In the

Supreme Court of the United States

BILLY JENKINS,

Appellant

vs

STATE OF GEORGIA

No. 73-557

Washington, D. C.
April 15, 1974

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BILLY JENKINS, Appellant	:	
v.	:	No. 73-557
STATE OF GEORGIA	:	

Washington, D. C.

Monday, April 15, 1974

The above-entitled matter came on for argument at 10:47 o'clock a.m.

BEFORE:

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

APPEARANCES:

LOUIS NIZER, ESQ., 477 Madison Avenue, New York, New York 10022 For the Appellant

TONY H. HIGHT, ESQ., Executive Director, District Attorneys Association of Georgia, Suite 406, 501 Pulliam St., Atlanta, Georgia 30312 For Appellee

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. 73-557, Billy Jenkins versus the State of Georgia.

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

ORAL ARGUMENT OF LOUIS NIZER, ESQ.

ON BEHALF OF APPELLANT

MR. NIZER: May it please the Court,

This is an appeal from the Supreme Court of Georgia, which affirmed a criminal conviction for the exhibition in a local theatre in Albany, Georgia of a motion picture entitled "Carnal Knowledge."

The Defendant, Billy Jenkins, who was the manager of the theatre, was fined $750 and sentenced to one year probation. The fine has not yet been paid and the probation has been stayed pending all appeals.

There is no question that only persons of 18 years of age or older were admitted or would be admitted to the theatre. Minors or juveniles are not involved in this case.

Also, this case does not involve obtrusive exhibition to unwilling persons nor does it involve pandering, despite the trial judge's instructions to the jury, held to be a proper charge by the Supreme Court of Georgia and despite the undisputed fact that there is not an

iota of evidence in the record of pandering.

This, alone, I shall later allude to,as in my argument on due process, as sufficient for reversal.

The issue in this case is obscenity. "Carnal Knowledge," which has been decided obscene by the Supreme Court of Georgia, has been proclaimed by discriminating critics throughout our country as a serious, artistic work and its distinction derives from the combined talents of many of America's leading contemporary artists.

There is Mike Nichols, the well-known stage and motion picture director, Jules Feiffer, the satirist and playwright, Jack Nicholson, Candice Bergen and Ann-Margret, who, incidentally, won the Academy Award nomination for her performance in this very picture and "Carnal Knowledge" has played to 17-million,500,000 people in some 5,000 theatres in small and large cities, including the State of Georgia, enoying popular and discriminating acceptance and then an investigator from the Sheriff's Office in Albany, Georgia seized the film.

One month later, Jenkins was arrested for having exhibited this film and the sole charge was public indecency.

He was tried by a jury which was instructed that he could also be convicted of two other crimes for which he had not been charged, namely, obscenity and pandering, reversible again.

The jury, after announcing it was hopelessly deadlocked, "If we stay here until July 4th," finally brought in a general verdict of guilty so that we cannot tell on what of these three counts, two of them illegally charge, improperly charge, he was convicted of.

On appeal to the Georgia Supreme Court and without hearing oral argument, the Supreme Court of Georgia upheld this decision by four to three and our appeal from that decision presents one particular constitutional issue, which is the profound significance to cultural freedom and that is, will the sensitive regard for First Amendment rights evidenced by the clear announcement in the Miller decision that hardcore pornography and only hardcore pornography, may be suppressed, be permitted to be stretched and grievously misinterpreted so as to strike down a work of serious literary and artistic achievement such as "Carnal Knowledge."

The dissenting opinions in the Georgia Supreme Court expressed shock that exhibiting so meritorious a motion picture should be a crime and that apprehension, your Honors, has swept through all the creative elements of our nation as the plethora of Amicus briefs in this case indicates.

From producers, who fear to risk production, to theatre owners who fear to exhibit on pain of criminal

involvement, to book publishers, who fear to print beyond the safe norm, to authors, who fear to be innovative and, most important of all, to the public, which may be deprived of access to aesthetic diversity, which flourishes best when the artist is not reined in , when he must not conform, to the lowest common denominator of safety and limitation and the damages here is not only to the work which has been barred, but the less visible and subtle encroachment, self-censorship, due to uncertainty.

