In the

Supreme Court of the United States

HOWARD ALEXANDER, ET AL.,
Petitioners,
v.
VIRGINIA,
Respondent.

No. 71-1315

Washington, D. C.
October 19, 1972

Pages 1 thru 31

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
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v. : No. 71-1315

VIRGINIA

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Thursday, October 19, 1972

The above-entitled matter came on for argument at 1:36 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. COUGLAS, 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:

STANLEY M. DIETZ, ESQ., 1029 Vermont Avenue, N.W. Washington, D.C. 20005 for the Petitioners

JAMES E. KULP, ESQ., Assistant Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219 for the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 7101315, Alexander against Virginia.

Mr. Dietz.

ORAL ARGUMENT OF STANLEY M. DIETZ, ESQ.,

ON BEHALF OF THE PETITIONER

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

This is the Third Act in your trilogy of obscenity cases but I am not going to follow the line urged by Mr. Fleichman and Mr. Brown -- excuse me, Mr. Smith and that is because, as I view the exhibits involved in my case and recall the testimony that was produced by the Commonwealth and by the Defendant, that our material did not involve hard core pornography which brings me to think about the Roth case because the Roth case involved hard core pornography. The case certiorari was granted on the limited point of whether hard core pornography was protected by the First Amendment and you ruled that it was not.

In the Roth case, as I understand it, the Post Office Department submitted exhibits -- examples of what hard core pornography really was.

Q Well, now, Mr. Dietz, my recollection of Roth was that the discussion was that the materials involved were obscene, whether hard core or what was not suggested.

We didn't even have the exhibits here and the concession, I think, as it appears in the footnote of Roth is simply that the materials here involved were obscene and that concession was made to present the question of whether obscenity was protected by the First Amendment and you keep talking about hard core pornography. I thought that was a phrase that came in much later.

MR. DIETZ: Well, of course, your Honor wrote the opinion for the Court. I was not involved in the case, but I --

Q I know, but you don't find the words, "hard core pornography" anywhere in the opinion, do you?

MR. DIETZ: No, sir. No, sir but I understood -- I understood that there were exhibits submitted of hard core pornography.

Q I know nothing about it. We had no exhibits here in that case.

MR. DIETZ: Well, I stand corrected.

Actually, I felt that in this pornography field it had really boiled down over the years to interpreting the Roth case to mean hard core pornography.

Q Well, I think that is a different argument.

MR. DIETZ: Yes, sir. Of course, in the very recent case of Riedel, you -- the Court again stated that hard core pornography or that obscenity was not constitutionally

protected but my argument is that the materials in this case -- if you compare them with other materials which this Court has had under consideration in such matters as Wiener and Dulan versus California which depict only simulated sexual activity, simulated sexual activities which I would define as possibly inches or possibly seconds away from the actual consummation, but leaving to the imagination the actual graphic depiction, the actual passage of the scene and I would urge this Court to draw the line at that line, at that place, differentiating between simulated sexual activity which should be constitutionally protected -- if you have the other elements involved "For Adults only" and without any obtrusive advertising which is the school of law which has mushroomed since the decision of this Court in Redrup versus New York.

Now, in this case that I have today, we have a statute from the State of Virginia. It is a civil statute although it is part of the criminal code and it provides for any person -- state's attorney or Commonwealth or any -- any person, any citizen to bring an action to deplore a book to be obscene. It specifically prohibits a jury trial. I therefore say it is unconstitutional because in an obscenity case I feel a jury trial is mandated by the First Amendment.

Q What has the First Amendment got to do with jury trial, at least on its face?

MR. DIETZ: Well, I recognize that the First Amendment does not spell out the jury trial, but if you take the Roth case definition of what is obscenity and what is not constitutionally protected under the First Amendment, then it must be decided by community standards. The community is the jury.

Q You want not only a jury, but a jury of the kind they had 500 years ago, then, where the jury brings its own knowledge to decide rather than --

MR. DIETZ: No, sir, I would follow the guidance of the late Justice Frankfurter in Smith versus California where he said that it's a jury question that you will have to introduce expert testimony around these points of prurient interests and community standards to guide the jury in their deliberations.

