In the

Supreme Court of the United States

ALIS G. SPEIGHT, t/a HAREM BOOK STORE, ET AL.,

Appellants,

vs

LEWIS R. SLATON, ECT., ET AL.,

Appellees.

No. 72-1557

Washington, D. C.
January 7, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, ET AL., Appellants,	:	
v.	:	No. 72-1557
LEWIS R. SLATON, ETC., ET AL., Appellees.	:	

Washington, D. C.
Monday, January 7, 1974

The above-entitled matter came on for argument at 2:51 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:

ROBERT EUGENE SMITH, ESQ., 641 Equitable Building, Baltimore, Maryland; for the Appellants.

THOMAS R. MORAN, ESQ., Assistant Solicitor, Criminal Court of Fulton County, Atlanta, Georgia; for the Appellees.

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. 72-1557, Speight v. Slaton.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case originated prior to the decisions by this Court in June of 1973, and so the District Court was not in the position of being guided by the wisdom of those decisions.

However, it does come from the same jurisdiction, and is one of the cases, and it was Paris Adult Theater that was argued by Mr. Moran and myself before this Court, and which was decided in June of '73.

In this particular case, the state of Georgia proceeded under a civil type of proceeding to entirely close an adult book store on the concept that during a particular period of time, approximately one year period before the action was brought, that certain publications were offered for sale which, in the opinion of the Solicitor, were considered to be, or should have been considered to be, obscene.

During the entire time prior to the bringing of the civil action, only one criminal case was, in fact, brought to trial. That criminal case ended in a hung jury -- I think it was 4 to 1, there being a 5-man jury

system -- and ended in a hung jury, 4 to 1, and this trial was declared.

So, we have the situation in which none of the publications, by virtue of the criminal process, had been declared to be obscene, by a jury.

Q Do the juries announce their vote when they have a hung trial in Georgia?

MR. SMITH: Well, they may not as a practical matter, Your Honor, but in this case they did indicate that they were hung, and that it was 4 to 1.

Q That's in the record, is it?

MR. SMITH: I don't believe it's in the record, I think that whether it was transcribed or not --

Q Well, if it isn't in the record, we're not interested in it.

MR. SMITH: It was recognized, or admitted, by the state, Your Honor, at the time of the proceedings before the three judge court, and was noted specially in the opinion of Judge Morgan, who dissented from the three judge opinions. So to that extent it's in the record. Whether it's stenographically recorded or not, I don't know.

Q But it is officially recorded, you think?

MR. SMITH: Yes sir. I would think so.

In this particular case, after not having succeeded in that particular action, they went about to bring an action

to close the store in its entirety. To stop the store from -- the people from operating the store from selling anything at all in that store. There was no concept that everything in the store was obscene. I think the allegations in the complaint originally filed by the state of Georgia was that a substantial part, or a large part, of the material offered for sale, they felt, could be, or would be deemed to be obscene, under the Georgia law.

Now, this was filed. We sought the intervention of a three judge court, and the opinion of the three judge court was, in essence, opinions by each of the three judges.

The first was Judge Moye, who wrote, writing for court, concurred in by Judge -- Circuit -- District Court Judge O'Kelly, felt that one of the issues why they should not seek to go forward in this case was because this was a new statute, and the new statute had not been construed by a -- by the state Supreme Court. That's first.

But second and more compelling was the decision of the Circuit Court in Palaio v. McAuliffe. In that case, a decision in the Fifth Circuit, this -- that case had not been appealed. In that case, the Fifth Circuit held that federal anticipatory relief would be inappropriate in this case, and we intimate no view as to appellants challenges to the state court proceeding.

They did so under the concept of the fact that it

was a quasi-criminal proceeding; that it was, in essence, in aid of enforcement of the criminal law. There there was attempt at seizure of films -- specific films -- named films -- which were to be utilized in a criminal proceeding, and a criminal proceeding was brought, before the appeal was argued in the Fifth Circuit.

Under these circumstances, what we had is that at the time of the argument in the Fifth Circuit, the decision -- the criminal case had been brought, this was pending, and before the decision by the Fifth Circuit, the state Supreme Court ruled that the seizure had been proper.

Q Are you saying that this decision in the state court was brought after the trial which was held in the jury disagreement in the prosecution?

MR. SMITH: In our present case?

Q Yes.

MR. SMITH: It was brought after the trial disagreement, and after the jury was unable to agree. Yes,sir. And absent in that determination, as I said, they went ahead and filed nuisance action. Mr. Ju- -- the -- Judge Morgan has addressed himself to that in his dissenting opinion, and points out the differences in that case.

Now, in the Palaio case, which we indicated, that case related to a specific film.

Now, in A Drive-In, Inc. v. Backley, which was

decided after the Palaio case, the panel said that, unlike Palaio v. McAuliffe, this case presents clearly the question whether Younger v. Harris precludes federal intervention in purely civil proceedings, as well as state criminal prosecutions.

But, because we affirm the judgement of the District Court on other grounds, we intimate no resolution of this question. So, they did not -- they clearly indicated they did not resolve that question, of course --

Q The same panel?

MR. SMITH: No, sir, it was a different panel, and, as I said, they indicated that they had not resolved that question.

Now, after, as we said, we filed this matter, Judge Morgan -- Judge O'Kelly, in a concuring opinion which was separate, indicated that there had been no allegations of bad faith in enforcement of the law, or harassment. And we say that the complaint does support such allegations. We did, in fact, make them; we did, in fact, have an affidavit by counsel setting forth the specific allegations to this regard; and so we say Judge O'Kelly had overlooked that particular concept.

Now, with regard to the specifics here, the -- since this Court has decided the decisions on June 21, 1973, nuisance actions have been brought and prosecuted in various other jurisdictions. This Court has before it now a case

Pursue, Ltd. -- Huffman v. Pursue, Ltd., involving the question of nuisance, and whether or not the store can be entirely closed because it's operated and sells a single publication which might be deemed to be obscene.

Q That's the Ohio case.

MR. SMITH: That's the Ohio case, yes, sir.

And, as Judge Morgan points out in his dissent, that acting under this statute, agents of the state of Georgia which were not successful in criminal prosecution, could obviate the criminal prosecution and go forth, and because one publication might be declared obscene, in a civil proceeding, by a single judge, the entire store could be closed, and nothing could be sold.