In short, your Honors, the decision appealed from will have a chilling, indeed, a freezing effect on the exercise of First Amendment rights of expression, unless -- unless the threat of this holding of obscenity is dealt with by vigorous renunciation and the limitation of hard-core pornography is limited to be what the Miller decision so emphatically stated it to be, the sole exception to the protective shield of the First Amendment.

Professor Bickel had written in 1962 that the radiating consequences of decisions impinging on the First Amendment would encourage Comstockian tendencies and recently he stated that this decision on "Carnal Knowledge" does not conform to the ruling of the Supreme Court in Miller.

Indeed, your Honors, it doesn't. It is unthinkable that this picture should be confused with hardcore pornography.

The film depicts two college students over a span of about 30 years. They grow older, but they don't grow up. They are preoccupied with sex, but the picture is not. It does not involve the senses with erotica, driving out all other ideas, which is the typical characteristic of hardcore pornography.

On the contrary, it depicts the failure of the boys' lives, though they are successful in their professional careers, because they cannot establish meaningful relationships and they are ultimately crushed by boredom, loneliness and impotency.

The picture deals with the human predicament resulting from the enthronement of impersonal detachment, the inability to love and the sequelli of cruelty and spychic illness and this artistic treatment of this problem which besets this decade and has evoked many social and philosophical studies, has been the subject of plays in the past from Strindberg to Tennessee Williams and that is why the New York Times reviewer called it "Profound," the Saturday Review, "Mature," the Atlanta General, "One of the best films in a long time," and the Catholic Film Newsletter, despite some reservations, "A preceptive and brilliant put-down of a certain lifestyle," and the many critics throughout the country who have heaped similar praise upon this picture certainly all could not have been fantasising.

The language in this picture, your Honors, is blunt, although not within dictionary distance of the erotic poem in Kois against Wisconsin, which this Court understandably held was not obscene because it bore "some earmarks of an attempt at serious art, even though the author's reach exceeded his grasp," as your Honor said.

Here it can be claimed credibly that a literary and artistic standard was achieved and it was not beyond the grasp of the multiple talents which reached for it.

The story in "Carnal Knowledge" predominates over any visual presentation. The greatest care was lavished on sets, lighting, camera effects, musical score, brilliant ensemble acting, all under the direction of Nichols, acclaimed among the most gifted of cinema techratic artists who synthesized the ancient arts of painting, writing, composing, acting in a new universal medium and the resulting dominant effect of the picture as a whole is a sincere and earnest effort to create a literary and artistic work and to confuse that result with pornographic imbecility is cultural illiteracy.

The decision below ignores inexcusably the Miller distinction between commerce in ideas and the commercial exploitation of sex for its own sake and it thus makes the distribution of films and books a more hazardous enterprise.

Now, this Court has reserved the right of independent review of the constitutional fact of obscenity and we submit respectfully that the answer is clear that "Carnal Knowledge" is not obscene.

Now, another reversible error which we urge was that the Supreme Court of Georgia, in its opinion, made be interpreted to have applied the community standard to determine whether the work had value. It is somewhat ambiguous, but the ambiguity is cleared up, your Honor, because in subsequent decision by the same court, the Supreme Court of Georgia, in Slaton against Paris Adult Theatre, it was clear that expressly-applied community standards to all parts of the obscenity test -- now, of course, this is fatal error.

Even if a majority of people in a community thought otherwise, Chaucer and Boccaccio and Rablaise and Fielding would still have literary value. The test is quality, not popularity and it is based on the inherent evaluation of the whole work, not by poll-taking.

A work which has literary value has, therefore, the impregnable shelter of the First Amendment. It cannot be subjected to the other two tests of obscenity, to forfeit its immunity.

So we need go no further. But the fact is, that the remaining two tests of obscenity are also not met in this

case. "Carnal Knowledge" does not appeal to prurient interests, nor is it patently offensive, nor does it depict hardcore sexual conduct.

The work belies any purpose to titillate or to exploit sex commercially for its own sake. The camera is almost always on the faces of the characters, not below. The camera angles are deliberately discreet, picturing the least, not the most and when the point is made, it terminates the scene, not extending it with explicitness.