Q But that was a criminal case, wasn't it?

MR. DIETZ: Smith versus California was a criminal case. I recognize the distinction. And Roth was a criminal case. At the same time, this Court decided Kingsley Books case, Kingsley Books versus New York -- Regents of New York. That case was a civil case and it did not raise this issue of a jury trial because in that case a jury was not requested. I believe that Justice Frankfurter wrote the opinion for the Court and noted that an advisory jury was available in New York, but none was requested.

But in my case, I had, right from the outset, requested a jury trial but this state statute specifically prohibits a jury determination. And through my experience in defending, representing this particular company we have many, many instances where a jury looked at obscenity exhibits differently than a judge alone. You have pending in this Court a petition for certiorari, another case that I have, Village Books versus Marshall, where a judge viewed a book and said that it was obscene, issued an injunction against it in the State of Maryland. That same book was tried before a jury -- three different juries in three jurisdictions acquitted. Of course, that was criminal cases and I recognize there is a different standard of proof involved.

Well, I feel very strongly that First Amendment case, obscenity case, a jury trial should be allowed where craved.

The second point that I claim this statute was unconstitutional is that it specifically provides for the community standard to be a city or a county. It doesn't even limit the community standards in the way that the case that Mr. Fleichman argued, to the State of California. It is not the State of Virginia. It is evidence of community standards in that city, in that county. This is -- of course, it is very easy for the state to say, "Well, how

else can we get experts? There are no such things as an expert on a national community standard." So, what are we faced with? We are faced with a so-called "expert" who, as we have in the record of this case, who has been part of a group that studied obscenity a year and a half before in that area and who had spoken with different people and those civic groups which consisted of the Navy Wives' Club and who had not been in an "adult" bookstore in a year or more; which I use the phrase "adult" bookstore. It has been referred to in the California case as "dirty" bookstores. Well, I take issue with that.

"Adult" bookstores are stores that only trade with adults, who do not allow juveniles entrance. It is so stipulated in our case, that we do not do business with juveniles.

All the states, or nearly all the states, have statutes. The District of Columbia does. The State of Maryland does, where they differentiate a different penalty involved if you deal with juveniles in the obscenity field. But that was not an issue. They stipulated in our case, no juveniles involved.

So that brings us back to the community of Portsmouth and I might say, this is not a situation like they had with Los Angeles, some 250 "adult" bookstores. This bookstore was the one and only bookstore in the City of

Portsmouth. I don't know the exact population. I think it is around 70 - 75,000 people. But this is the only bookstore, "adult" bookstore in that city.

Q Do you think it makes a difference under the First Amendment whether you have one or 250?

MR. DIETZ: No, sir. I mentioned that because I was discussing community standards and, earlier, I heard an argument stated that are we to apply the community in some small city in Montana as a standard as compared with the entire State of California? California is covered with "adult" bookstores. There are not quite so many in the Tidewater Area. There are approximately 10 that I am aware of, but only one in the City of Portsmouth.

Now, on community standards, it might be argued that the majority of the people in the community don't go into these bookstores and don't make purchases from these bookstores. Well, I would then argue to this Court that this is quite true. The majority of the people are not customers in my client's bookstore. But the First Amendment was not made or created to protect only the majority view but I think, principally, the minority viewpoint, that is the one where you have -- under the First Amendment -- the right to get up and say, "I don't agree with all of you people. This is my point of view." And that is what is being done in this bookstore in the City of Portsmouth.

Now, if I might at this point refer to another element of the issue of obscenity, we claim that the judge in his opinion found that these books to be "patently offensive." "Patently offensive" to whom? Certainly not to the customers who go into that bookstore. They are not forced in. We don't have any sidewalks that pop them into the store as they walk by and adult bookstores, and particularly that bookstore in Portsmouth, have the windows blacked out. You cannot see inside and there are big signs, "Adult Bookstores, No Minors Allowed," and if anyone comes into the store who might be close to the age of majority, he must demonstrate his credentials to prove that he is, in fact, adult.