Q We don't know yet, do we, whether all of the books could be forfeited and destroyed until the Supreme Court of -- the highest court of the state of Georgia decides that that's the reach of the statute, and that it's valid, or, perhaps, strikes down the statute?

MR. SMITH: That may very well be true. Yes, sir. But, of course, that doesn't -- that's not a construction that the state can make which avoids the federal question that's presented in this case, we suggest, Your Honor. That the -- we're saying, A, here on its face, that's what the statute says. Now, a limiting construction could be placed upon it. But this is not what the intent was, certainly, of the people

who were prosecuting. They seek to stop --

Q Well, so do sometimes permit the highest court of a state to have a limiting construction of its own statutes, don't we?

MR. SMITH: Yes, sir. Yes, sir.

MR. CHIEF JUSTICE BURGER: I think we'll begin at this point at 10:00 o'clock tomorrow morning, Mr. Smith.

[Whereupon, at 3:00 o'clock p.m., the Court was recessed, to reconvene on Tuesday, January 8, 1974.]

IN THE SUPREME COURT OF THE UNITED STATES

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, ET AL., Appellants,	:	
v.	:	No. 72-1557
LEWIS R. SLATON, ETC., ET AL., Appellees.	:	

Washington, D. C.
Tuesday, January 8, 1974

The above-entitled matter was continued in argument at 10:11 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
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APPEARANCES:

ROBERT EUGENE SMITH, ESQ., 641 Equitable Building, Baltimore, Maryland; for the Appellants.

THOMAS R. MORAN, ESQ., Assistant Solicitor, Criminal Court of Fulton County, Atlanta, Georgia; for the Appellees.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Speight v. Slaton.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Yesterday, I think we left off with the Court addressing a question about -- or comment to the extent that this Court has, from time to time, allowed the State Supreme Courts of the states to give a savings construction to its statute. We suggest, of course, that in this instance we think that the concept of the Circuit Judge Morgan was correct, that this statute is sort of straightforward. It says that any place that sells an alleged obscene publication, by the definition of the criminal law -- that's using the criminal law definition -- is declared to be, and shall be, a public nuisance. Hence, the activity is clear that what they can do is, one publication, offered for sale, could in fact, if it's declared to be obscene, justify the closing of the entire premises. That's what the statute says; that's what the statute gives them authority to do.

Now, certainly, we have the question of who won the race to the courthouse door. Well, obviously, in this context,

we didn't know, and couldn't know, what's in the mind of the prosecutor. He files a civil action in the state court. We, of course, moved right into federal court, taking and trying to have an election of the jurisdictional form is which we seek to litigate our rights. And if --

Q Well, are you saying, Mr. Smith, that it is inconceivable that the state court would say that this statute -- the state statute -- would pass constitutional muster -- muster for them, as the state's highest court, only if it were construed not to reach anything except obscene materials? Haven't the state courts exercised that kind of a role before?

MR. SMITH: Sir, they have not generally done so. There are some states, of course, which I have pointed out in our brief that have done so, but their statutes were unlike the statute at bar here. The New Riviera Arts Theater case was -- didn't have such a statute in their jurisprudence. Hence, we have one here.

There was such a statute, as we indicated yesterday, in the matter of Pursue, Ltd., which the state court construed to authorize the entire shuttering of the premises; and, of course, that's what is here. We don't have the statute saying that the sale of that article would be a public nuisance. This Court addressed itself to the question in Paris Adult Theater of whether or not a procedure could be employed whereby a film, or a book, or anything which might be declared to be obscene in

a civil proceeding, could not further be shown. And that's, of course, now the law.

But here, they're going on a broader attack, saying, "We're going to shut the entire premises because of the one thing."

Now, if the Court's language in Heller, and Roaden, has significance in quoting Bantam Books, and such, that any law that necessarily involves a prior restraint comes to this Court bearing a heavy presumption against its validity. And we're talking about that kind of law in the context of this case. As I said, it -- and it's the extreme to which the law certainly can be applied that is obvious and patently apparent. As I said before, if a department store, which might offer for sale the book of Joy of Sex, if the prosecutor wanted to he could go in say, "OK, they sold this book; hence, the department store could be closed." And everything there can be seized as contraband, and destroyed.

Q Well, if the state court found that none of this material was obscene, none of those untoward events could occur, could they?

MR. SMITH: If it found just one item obscene, then everything would be declared. This is not a --

Q Unless they gave it a narrowing construction.

MR. SMITH: Unless they ultimately gave it a narrowing construction. But in the plain, factual -- I mean, the

thing on its face absolutely says that the premises shall be constitute a public nuisance. It isn't the publication that would be a nuisance, it's the use of the premises would be a public nuisance. If it --

Q Mr. Smith --

MR. SMITH: Yes, sir.

Q -- I take it you have first to get over the hurdle whether all of those arguments should initially be addressed to the state tribunals. Whether, in other words, the Younger principles are to apply --

MR. SMITH: Yes, sir.

Q -- in a situation like this.

MR. SMITH: Of course, we have taken the Younger case, and this Court has said that in a criminal proceeding that the concepts of comity and federalism and such would apply, and that, certainly, that is the law as it is today. This Court left open, as the comments of the various writers of the opinion made clear, that in a civil case, they would post- -- you all would postpone the reaching of that question. And, of course, in Heller --

Q Well, my question is --

MR. SMITH: -- you were addressing yourselves to that.

Q -- if the District Court erred in not deciding the constitutional questions you raise, because, as I understand it, they did not decide the merits. They said, "No, you have to go on Younger principles, and submit those constitutional

claims to the state tribunals," did they not?

MR. SMITH: Yes, sir, that's correct.

Q Now, if we were to say they were wrong about that, would we then reach the merits of the constitutional claims, or would we send them back to the District Court and say, "Now, you decide the merits."

MR. SMITH: I think that's what would probably have to occur.

Q The latter.

MR. SMITH: Yes, sir.

Q So that, really, the issue we have to decide as this case is here --

MR. SMITH: Yes, sir.

Q -- is whether you ought to take those constitutional claims to the state tribunals, or you're entitled to have them heard by the District Court.

MR. SMITH: That's correct. And, of course, the --

Q Yeah.

