor or distributor to make a film available for judicial hearing while permitting its exhibition pending that hearing. And the adoption of such legislation, consistent with local practice, would appear warranted in jurisdictions which may continue to seek to prosecute film exhibitors for adults, contrary to the commission's recommendation. The commission proposed a model declaratory judgment and injunction statute and it provides that whenever material is being disseminated in violation of the obscenity laws, the state may bring a civil action against the disseminators in order to obtain a declaration that the dissemination is prohibited.

We say that the requirement of an adversary hearing will work.

Application to be made for preliminary injunction after notice to the adverse party and opportunity for him to be heard. The court could grant an ex parte restraining order to control any real threat of editing. The order can direct the exhibitor to keep and maintain the film within the jurisdiction and keep it intact, and it can order and enjoin the exhibitor from altering any part of it, and it can punish violations of those orders by contempt.

There is nothing, we say, to prevent diligent state

prosecutors from executing adversary proceedings before a judicial officer through notice to the distributor and a subpoena duces tecum directed to it, with the name of each questionable and challenged publication; and following judicial determination of obscenity, the state authorities may seize and prosecute if the publications and materials are put on sale. And this is very clear where state procedures are modernized.

The prosecution contends that it is significant that petitioner did not move for a return of the film so that he might continue to show it at the theatre. We do not think this is significant. Clearly, the prosecution must proceed by the injunctive process or in some combination of manner which will afford an opportunity for the prior adversary hearing. It is not up to the defendant to seek return of the film. If the trial court here had sustained his motion to suppress, return of the film necessarily would follow. The burden is on the prosecution to show their right to this film and their right to keep it. And return of the film in any event is not an adequate remedy because it does not redress the restraint which has already occurred up until the time the film was ordered returned.

The Quantity of Books case, I believe, makes it clear that the adversary hearing must precede seizure in order to protect the right to circulate non-obscene material.

Again, the prosecution's argument has not taken into account the defendant's Fourth Amendment rights to be free from unreasonable searches and seizures, for which the only adequate redress is exclusion of the evidence. Exclusion of the evidence will compel respect for the constitutional guarantee, and the only effective way, as said by this Court in Mapp v. Ohio, is by removing the incentive to disregard it. And even if the film is returned, officers are still going to keep on seizing films, knowing that if return is ordered with the provision that a copy be made available, ultimately they still get the evidence. The return of the film proposal secures to the state the fruits of the poisonous tree. It was the illegal seizure that started the process of which led to obtaining the evidence.

My time is up, Your Honor. Thank you.

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

[Whereupon, at 12:00 o'clock noon the case was submitted.]

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