Now, the second point that I wanted to claim as far as the statute being unconstitutional is that it affects a prior restraint. I won't spend too much time on this point because they never, in fact, got the restraint off the ground. They -- in this case -- they went into the bookstore, took a list of all of the books that had anything to do with sex, issued a subpoena duces tecum to managment of the store to appear in court with a copy of the books.

The people appeared, the books were taken following which the -- two of the judges reviewed the books and issued a show cause order and the Commonwealth Attorney filed a petition asking that all of these books be declared obscene.

Now, at that time they also filed a notice to the two employees of the bookstore that -- I think three or four days later -- that they were going to ask the court for a temporary restraining order. This is where we claim there would have been a prior restraint. It would have been granted had not we gone into federal court to ask for an injunction and then the motion for a restraining order was continued indefinitely, and we never did actually have a hearing on the motion for a restraining order but this restraining order would have been in effect but there was absolutely no time limit as this Court has held constitutionally mandated in affirmative statutes of this nature. There was no time limit other than the general boundary that it should be heard as soon as possible, as soon as it was expedient.

As it turned out in this case, the proceedings started in May and the hearing was held in November. The decision did not come until December of the same year.

Now, in this Court's granting of certiorari on this case you added, as an issue, whether or not these sexually-oriented materials are constitutionally protected.

Now, we feel this case to be the perfect vehicle for the argument that -- following Redrup -- that this material is constitutionally protected, first of all because it does not involve any material which could be considered

hard core pornography -- and the definition of hard core pornography, of course, we draw from the opinion of Justice Stewart which I believe was actually the definition of the United States Government in U.S. v. Ginzburg and in all the law materials we do not have -- we do not have that element of graphic depiction of sexual activities.

The testimony that was produced by the state -- many of their witnesses said that this is not hard core pornography. One of them said it would only be obscene for juveniles, for 19-years-olders. That was the gentleman who was the part-time police officer and part-time printer who testified as an expert for the State of Virginia.

I would like to reserve some time for rebuttal if I may.

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

Mr. Kulp.

ORAL ARGUMENT OF JAMES E. KULP, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KULP: Mr. Chief Justice and may it please the members of the Court:

At the outset in this case, it must be borne in mind that the type procedure we are talking about involved in this case is a civil procedure in realm as opposed to a criminal prosecution. The procedures in Virginia under this civil procedure provides for no criminal sanctions whatsoever.

It is merely an action against the books which are alleged to be obscene.

Q So there is nothing about conduct in this case?

MR. KULP: No, sir.

Q It is just suppression of books as books?

MR. KULP: That is correct, sir. This statute is, of course, a creature of statute and it was unknown at common law. It has long been established that neither the state nor the federal constitution guarantees or preserves a right to jury trial except in those cases where it existed when the constitutions were adopted. The Fifth and Sixth Amendments deal exclusively with criminal proceedings and the Seventh Amendment, while dealing with civil actions, pertains to suits at common law and where value exceeds $20.

In Kingsley Books versus Brown the court upheld a New York statute which is very similar to the statute involved in this case and a determination in the New York case was for a procedure without a jury and this Court held that it was not for this Court to limit the state in resorting to various weapons in the armory of the law and they could use the criminal, civil or some combination of these two procedures.

Q Mr. Kulp, let me ask you a question. Suppose

a bookdealer had a thousand of a particular book that came under the ban of this statute in the view of the Commonwealth and you proceeded against one of them and in the interim proceedings against the book itself, would it be a violation of the statute if this dealer gave the balance of the books away for nothing instead of selling them?

MR. KULP: No, sir, I don't believe so because the statutes, as I recall and believe to be in Virginia is that it is sale or some commercialism involved. Now, where there was a transfer of these, I don't believe that would come under the statute in this case.

Q Given away to minors?

MR. KULP: No, sir, I don't think you could do that. There is a specific statute which would prohibit the giving of the articles to minors. We might have to back up. I think that, probably, the criminal statute in Virginia might even prohibit the giving of these books to another person.