And sex is treated in this film as a sometimes baffling and exasperating part of life, but without looseness or lascivity and briefly stated there for your Honors, material cannot be obscene unless it meets all three tests of Miller.

"Carnal Knowledge" is a film which meets none of these tests.

How large should a muster community be which determines the applicable standard for pruiency and offensiveness? The state decisions, your Honor, have varied and conflicted with each other, some applying state, like New York and Washington, some applying local, like Florida and Alabama and one state both, Texas.

In this case, the Supreme Court of Georgia held that a local standard was permissible but gave no clue as to whether that local meant county, city, neighborhood, block or whatever and that local standard is therefore void for

vagueness.

Moreover, even if the local area were specified, were defined precisely, we believe it would create constitutionally intolerable consequences.

Let me cite a few facts in support of that contention because we urge that the state geographic limit ought to be the minimum required.

Q Mr. Nizer, could I ask, please, let's assume you are correct in saying that under Miller a movie or a book would not be obscene unless it was hardcore and let me assume that it is hardcore in whatever you might mean by hardcore. If that is so, doesn't a good deal of the argument about local or national standards wash out?

MR. NIZER: It would end the case there, quite likely.

Q Well, I know, but there is hardly any room, then, for a local standard to be whatever the local standard might be, but if a work didn't happen to be hardcore, the work would not be obscene.

MR. NIZER: That is right and it wouldn't pass the test.

Q And the hardcore standard, if that is the standard, is the national standard. Is it not?

MR. NIZER: Yes.

Q It is the First Amendment standard.

MR. NIZER: Right, and not only that, in support of that view, it seems to us, where you are dealing with the literary and artistic value, community standard is irrelevant.

Q Well, again, I just suggest that if it is hardcore pornography, that is, that Miller limits the obscenity definition to, the argument about national or local standards is a great deal beside the point.

MR. NIZER: Yes. And I -- the only reason I address myself to this is that this case raises several issues and it seems to us that in the interest of what Justice Brennan has referred to as the institutional burden on the Court to stop, perhaps, hundreds, maybe thousands of applications as to what is the area, the geographical area of a community's standard, that it might be worthwhile for this Court to examine this matter and I address myself to it, even though the case would be over if the picture isn't obscene, that is the end of it. Reversal would be required.

Indeed, it would be required on due process entirely apart even if obscenity.

So I wish to, if this Court should wish to further examine this matter, because as we read the Miller decision, it didn't specify what the geographical area must be, it merely was permissible with respect to local or to state and their indications, it meant state to us.

Now, I wanted to point out that even if the local

area were precisely defined, we think that it would still create an intolerable burden on the First Amendment for these reasons.

There are more than 78,200 separate political subdivisions in the 50 states. There are approximately 14,800 motion picture theatres in the United States and in many states, these subdivisions overlap. Thus, a single theatre or a bookstore could be located within a number of different subdivisions.

This creates a sort of a crazy quilt of conflicting standards and all of this would pass intolerable burdens on the distribution and dissemination of communications.

Now, as your Honors, I am sure, recognize, it is not feasible to prepare different versions of books and films for distribution in different parts of each state. These practical considerations invade the constitutional realm for they have a chilling effect on the expression of thoughts in that they compel the author, the producer, to run the gauntlet of thousands upon thousands of uncertain determinations on pain of criminal punishment.

Q Why is that argument any stronger, Mr. Nizer, than the argument that the producer ought not to be compelled to tailor his product to the, perhaps, vagaries of 50 different states?

MR. NIZER: If the -- if this Court would recognize a review of its consideration as to a national standard, which is what your question, Justice Rehnquist, inplies to me, we would not be unhappy, but we think --

Q But having rejected the national standard, how much force is there in the argument that, although we concede we have to do it for 50 different states, we shouldn't have to go beyond that?

MR. NIZER: Great force, in that the balkanization of this issue of submissions to 78,000 potential divisions as against 50 states seems to me to be a great difference in degree and what we are dealing here with is the rule of reason, as this Court has said, no provision will be perfect and furthermore, there is a natural division for state rights since the statute is state statute and it seems to me rather natural to follow that sovereignty of that geographical area, rather than permit its fragmentation to dozens of thousands of local communities, each of which require definition.