MR. SMITH: -- dramatic presentation or argument regarding the closing of an entire store is only made, of course, apparent to show that this is a matter of prior restraint, obviously, and that this is the way the state has gone about it in the factual situation here. If we have to take the issue that in criminal cases, of the criminal case is started that we cannot have any federal court intervention, and we say,

"OK, that's one theory; that's one, you know, rationale of law;" then say, "Now, in civil cases it can't apply either," then we really don't have anything left, and the Civil Rights Act would almost be meaningless.

Q You'd have nothing left except the state courts.

MR. SMITH: Yes, sir. I'm saying that the Civil Rights Act -- the statute of Congress -- would be almost meaningless then, if we were to be foreclosed the right to go into a federal court when a civil matter has been presented.

Q Well, it would be meaningless only in the sense that you couldn't interrupt an already commenced state judicial proceeding. It would certainly have a lot of other uses where that situation didn't obtain.

MR. SMITH: Yes, sir, but in the context of the case like this, if we were first to file before there was any action of the part of the state, then we'd be faced with the problem, is there a case in controversy; and if there is no case in controversy, can we in fact go in and seek a declaratory judgement? So, then, what good is it to have Zwickler v. Koota that says we have an election of forums, or that election of forums to litigate federal constitutional rights should be allowed.

So we're saying that if this Court were to say that in civil cases, already commenced, where of course, the prosecution knows what it's going to do in advance, that we are foreclosed from going into federal court to litigate our federal

constitutional rights, then I'm saying the statute of Congress that permits injunctive relief would almost be meaningless, or at least --

Q Well, that's the same situation with respect to criminal -- state criminal proceedings.

MR. SMITH: Well, but I think this Court answered the questions there with regard to --

Q And they answered it and said you couldn't go into federal court if there was a pending proceeding, which is the same kind of an argument you're making now was made then.

MR. SMITH: Yes, and then you had, of course, the -- that is true, except --

Q I wonder, Mr. Smith, if really the considerations of federalism is what underlay the Younger line of decisions in the criminal cases -- the pending criminal proceedings. And aren't you really in the position where you have to argue that in respect to pending civil proceedings, considerations of federalism are not as significant as they are where there are pending criminal proceedings.

MR. SMITH: Yes, sir.

Q And then, secondly, I suppose, you've got to confront the holding below that this civil proceeding is an aid of the enforcement of criminal -- of the criminal statutes -- the state criminal statutes, and in that sense, this is not a pure civil proceeding, but sort of a hybrid.

MR. SMITH: Yes, sir.

Q Quasi-.

MR. SMITH: Agreed, and -- but we take the position, of course, that it is not an aid in the enforcement of criminal law.

Q That it's pure civil.

MR. SMITH: It's purely civil, Your Honors, because you do not have a seizure of a film to be used in a criminal case. None of this material needed to be seized to be used in any of the criminal cases. It's just the shuttering of the premises because something was alleged to be obscene; and, of course, we're being deprived of the criminal burden of proof by the proceedings because it's a single judge deciding whether or not he thinks an item in there was obscene. And if he thinks an item was obscene, the entire place is shuttered, and we say that that makes a significant difference, and federalism should not be the bar to us seeking our relief in the federal court in this regard.

Q And yet, if it were a criminal -- if it were an action for a criminal nuisance prosecution, with exactly the same result, you would clearly be barred by Younger, wouldn't you?

MR. SMITH: Yes, sir. But then, again, we wouldn't have the concept of the potential of the irreparable harm -- the irreparable harm being the potential for self-censorship,

the potential for chilling of speech. If one knew he had -- if he had a business, and if he sold a publication which might be held by one judge to be obscene, somewhere, and that the entire business could be shuttered, then there would be a chilling of speech, which, of course --

Q Well, why wouldn't you have the same chilling if you had exactly this Georgia statute on the books that you have now, except it was a criminal statute, rather than a civil one?

MR. SMITH: Then we'd have all the attendant protection that a criminal case would afford a litigant that is not present, necessarily, in a civil case, whether it's the burden of proof, the right of juries, things of this nature. So we say that this isn't necessarily the same. So at least in a jury case, where it is applicable in a criminal case, you -- if the community standard, as this Court has indicated, is to be determined, whether it's local or state-wide, at least the Court has said that the jury is the representative of the community and can make that determination. You don't have that with a judge who may, necessarily, just find one publication may offend him subjectively, and he -- or otherwise, in applying the test of law, he might find it obscene, and then says, "OK. Fine. One publication, we'll shutter the entire premises."

So I think it's different. The criminal case is a -- you can -- if there is a single criminal case, and I think what this Court has said is, if there is a single criminal case you

can defend your position in that case.

However, suppose the government brought multiple cases all across the country, relating to the same, oh, type of activity for the same parties, it might be that if a defendant in that situation could say that he thinks the government is engaging in bad faith enforcement of the law, or harassment, that he could go forward.

But here we have, as I said, a shuttering -- it's completely independent of the criminal proceeding.

Q There's no use at all that the state can make of the result of this civil proceeding in any subsequent criminal prosecution?

MR. SMITH: No, sir, because they're asking to destroy everything. There is no question or contention raised, there is no request that the material be delivered up to the sheriff and -- or to the clerk of the court for potential use in a criminal case, as there was in the Paris Adult Theater concept, or Walters -- there's a Walters case there where that concept has been held; or in the Palaio v. McAuliffe case, which was the rationale of the Fifth Circuit that the two judges in this Court -- in the case here, bottomed themselves on.

So, we'd say, no, sir, we don't feel that there are.

Q Mr. Smith, it's the -- one case was removed to federal court, was it not?

MR. SMITH: The original case was removed.

Q Is that still pending?

MR. SMITH: No, sir.

Q What's happened to it?

MR. SMITH: I think it was remanded back after the judges decided that they had decided to abstain, or, in essence, federalism. The federal matter --

Q And then there was reference somewhere to a Sanders case argued to the Georgia Supreme Court. Has that been decided?

MR. SMITH: No, sir, it has not. It has not as of yesterday, sir. And, of course, I think those circumstances even developed after this case had started, that litigation was independent and --

Q Is it part of your argument, or, at least, are you making the alternative argument that even if the Younger doctrine applies to this case, that this case is within one of the exceptions recognized by Younger? Is that the reason you keep telling us about the --

MR. SMITH: Irreparable --

Q -- irreparable -- well, before you can have an injunction anywhere, in any court, at any time, quite apart from Younger or federalism or anything else, you have to show irreparable harm, don't you? That's just a basic equity concept before there can be an injunction. So that doesn't get you anywhere.