Now, the question about the prior restraint, of course, as this Court knows and the record shows, there was no prior restraint in this case and as Mr. Dietz says, advised the court.

The one thing I would like to call to the Court's attention is the fact that the record will show -- it is not in the Appendix, but in the record, the trial record itself,

it will show that Mr. Dietz agreed to continue this case, so this question of when the case started and when it ended is not exactly the amount of time that is really for this Court to consider in the prior restraint aspects because, as this Court indicated, in Thirty-Seven Photographs, it said that "no seizure or forfeiture will be invalidated or delayed where the Claimant is responsible for extending either the administrative action or judicial determination beyond allowable time limits." So I simply submit that in this case, Mr. Dietz did not press for any hearing in this matter and, in fact, went in and requested a continuance.

Q Mr. Kulp, when the state prevails in one of these proceedings, what happens, finally, to the books?

MR. KULP: The books are permanently enjoined, as they were in this case, from being sold.

Q But the are not destroyed?

MR. KULP: But there is no destruction involved.

Q I see.

MR. KULP: Now, as to the community standards, of course, this statute sets a community standard being the community wherein the --

Q That is to say, the state doesn't keep them?

MR. KULP: No, sir.

Q They return the books and the bookseller is simply subject to an injunction.

MR. KULP: that is correct and if he violates it, of course, could be subject to the contempt of court --

Q While I have you interrupted,there were --what -- 339 different books involved in this?

MR. KULP: Yes, sir. They were all single copies that were brought in.

Q And these were hard-cover books or what?

MR. KULP: Most of them soft-cover. I don't think there were any hard-cover books.

Q Paperbacks.

MR. KULP: Yes, they were large -- more like -- they are really magazines, as opposed to little pocketbooks.

Q Photographs?

MR. KULP: Photographs.

Q So this ends up as an injunction against some kind of conduct, sale?

MR. KULP: Yes, sir, that's --

Q Is that the only injunction?

MR. KULP: Well, it is against the books and it says that --

Q "They many not be sold"?

MR. KULP: They may not be sold, that is correct.

Q Can he leave it and start over again as a library?

MR. KULP: Well, I think that he might then subject

himself to a criminal penalty.

Q Of what?

MR. KULP: If the books were sold.

Q I didn't say sell. Just leave it open, anybody wants to come in can read them.

MR. KULP: I would say there is probably no statute in Virginia which would prohibit that.

Q You have described this all along as an in rem procedure, but of course, an injunction is not an in rem procedure is it?

MR. KULP: No, sir, it's actually -- it's an injunctive procedure but it goes against the books as opposed to a person. The procedure --

Q On the injunction, does the injunction name anybody?

MR. KULP: Yes, sir, it names the people who are the producers or the publishers of these books.

Q It enjoins them, doesn't it?

MR. KULP: Yes, sir. It enjoins them from selling these particular books which have been listed in --

Q That's a reversal.

Q How do you get in rem out of that? Rem is a person, isn't it?

MR. KULP: Yes, sir, well, I think that the procedure does allow for the -- or calls for the injunction

for these persons not to sell these books which have been judged to be obscene.

Q Under Virginia procedure, if these books were transferred to someone else who had no connection with the people who were defending against the state in the first action, could those people relitigate in some other court the question of whether they were obscene because they weren't parties to the first action or would the books themselves be branded as obscene by virtue of the in rem character?

MR. KULP: Well, I think that probably they would be able to litigate it in some other situation.

Q Wouldn't it be res judicata as to the book itself, if it is an in rem action as to the first stage?

MR. KULP: Well, I think it would be a decision as to the effect that those books have been declared obscene, but I don't think that the injunction would only apply to those people who were brought into court as parties or who were served with notice.

Q Is this an ancient statute?

MR. KULP: No, sir, this is a fairly recent -- I don't know if I can -- I don't -- it's not within the last two or three years but I think it was in 1960 if I am not mistaken -- somewhere along that time.

Q We are talking about 18.1-236 that is on

page 19-A of the --

MR. KULP: Yes, sir.

Q It does say that the order to show cause shall be directed against the book by name or description, then it goes on to say, "-- authorizing the court to issue a temporary restraining order against the sale or distribution of the book alleged to be obscene." Now, is that order also run against the book so it makes anybody who sells it anywhere in the jurisdiction of the court --

MR. KULP: I don't believe so, your Honor.

Q Well, isn't this on page 19-A, "The order of the court below was, in accordance with its findings, that the magazines listed are declared obscene and the said Alexander, Collier, Village Books, Inc., Media Arts and Guild Press, Limited are hereby restrained from either the sale or commercial disposition of the aforementioned magazines." That is the order before us, isn't it?

MR. KULP: Yes, sir. In a notice on page 19-A that the statute was -- on 22-A -- was enacted by chapter 233 of the Acts of Assembly, 1960.

Now, as to the community standards, the First Amendment in clear language states that Congress shall make no law abridging the freedom of speech or press. There is no specific mention of the states in this amendment and the freedom of speech has been made applicable to the states

through the due process clause of the Fourteenth Amendment. Therefore, what the states may constitutionally do in this area must be judged upon the language of the Fourteenth Amendment and not upon the language of the First Amendment.

The question arises as to how would a national standard be determined? Would each locality have to have its own set of "experts" to go around the country in order to ascertain what material is acceptable? How many people would be required to be interviewed? Would they be required to go into the rural areas as well as to the large metropolitan areas?

If a national standard is required we would be relegated to they type expert which the appellants present in this case. It appears that this Dr. Hammon, who was in the Georgia case also appeared in this case.

We get experts from out of state who come into town on the day of the trial and in this case the record shows that they spent no more than 10 or 15 minutes thumbing through not more than half of the books which were involved in this case and then making their opinions known to the court and we compare this to what the state experts did on the other hand. These people were all local people. They had examined each book thoroughly. They had knowledge of what the customs were and what the community standards were in Portsmouth, Virginia and, as former Chief Justice Warren

said in Jacobellis, he said he didn't believe that there was a provable national standard and that this Court had not been able to enunciate one and it would be unreasonable to expect the local courts to demand one.

As this Court said in Missouri versus Lewis, the Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in this respect may exist in two states separated only by an imaginary line.

When we get to the question which this Court asked Counsel brief and argue, the answer to the question of whether the display of any sexually-oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles -- the answer, I believe to this question, depends upon whether we are talking about sexually-oriented pictorial magazines which are obscene.

If the magazines are, in fact, obscene, then there is no constitutional protection for the reason that in Roth this Court held that obscenity was not within the area of constitutionally-protected speech. This question was clearly answered, I believe, in the negative in United States versus Reidel decided in May of last year.

In Reidel the jurisdictional statement was whether

the government could constitutionally prohibit the distribution by the mails of obscene material to the willing recipients who state that they are adults, to which question this Court responded by holding that the government could prohibit discrimination of obscene material through the mails.

This Court expressly rejected the argument that Stanley somehow limited Roth and that the state and federal governments were constitutionally limited to prohibiting distribution of obscene materials to juveniles and to unconsenting adults.

Stanley recognized that the states retained broad powers to regulate obscenity.

There is being espoused the proposition that since the President's Commission on Obscenity found no causal relationship between pornography and antisocial conduct and sex crimes, then the states have no interest in protecting consenting adults from pornography.

The position of the Commonwealth of Virginia is that this argument completely takes away from the states the right to reject the findings and conclusions of the President's Commission. The Commission's report has been rejected not only by the President and by the Senate, but it has been criticized by scholars.

The Commission's studies did not explore the

long-range effects of frequent exposure to the obscene. At the time the Commission was concluding that public opinion did not support any legal restrictions on the right of adults to read or view explicit sexual material, the Gallup Opinion Index found 80 percent of the adult population favoring stricter laws on pornography and the Harris Poll at the same time found 76 percent of the population want pornography literature outlawed.