MR. SMITH: Right, sir.

Q But, are you telling us that this comes within one of the exceptions recognized by --

MR. SMITH: Well, of course --

Q -- Younger, even assuming -- let's -- even assuming this were, as my brother, Rehnquist, has suggested, a criminal nuisance statute, so that Younger would be clearly applicable. Are you arguing that this comes within one of the exceptions recognized in Younger that would allow an injunction by a federal court of a state criminal proceeding?

MR. SMITH: Yes, sir, that is an alternate argument we have made --

Q I wondered why you were talking so much about --

MR. SMITH: Yes, sir.

Q -- the substantive merits of your claim, and about prior restraint, and I assume that it's only materiality could be -- could reflect that alternative argument.

MR. SMITH: Yes, sir, and of course, the Court did not reach that issue because of the way they disposed of the case.

Q Right. I know, but I'm asking about your argument.

MR. SMITH: Yes, sir. That's right, and that's one of the things we had hoped to demonstrate and try to demonstrate in the court below.

So, in summary, as I said, our position is that Younger should not apply to these civil cases. This Court has before it Lynch v. Snepp, which is -- in which no action has been taken, and I think was relied upon by counsel in the case -- in our case here in the brief. We say that this is the kind of situation that if this Court takes the language that any statute that involves itself with prior restraint bears a heavy presumption against its constitutional validity, this is the kind of case that should allow the determination.

Q Do you suppose that the question is quite so simple as you implied by your -- just what you said in conclusion -- that Younger should not apply to civil cases, don't you think, possibly, that it might apply to some civil cases but not to others?

MR. SMITH: Yes, sir, I think particularly it should --

Q Now here's a civil case in which the state -- the state is the plaintiff. Now, normally, when we think of civil cases, we think of cases between two private parties in a state or federal court. Here, the state is the plaintiff -- the state is the plaintiff, which may make it different from other civil cases; and, as the state suggests, it's in aid of its criminal laws, but even if not an aid of its criminal laws, it's sort of a quasi-criminal proceeding, is it not?

MR. SMITH: No, we don't --

Q It's trying to put somebody out of business because of his anti-social behavior -- isn't that it?

MR. SMITH: Yes, sir.

Q Which is -- pretty much reflects the same purpose that criminal laws reflect, does it not?

MR. SMITH: Or to punish. The criminal law to punish the -- for the --

Q Right. Trying to stop somebody from doing something anti-social.

MR. SMITH: Yes, sir.

Q Which is different from a -- many other sorts of civil cases -- tort, contract cases, divorce cases, and so on.

MR. SMITH: But then, in a lot of those cases, Your Honor, if it's a civil case involving litigants -- private litigants who are not state officials, or state action, then we lose some of the rights under our Civil Rights Act there, because there must be, certainly, some color -- under color state law.

Q No, for the state action insofar as the court permits racial restrictive covenants, that's been held to be state action.

MR. SMITH: Yes, sir.

Q And so far as the court permits libel and defamation verdicts, that's been held to be state action -- New York Times --

MR. SMITH: Yes, sir.

Q And so on. So that's not the whole answer. I'm

just suggesting that the answer may not be quite so simple as to say Younger applies to civil actions, or it doesn't apply to civil actions. It may apply to some in some times and not to others, wouldn't you -- ?

MR. SMITH: Whereas, of course, Younger is now, seemingly, saying that it always app- -- almost always applies to criminal actions, and, of course, I was making the other simplification with regard to civil actions. And that was merely the purpose.

Thank you.

MR. CHIEF JUSTICE BURGER: This is somewhat analogous, is it not, to proceedings to impound and, perhaps, ultimately destroy, contaminated food, or contaminated drugs, where there is no purely criminal procedure, but a forfeiture procedure?

MR. SMITH: No, sir, I don't think so. This Court, in the opinion of the Chief Justice, indicated that the material is not contraband until such time as there's been a judicial determination, or, at least, a adversary hearing of some type, after the seizure, or before the seizure in a civil --

MR. CHIEF JUSTICE BURGER: But we have said that in certain circumstances it can be seized and impounded pending the determination of its -- in the case of food or drugs, it's contaminated or dangerous condition.

MR. SMITH: Yes, but I think this Court said in the Heller and Roaden series of cases that when you are dealing

with a civil forfeiture that, perhaps, quantity --

MR. CHIEF JUSTICE BURGER: Because of the First Amendment implications involved.

MR. SMITH: Yes, sir.

MR. CHIEF JUSTICE BURGER: But I was speaking procedurally of the analogy. It's analogous to some of the things that were mentioned in Fuentes Seven -- Fuentes v. Seven --

MR. SMITH: Yes, sir.

MR. CHIEF JUSTICE BURGER: That in certain circumstances speedy action is required by the state. That isn't a pure civil procedure, and it isn't a pure -- it certainly isn't a criminal procedure.

MR. SMITH: No, and, of course, its design is to protect the public from the material going out into the public, and injurious to their health, and stuff like that.

MR. CHIEF JUSTICE BURGER: Now, that's at least, whether it's correct or not, that's Georgia's theory here, is it not?

MR. SMITH: No. They are simply saying that if you sell -- well, of course we don't know what the legislative theory is in passing legislation except just to close the place down. It would be conceivably said to be that they feel that they should --

MR. CHIEF JUSTICE BURGER: The court may -- the state courts might rationalize it that way.

MR. SMITH: Yes, sir, but you take the situation of a drive-in theater that this Court dealt with in Rabb v. state of Washington, where there it was, out in the open, and it was a constant, repetitive kind of thing -- well, OK, that may have First Amendment implications, but then, again, had they brought a nuisance action, because of the continual showing of the kind of material that people were having it thrust upon them, and I think therein that kind of area, the state may have had the interest that would have justified, perhaps, going forward. But we say this is not that kind of interest.

Thank you.

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

Mr. Moran?

ORAL ARGUMENT OF THOMAS R. MORAN, ESQ.,

ON BEHALF OF THE APPELLEES

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

To start with, I'd like to tell the Court that the -- as my brother has told the Court -- that the Sanders case now before the Georgia Supreme Court has not been decided. It brought into question Ga. Code Ann. § 26-2103, which is the statute that was essentially attacked here. There are the grounds the court may not decide it on that particular statute, but I thought the Court would be interested in that it is before

the Georgia Supreme Court.