The Commission also reported that in Copenhagen the rate of reported rape declined during the period in which pornography has been widely available. Therefore, the Commission concluded that there was no causal connection between sex crimes and pornography. However, the Commission completely dismissed the fact that in this country, adult arrests for forceful rapes increased 50 percent in the last decade when the availability of erotic material also increased.

The obscenity report published by Stein and Day publishers in 1970 found evidence of a demonstrable correlation between rising obscenity statistics and rising crime rates. Within the last few weeks a British study found that British society was threatened by the growth of pornography. Common sense does suggest that if good literature can enoble its readers, foul literature can degrade them and that to depersonalize and deromanticize sex may be

damaging and certainly cannot be helpful to the development of happy human relationships.

The people who are presently saying that a book does not corrupt are the very same ones who seem convinced that displays of violence on television do indeed have the power to corrupt.

The position of the Commonwealth is that in the question or the area of obscenity, that this Court has specifically held in Roth and reiterated in Stanley and reiterated once again in Reidel and Thirty-Seven Photographs that obscenity is not protected by the First Amendment and while it may be proven truly at some time that certain areas in this law should be changed, it is the position of the Commonwealth that this matter rests in the hands of the legislature and we would ask this Court to affirm the judgment.

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

Mr. Dietz, do you have anything further?

REBUTTAL ARGUMENT OF STANLEY M. DIETZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DIETZ: If it please the Court, I should like the opportunity to answer a few of the questions that the Court posed to Mr. Kulp.

Mr. Chief Justice Burger, I believe you asked the question regarding giving away of this material. This statute

which appears on 19-A deals only -- paragraph one -- "Whenever he has reasonable cause to believe that any person is engaged in the sale or commercial distribution of any obscene book," et cetera," any citizen or the attorney for the commonwealth of any county," et cetera, "may bring it to the attention of the court."

Now, that is particularly interesting because he says "any citizen who has an interest" and then we get to the issue of this injunction because if you will consider the very final paragraph of the statute as it appears on 22-A in the petition for certiorari, paragraph 13, and I quote, "It is expressly provided that the petition and proceeding authorized under this article relating to books alleged to be obscene shall be intended only to establish scienter in cases where the establishment of such scienter is thought to be useful or desirable by the petitioner."

"Only to establish scienter." I cannot visualize how any common citizen who might be offended by the sale of a book would be concerned about scienter.

Q Well, what does that mean? What do you suppose that subparagraph 13 means?

MR. DIETZ: I believe that they intended it to sort of open the door for them to use this in a criminal prosecution. I argued in the Supreme Court of Appeals of Virginia that this statute was vague and unconstitutional,

It contains no provision for granting an injunction, no provision for injunction. It only contains a provision for a temporary restraining order and that is paragraph 5 and it does have as its avowed purpose only to prove or establish scienter whenever it might be considered important to the petitioner. And of course, in this case the lower court -- and in this brief I argued that the judge overstepped his bounds in even granting this permanent injunction and he never granted a temporary restraining order.

Q Well, is the temporary restraining order procedurally under this statute directed at the period between the seizure of the book and the determination of its quality?

MR. DIETZ: I would have to assume so. It does not say "state," but it does say that this can be granted upon four days' notice after the filing of the original show cause order. Now, the show cause order has to be advertised in a newspaper for three weeks following which the respondents or any interested party has a right to come in and defend.

As it occurred in this case, because this was a bookstore that had counsel, I immediately came into the case. As a matter of fact, we had a counsel even at the time that they served the subpoena duces tecum and when we produced the books in the court.

Q Well, was the temporary restraining order in

effect on the date of the seizure and the date of the hearing?

MR. DIETZ: It was never -- it was never issued. The motion was never granted. I might clarify this. Mr. Kulp says that I agreed to a continuance. Actually, I believe that if you read the record carefully, I appeared in court on the day that the temporary restraining order was to have been heard and first I asked them for a stay, which was denied and the I asked them to just continue it indefinitely, which was granted because -- and that was not for trial, that was only the temporary restraining order feature -- because I had filed an action in the United States District Court asking for an injunction to prohibit any further proceedings in the Court of Hustings. So that is what stopped it.

Q Well, what -- excuse me. Sorry, I didn't mean to interrupt.

MR. DIETZ: Well, that is what stopped the court from issuing the temporary restraining order.

Q But under this statute, all that is ultimately secured if there is a finding that the book is obscene is a kind of a kind of a declaratory judgment, is that it? That's the way it looks to me.

MR. DIETZ: Well, I wouldn't say declaratory judgment. Well, all right, a declaratory judgment but it says that it is only to be used to establish scienter when everybody should have equal views for it, so I would assume

that if they went ahead and sold these books while a temporary restraining order was in effect --

Q Or after such judgment.

MR. DIETZ: Or after judgment, then they could come into court and get around the -- what this Court said they must prove in Smith versus California as far as scienter or knowledge of the obscene nature of the material by a bookseller.

Q But there is no -- ultimately there is no -- this statute itself doesn't impose any restraint, ultimately on the sale. It is just a judgment. The court shall order the clerk of court to enter judgment that the book is obscene.

MR. DIETZ: Yes, sir.

Q That is the end of it.

MR. DIETZ: That is according to the statute, but as it is applied and I had the entire order printed in the petition for certiorari on page 19-A, the judge did issue a permanent injunction against my client and restrained him from either the sale or commercial distribution of all of the magazines. And all of the magazines, that is an interesting point because -- and I argued to the courts below that some of these magazines had been considered by this Court in different cases but he still enjoined those as well, even though this Court has applied constitutional protection to these magazines.

Q To the specific issues or just to the same magazine on some other issue?

MR. DIETZ: As it so happened, this was the same magazine -- I am not sure of the specific issue, but --

Q Well, that isn't the whole story.

MR. DIETZ: -- if you look at the magazine involved, you just compare it as the magazines were girlie magazines and the only thing that changes is the face of the girl. The position, everything else is the same.

Q And then the Supreme Court of your state affirmed that permanent injunction?

MR. DIETZ: The Supreme Court of Virginia affirmed the entire proceedings in the court below, and I argued this point in the Supreme Court of Appeals of Virginia.

Q And they said, didn't they, that where something was found to be obscene, it was perfectly proper to enjoin it?

MR. DIETZ: I don't--

Q Or words to that effect, at any rate.

MR. DIETZ: Well, the general effect was they sustained the lower court so they sustained the injunction.

Q Yes, but they did pass -- they did say where something is found to be obscene under Virginia law it is proper to enjoin it.

MR. DIETZ: I believe that is the general effect,

Justice Rehnquist, but -- well, I'll say no more on that. That is what they did. I do not believe that they acted within their jurisdiction in doing that any more than Judge Bain acted within his jurisdiction under this statute in issuing the injunction.

This, as was argued by Mr. Kulp, this is a creature of statute only. There is no common law right to declare the book obscene, nonmailable. It is only by statute. And this judge exceeded what the legislature intended that he had the power to do in his authorization.

I argue that this statute is unconstitutionally vague. I have that in my brief and that is the prime reason and I believe my time has expired. Unless there are any other questions by any member of the Court, I will submit.

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

Mr. Kulp, your argument is submitted, but if there is any Virginia statute which authorizes a permanent injunction, it has escaped our attention in the briefs and you may call our attention to it if there is such, sending a copy, of course, to your friend.

I am suggesting you submit additional argument of merely citation, if any.

COMMENT BY JAMES E. KULP, ESQ.

MR. KULP: I believe I might be able to answer that right now. To my knowledge there is no statute which

authorizes the permanent injunction which the court declared in this case but the Supreme Court of Virginia in its decision, which is shown on page 2-A of the petition for writ of certiorari, held that if the material is adjudged to be obscene, then it is perfectly proper to restrain its sale or distribution. So this is the statutory construction put on it by the Supreme Court of Virginia.

MR. CHIEF JUSTICE BURGER: Very well, thank you. The case is submitted.

(Whereupon, at 2:21 o'clock p.m., the case was submitted.)