Now, in this case, may it please the Court, the facts are not too complicated. We brought --

Q Let me get that straight, Mr. Moran. Do you think it'll bear on this case, or did you think it will not bear on this case?

MR. MORAN: Your Honor, in as far as the briefs are concerned, it will bear. I've read the briefs, and I know counsel on the other side. There were two issues. First of all, it was closed on a nuisance theory based in part on this statute, and then on a zoning statute. So the Supreme Court conceivably could go in zoning and leave this issue alone.

Q Well, if it bears on the case, and if it comes down before this case is decided, will counsel --

MR. MORAN: Yes, Your Honor.

Q -- bring it to our attention?

MR. MORAN: Yes, sir. Yes, sir.

Your Honor, and may it please the Court, the facts of this case are essentially that in August of '72, the state brought a nuisance action, some two months after we had a mistrial on a criminal case. The nuisance action was brought against Campbelton Road Book Store. The criminal case was against one man, Chandler, who, we found out after we brought the civil action, either lost his proprietary interest or something, and Speight took over.

Now, we set it down for a rule hearing as in normal Georgia procedure in nuisance cases. That was four days after the filing of the complaint. On the morning that we arrived for court, after the court had cleared its calendars for its rule hearing, we were served with removal after we announced writ.

At that time, we repaired to the federal court, on the state court's direction, and we discussed the case, both counsel, with Judge Moye, who drew the case when we got over there, and it was held over for a three judge panel.

Between the time that we could hear the removal action the 1983 civil rights action was filed by the appellants herein, and they alleged that the Georgia statutes, 26-2101, which is our general obscenity statute, and in that time, pre-Miller, it tracked Roth mémoires, and had been declared constitutional in the Fifth Circuit, and was affirmed by this Court in Gable v. Jenkins.

They attacked 26-2103, which is the nuisance statute that counsel has referred to. They attacked 26-2104, which makes any materials which have been found to be obscene contraband, that is after determination, therefore we could destroy it. And they attacked the entire nuisance chapters.

Now, the District Court, when we went over there, did not reach the merits. They decided the case on abstention, comity and federalism, and sent us back. That's where we are

at the present time.

Now, it's important to note that the rule then pending in the Fifth Circuit, as far as abstention and comity, and what to do when a injunction or declaratory relief is asked against the state statute, was that federal intervention will not rest on labels such as civil or criminal. It's simply a balancing of the competing interests. The doctrine arose out of the Palaio case.

And that's what the court did in this case. They weighed the competing interests. They determined that this was quasi-criminal case, similar to Palaio, therefore Younger v. Harris standard should apply. It also found that this statute had never been construed by any state court. Therefore, abstention would be proper.

Now, --

Q Well, was this -- do you think the District Court saw this as an abstention case or as a case that should be dismissed under Younger v. Harris?

MR. MORAN: I think they're saying --

Q The judge -- the prevailing opinion just simply dismisses, and talks primarily about Younger. The concurring opinion talks about abstention, and the dissenting opinion talks a little bit about abstention. What do you think this case is about? Is it an abstention case, or is it a dismissal by reason of Younger v. Harris?

MR. MORAN: Your Honor, I think they're both combined. I think there was one sentence in the majority opinion that said that in this instance --

Q Well, there is no majority. Well, yes there is. Yeah, yeah, because the concurring opinion joined them -- joined the prevailing opinion, yeah.

MR. MORAN: In this particular case, the state courts hadn't ruled on it, and that's more of a reason why we ought to send it back. I don't think they went into it in any great depth.

Q Because the Younger doctrine doesn't have anything at all, really, to do with abstention, does it?

MR. MORAN: No, Your Honor. Not at all.

Q It's quite a separate doctrine -- concept.

MR. MORAN: I think --

Q Mr. Moran, haven't we suggested that when the District Court abstains, as distinguished from applying Younger, the District Court ought not dismiss --

Q Right.

Q -- but hold the case for this abstention. Here, there was dismissal.

Q Right.

MR. MORAN: Yes, Your Honor, and --

Q And wouldn't we suppose, since the -- I think our cases have been rather explicit that if you're abstaining you

hold the case.

MR. MORAN: Then the statutes --

Q That we ought to infer here that what the District Court did here was dismiss on Younger grounds.

MR. MORAN: Yes, sir, I totally agree, but I think they used some extension to back up their position.

Q Um-hmm.

MR. MORAN: That the state courts hadn't acted here. I know this 1980 -- no, I'm sorry, 2284 does mandate the court to hold it.

Q Yes.

MR. MORAN: For the state.

But this rule as far as one of the competing interests is now the rule in the Fourth and the Seventh Circuits, also. Lynch v. Snepp, which is on appeal up here, uses that rule. And so did Cousins v. Wogoda. Now, the Fifth Circuit went one step further when they added the quasi-criminal concept, and weighed the competing interests in light of Younger v. Harris standards. Now, this was left out --

Q Mr. Moran, do you think that's an accurate description of this statute -- quasi-criminal?

MR. MORAN: Of --

Q I gather it's in the -- is it a section in the general obscenity statute?

MR. MORAN: Yes, Your Honor, it's only --

Q Yes.

MR. MORAN: -- criminal provisions. It's the next statute codified under the obscenity statute.

Q But, as I understand it, it may be pursued independently, without reference to any present or prospective criminal prosedution, can it -- may it not?

MR. MORAN: Well, that's what my understanding of the statute is. But you'd have to go back to the -- to 21 -- 26-2101, the general obscenity statute, to determine if it's obscene, which is the criminal attraction.

Q Yes.

MR. MORAN: In other words, if we find obscene material we could move in either two ways, or at the same time. We could hit him criminally, or civilly, or we could hit him with both.

Q Both.

MR. MORAN: Like Kingsley Books suggested we might.

Now, --

Q That doesn't make it quasi-criminal, just because you have a criminal remedy or a civil remedy, doesn't make the civil remedy quasi-criminal, does it?

MR. MORAN: I think in this instance it would because we are further in the aim of the criminal statute. It's simply another alternative penalty.

Q To the criminal statute, or to the general peace and good order of Georgia?

MR. MORAN: I think to both. The criminal statute is the general obscenity --

Q But if I understand here, somebody can give you an obscene book and say he bought it in Rich's Department Store, and you can close up Rich's Department Store.

MR. MORAN: The courts can after a jury trial.

Q Is that right?

MR. MORAN: Now --

Q And there'd be no criminal proceedings at all.

MR. MORAN: No, there needn't be the criminal --

Q So how did it become quasi-criminal?

MR. MORAN: Just when it --

Q Closing up the store is not going to jail.

MR. MORAN: No, but it would be in the -- this question has come up before, and came up before this Court in Geiger v. Jenkins, which was a position case, where he was brought before the board and he was "defrocked," if you want to use that term. In that case, the Georgia courts had held that in attorney type proceedings -- disbarment proceedings, in position cases, that you use some of the criminal rules because it is quasi-criminal nature because it's a penalty. So, that does have precedent in our particular state law.

Q Well, isn't that, you find something contraband, and you destroy it, and that's quasi-criminal?

MR. MORAN: There would be -- under the rationale of

Geiger v. Jenkins, in our state it would be. I don't -- there are no cases dead on point on it, that I know of in all the other states.

Q It's a good prah (?) book --

MR. MORAN: It is -- cross your eyes.

Q I'd say if you have the alternative of -- have the alternative, as you suggest in your state, of proceeding by way of the criminal law under criminal prosecution, or this way, it's just the opposite of quasi-criminal. It's like -- the analogy is the Federal Anti-Trust Laws. The federal government can pro- -- has the option of a criminal prosecution or a civil action to enjoin the alleged wrong-doing, and that doesn't make the civil action quasi-criminal. It's chosen just the opposite, to proceed civilly.

MR. MORAN: Yes, sir, that's what --

Q Of course, we're dealing mainly in semantics, and perhaps it's not important, but I should think if you have the option of proceeding criminally or by this method, it's just, by definition, not criminal.

MR. MORAN: Well, I -- you can put like the state courts say -- I mean, the federal courts have just civil approval on it -- stamp it, and that's it. But I think, as far as competing interests -- what do you do to the state court machinery when you intervene in a case like this is entirely different than in a civil case. It's just like tax cases. You

go in. The bureaucratic system is set up to move; the courts are set up; the prosecutors are moving; the laws are being enforced, and then you stop it -- boom.

And I think that is the danger in interrupting our dual system to begin with. That you do embarrass the state proceedings, you prohibit a state prosecutor from going into his own court and finding out what the law is. And then you short-cut the usual system of going through state courts and other --

Q Well, the prosecutor's not going into the court to find out what the law is. He's going into the court to put the defendant out of business, isn't he?

MR. MORAN: Yes, sir. That's exactly what he's doing. Or it's exactly what I've been --

Q Right.

MR. MORAN: Now, we don't -- as an important fact, we don't really know what the extent of the remedy in this statute is, under nuisance, because our general statute is a blind type of statute -- 72-301 et al. -- and it deals with houses of prostitution, and every section refers back to the initial section on houses of prostitution, lewdness and assignation.

So, until the Supreme Court rules, we don't know whether -- in fact, in my opinion, under the Davis case, we couldn't go in there and padlock it and destroy the material. It'd have to be only by injunction.

Q Have to whats?

MR. MORAN: It could only be by injunction. The judge would have to write -- he couldn't padlock and he couldn't destroy forfeiture. He'd have to enjoin. That's the Davis case coming out of our state that said unless there's a specific statute on it that you can't forfeit and destroy. Here it's only by injunction; you can't close down his business. It was a beer garden case.

Q Well, what would the effect of the injunction be?

MR. MORAN: The effect of the injunction would probably be to --

Q To close down his business, wouldn't it?

MR. MORAN: It could be just to tell him he can't sell any more obscene books. It could be to tell him that under -- you'd have to construe our Georgia constitution with it.

Q Why'd you have to seize all the books to tell him that he can't sell obscene book? I understand you seize all of his books, don't you?

MR. MORAN: We prayed to seize all of his books. No state action had -- we didn't -- at this point, we don't know, construing the nuisance statutes, which had never been construed on this particular point, whether we would have gotten that relief or not.

Q Well, I see.

MR. MORAN: In other words, in effect, the --

Q Well, whatever route you get, Mr. Moran, do I understand you to say, is limited to injunctive relief?

MR. MORAN: Yes, sir, under code, just as I read it.

Q Well, but, as you've also represented to us, none of this is really very clear until your courts --

MR. MORAN: That's true.

Q -- speak on the subject, is that right?

MR. MORAN: That's true. It just says that if you sell a book you are a nuisance.

Q Right.

MR. MORAN: And, in effect, how do we abate you is not particularly clear at this time.

Q Is the point -- this was -- this legislation was enacted in 1971, I think, wasn't it?

MR. MORAN: Yes, Your Honor, it went into effect in --

Q It seems to say so here in the --

MR. MORAN: -- April in 1971.

Q -- in the brief in the -- and what it did was to sort of tack itself onto, or incorporate, much older legislation that had to do with houses of prostitution. Is that it?

MR. MORAN: Not exactly, Your Honor. It never mentions it. We went under the basic law that says a nuisance is anything that works hurt or inconvenience to the public. And that's -- and that the Attorney General -- or, I'm sorry, the

District Attorney in each particular judicial district can move to have it abated. That's generally what we move --

Q Well, but 26-2101 is much more specific than that, isn't it?

MR. MORAN: Yes, sir. That's the general obscenity statute.

Q What?

MR. MORAN: That's the general obscenity statute.

Q And under which statutory provision did you proceed?

MR. MORAN: 26-2103. And 72- --

Q Well, "the use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

MR. MORAN: Yes, sir.

Q Right? And what other one?

MR. MORAN: And 72- -- I think it's 201, which is the general -- gives the District Attorney the power to go in and abate nuisances --

Q "Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety..." and so on. That one?

MR. MORAN: Yes, sir. Yes, sir, and there are a couple more general statutes in there that give us the power to go in and --

Q And those are older statutes?

MR. MORAN: Yes, sir. Very old. They --

Q And generally have been applied against houses of prostitution. Correct?

MR. MORAN: Yes, sir. The -- your Chapter Three is the one that gives the forfeiture in --

Q Chapter 72-3?

MR. MORAN: Yes, sir. That gives the forfeiture and abatement proceedings in houses of prostitution. You lock the place up, you sell everything that's in it.

Q That is 72-302?

MR. MORAN: Yes, sir. And the rest of the Chapter always refers back to that initial paragraph.

Q Right. I see. I think I see.

MR. MORAN: Now, Your Honor, I think the rule in the Fifth Circuit is a good one. In equitable proceedings, it's discretionary with the court, and you have to have some discretion built into your rule that you're going to use when you determine whether to take a case from the state court. Or you get in the position that this Court found itself in the Mitchum case, where it had to construe Younger v. Harris, and the Atlantic Coast Line case.

Now, comity, as the Court well knows, is a judge-made rule which protects our dual system of justice. In this case, most of the decision of the lower court was based on comity, and

the Younger v. Harris doctrines. We've come to a point where 1983 is the expressed exception to 2283, the anti-injunction statute. But in Mitchum, it's clear that the District Court has to go further than that, to determine if the basic principles of equity, comity and federalism will be violated by taking jurisdiction. In this case, they found that, simply because the state was acting.

We had a statute which had not been construed by the federal court -- or, by the state courts, authoritatively. There had been no state action as yet. In other words, the plaintiff in the lower court below comes in and says he has filed a complaint against me. And this chills my First Amendment ar- --

Q I thought the state did file this action.

MR. MORAN: It did, but, I mean it --

Q Well, that's state action.

MR. MORAN: -- the state court had not acted --

Q Well, that's state action, isn't it?

MR. MORAN: Yes, sir. I'm sorry. It's a slip of the -- of terms.

Q Yes.

MR. MORAN: But, in other words, the state court had not acted yet. We don't know exactly what his irreparable injury may be, if there is any. And when he comes in, when they file their action he has a rule, so he has an adversary hearing

before anything's picked up. Nothing's seized. In fact, in this case, we went out and bought, on three different occasions, alleged that this was representative of everything in the store, that everything in that store is either obscene or so comingled with other things that are not obscene, as to make them indistinguishable.

A judge would issue an interlocutory order, and within sixty days we'd have to go to trial before a jury. That's the procedure we were moving under. And the procedure grew out of three cases, one of them, Paris Art, which this Court had, Palaio, Walter's v. Slaton. These were old adversary hearing procedures around 1969, where our courts -- we didn't have any procedure for adversary hearings, and our courts said that they were like nuisances, and we based this statute on that, and passed it.

Q Mr. Moran, is --

MR. MORAN: Yes, Your Honor.

Q If we affirm, and the federal claims are then remitted to this state proceeding, and they're decided adversely to this store, whatever the name of it is, and that's affirmed in the Supreme Court of your state, then, I gather, the only federal court -- the only federal court that can hear, or determine, these federal claims will be this Court--

MR. MORAN: Yes, Your Honor.

Q -- if we grant review of the Georgia Supreme

Court, I take it, that might come up, either by appeal or on certiorari. Whereas, if you had succeeded in the criminal prosecution, and that had been affirmed by your state Supreme Court, Mr. Speight could have gone into federal habeas, could he not?

MR. MORAN: Yes, sir.

Q And the local federal District Court could have disagreed with your state Supreme Court, could it not?

MR. MORAN: Yes, sir.

Q And you then would have had to come here by or through the Court of Appeals and then to this Court.

MR. MORAN: Yes, sir.

Q So that there is that difference, isn't there, between a criminal prosecut- -- state criminal prosecution --

MR. MORAN: And civil.

Q -- and a state civil proceeding.

MR. MORAN: Yes, sir.

Q Now, do you think that has any bearing on the application of Younger principles? Oh, I may add one other thing. I don't know that it's yet been decided, but I imagine there are problems of res judicata on the 1983 proceeding, if the civil proceeding comes out adversely to the -- to Mr. Speight, aren't there?

MR. MORAN: Could be. Could be --

Q I gather that if you -- if he loses in the civil

proceeding, and that either -- he either appeals or he doesn't, but anyway, the litigation is over in the Alabama courts, he can't bring an 1983 suit. The issue has been decided against him.

MR. MORAN: I -- you're right.

Q And his only resort is appeal or cert- -- through the state system to here.

MR. MORAN: But then he doesn't run the forf- -- the problem of going to jail. That's why that we have it.

Q I understand that, understand that.

Q Now, that's the -- what I'm getting at is, now we've got plenty to do up here, as probably you've been hearing of late, and are we then to take on the ultimate determination of these federal claims from all fifty states?

MR. MORAN: Well, you have --

Q We have the assistance on the criminal side, at least, of the lower federal courts and federal habeas, but we wouldn't here, would we? Why isn't this something like the Englander, which was an abstention problem, you recall?

Q I suppose we can always deny certiorari.

MR. MORAN: Yes, sir.

Q Yes, we can, but that's just the problem; and, more often than not, we do deny certiorari, for a lot of different reasons; and the consequence, then, is that these federal claims are never heard in the federal forum.

MR. MORAN: No, sir, but they're on the state forum, and the --

Q Well, I -- I agree --

MR. MORAN: -- the state judges have to do just the same --

Q I agree, but --

MR. MORAN: -- duties as this Court and the other federal courts have.

Q -- as Mr. Smith suggested, Zwickler and Koota had something to say about the availability of the federal forum.

MR. MORAN: Yes, sir, but --

Q And it was a unanimous decision of this Court --

MR. MORAN: Yes, sir, it did, but --

Q -- and the meaning of the 1875 amendments, and so forth.

MR. MORAN: But there were no -- there was no pending state court action in --

Q No.

MR. MORAN: -- Zwickler. That's another thing.

Q But I'm just --

MR. MORAN: And it's still an extension --

Q My real question to you is, don't you think our determination whether or not Younger should be applied in the civil area ought to take into account that the only federal

forum available will be this Court?

MR. MORAN: Yes, sir, it should weigh all the interests.

Q With the difficulties of getting cert?

MR. MORAN: It should weigh all the interests, and it -- I think it has to be on a case by case basis, just as this one was, because a special way of -- I'm trying to think of the Justice who said it, but it was in the Wisconsin case, when a statute --

Q That's Stanton --

MR. MORAN: Yes, sir. When a statute comes to a federal court to be adjudicated, it's naked, in essence. It has no construction applied if it's never been construed, and they can't construe a state statute. So it either stands or falls on its face, period. And I doubt if they can construe it in light of other provisions; like, we have a constitutional provision -- you'd have to construe the statute with that.

Q Well, that's more in the abstention area, I suggest, than in the Younger area.

MR. MORAN: Yes, sir, but I think that would bear in whether to apply Younger v. Harris standards, just as the habeas corpus would bear on it. You're going to have to weigh all the competing interests, not just one of them.

Q But that's not true if the statute does not need interpretation.

MR. MORAN: No, sir, that's true. That's what it was --

Q Well, what language in this statute need interpretation?

MR. MORAN: A nuisance. I think that what it means when it makes it a nuisance. How do we abate it? You're going to have to construe --

Q There's no decision in Georgia about a nuisance?

MR. MORAN: Not on this particular statute, no, sir. There are decisions about beer halls --

Q My point was, is there any decision in Georgia on nuisance?

MR. MORAN: Yes, sir, quite a few.

Q As to what is a nuisance.

MR. MORAN: Yes, sir.

Q I should hope so.

MR. MORAN: There are quite a few, and how to abate --

Q So that's -- that word's not vague, is it?

MR. MORAN: No, sir, it makes it a nuisance.

Q Well, what's vague in the statute?

MR. MORAN: I don't -- I think what is vague is not the statute on its face, but the remedy the statute provides for the state.

Q And --

MR. MORAN: And that --

Q -- the remedy is vague?

MR. MORAN: That how the statute -- how the nuisance is to be abated after you determine it's a nuisance.

Q What did the statute say?

MR. MORAN: The statute says, "The use of any premises in violation of the provisions of this Chapter," that's the general obscenity statute, "shall constitute a public nuisance."

Q It says nothing vague there, is it?

MR. MORAN: No, sir, not on the statute's face, I don't think there's any vagueness.

Q Well, that's -- isn't that what's before us -- this statute?

MR. MORAN: Yes, sir, and three other statutes.

Q And that's what you wanted interpreted by the Court -- by the Judge of the Supreme Court -- this statute?

MR. MORAN: Yes, sir, and I want the Georgia Supreme Court to interpret --

Q And you say there's nothing in the statute that's vague.

MR. MORAN: No, it -- yes, sir, on its face, there's nothing, but as applied, it could be.

Q It could be vague.

MR. MORAN: As applied.

Q Well, I imagine if you applied the statute to a gasoline station, it wouldn't apply, but that doesn't make it vague.

MR. MORAN: No, sir, not vague on its face. In the First Amendment area, though, you still have to apply the doctrines of abstention and comity. I know when the state court comes in and says -- I mean, when we come into --

Q Have you got a prior restraint case where that was done by this Court?

MR. MORAN: I beg your pardon, Your Honor?

Q Do you have a prior restraint case where this Court did that?

MR. MORAN: There's one --

Q You agree this is a prior restraint case?

MR. MORAN: Yes. There's no prior restraint without judicial action, but it could be prior restraint, yes, sir. That's what -- that's what we would want to --

Q It's a prior restraint. It says if you are caught with an obscene book, you'll -- you might lose the whole business.

MR. MORAN: Yes, sir. Or in the future, if it's interpreted that way.

Q Well, I -- I'm not saying that we did or did not, but I wonder if you know of any case in which this Court, where there's been an alleged obvious prior restraint, the

Court has said, "We will yield to the state."

MR. MORAN: There's -- no, sir, except in Mitchum v. Florida.

Q In Mitchum -- the Mitchum case had that sort of a background. Of course, that wasn't the issue in that case.

MR. MORAN: No, the issue was whether 28 bars it on its face -- 28 --

Q But it had the same kind of background as this case.

MR. MORAN: And when you sent it back, you did say we had to go into this --

Q I don't think that necessarily kills you, one side or the other, but I was just wondering if there was one. I don't think so.

MR. MORAN: Unless there are any questions, I think I'll use the rest of the time --

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Smith, you have about three minutes left.

REBUTTAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SMITH: Yes, sir.

Incidentally, there was some discussion about Sanders, and I wanted to tell the Court that, as counsel was alluding to, there was a zoning problem in Sanders, and that is to say, that the city council, or the county council of

DeKalb County said that no adult book stores or theaters could be within 200 yards of a church, a school, a pool hall, and things like that. So it's very conceivable, in view of that absolute concept, that Sanders could be decided on that issue, and not reach the nuisance issue. It was not declared to be a nuisance, it just says a matter of zoning. No adult theater or book store can be placed within so many hundred yards of these various facilities.

Q Per se determination that if it's within 200 yards it's determined to be --

MR. SMITH: No, it's not a nuisance, sir, it just can't have a license.

Q Oh.

MR. SMITH: And if you can't have a license, you're -- and it's zoned -- you're not, just are not allowed to be operating there. Right, sir.

And in -- further, in the -- under the Georgia provisions, the determination of a place of being -- as a nuisance does not entitle us to an automatic right of the supersedeas bond. In fact, in Sanders, I think he was closed approximately three weeks before the state judge gave him a $50,000 supersedeas bond to operate.

And, finally --

Q What's the situation here, with respect to whether or not he's closed or open for business?

MR. SMITH: He's open, sir.

Q Why? And how?

MR. SMITH: He's been open because there's been no de- -- no further action by the state court, I suppose, pending the decision of this Court.

Q Um-hmm. Of course, the federal court --

MR. SMITH: The federal court found --

Q The federal court declined to enjoin the state proceedings, but then what? Was the stay granted?

MR. SMITH: No, sir, no stay has been granted. None is -- none was requested.

Q They're just in suspense, pending --

MR. SMITH: Yes, sir.

Q -- pending the determination of this litigation.

MR. SMITH: And, in this instance, as we pointed out, just to be sure that the Court understands, if the jury finds any of the publications bought by the prosecution's --

Q There is a jury trial here, is there?

MR. SMITH: As to the issue of the obscenity of the publication. Then the judge would apply the law, as it is written, obviously, and shutter the premises. So the jury would not determine whether it was a nuisance. The jury would determine whether the material was obscene under the standards that this Court has set forth.

And, incidentally, the Court mentioned Mitchum, which

was the case that we argued before the Court some time ago. The Mitchum case is now being held by the District Court Judge waiting the decision in this case.

Thank you.

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

[Whereupon, at 11:00 o'clock a.m., the case was submitted.]

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