So I think it would at least diminish the chilling effect of these limitations. At least, I respectfully submit that is a great possibility.

Now, another form of constitutional inhibition caused by local standards is that an affirmance by the highest court of that state of a purely local finding of obscenity, in effect, forecloses other local areas within

the state from their right to make their own test, not legally, but psychologically and as Jutice Hawes wrote in the dissenting opinion below, "Local standards," he said, "place in the hands of the few the tastes and cultural advancement of the many who are members of the greater state community."

So where there is a state statute, it is more reasonable to insist upon a state standard, thus also limiting the number of confusions and the hodge-podge of local areas overlapping with each other and coming to this Court to ask whether they are/a constitutionally viable standard.

I now proceed to --

Q Mr. Nizer, there are many city ordinances in this general area, aren't there, throughout every state in the union, or most states.

MR. NIZER: Yes, and it seems to us that a city ordinance defines by its own arrangement this specific area but where we are dealing with a constitutional question, and after all, the Constitution is national, it seems to me that we ought to tend towards this theory, which I respectfully submit to you, that as you widen the circumference of the geographical area, you decrease the possible inhibition of the First Amendment.

The little town or the block or the neighborhood, in all probability, have inhibitions upon First Amendment,

state less and even national, still less.

Therefore, I think the tendency ought to be to make the geographical area larger and by natural boundaries. At least the minimum requirement ought to be the state, which I read the Miller decision to tend to, although I am not certain.

Q Well, I also read the Miller decision, even though I did not join it and it talked about local standards and I rather gathered that that was self-defining, meant that jurisdiction from which the jury came from that was trying that case.

MR. NIZER: Yes, but --

Q That is at least arguable, isn't it?

MR. NIZER: It certainly is arguable, but I think it would be most unfortunate if we didn't make a standard, community standard, the minimum requirement for constitutional reasons, to delimit the impact upon the right of expression.

It is difficult enough as it is, as Mr. Justice Rehnquist just indicated by his question, really. It creates the practical problem, but it invades the constitutional realm. How are we going to make the book into so many sections that we can give it to each local area? At least, if you have 50 states it is bad enough, but it is a little easier and that is true of motion pictures.

Q What would you do on the state area as between Rhode Island, Texas and Alaska?

MR. NIZER: I am not sure I understand the question. I would have each state area --

Q Well, you are not -- what are you putting it on? Size, number of people?

MR. NIZER: No, no.

Q You said geographical area solely.

MR. NIZER: The state statute ought to be interpreted as a minimum requirement the community standard must be gauged by that state in which the standards would exist.

Q That doesn't touch it. That doesn't have anything to do with the number of people.

MR. NIZER: Exactly. That's right, sir. That is the way I would interpret it.

Q Mr. Justice Stewart just suggested, however, the city ordinances vary, for example, on the First Amendment area of raid permits and a good many types of demonstrations, do they not?

MR. NIZER: Yes, they do, your Honor and I suppose we will never have anything but an approximation of a practical solution where you are dealing with constitutional prerogatives and the divisions in the states in the 14th Amendment applying them.

Q Your argument seems to run a little bit counter to the traditional idea -- and maybe you reject the traditional idea -- that a jury is the conscience of the community from which it is drawn.

MR. NIZER. I believe very strongly in the jury system when they decide facts; when they decide constitutional facts, I think, as this Court properly said, you reserve to yourselves the independent review because of the overall umbrella constitutional requirement and I would distinguish jury inviolability between ordinary facts in which I trust a common sense. They have seven senses, not five. They add horse and common and I believe in them.

But when it comes to a constitutional fact, as Professor Bickel said, if a jury decided that a woman's leg was obscene, this Court would be heard from or if it was decided that the statue of David must have a fig-leaf on it, this Court would be heard from and we wouldn't accept the jury's decision, even though I trust their wisdom generally.

And it is because of this question being instinct with constitutional problems, that we urge that special consideration.

I go -- I may say, in all candor, since the question of national standard has come up, understanding your Honors' ruling and accepting it respectfully that there is too much diversity in a large country such as ours to have

a national standard, but if this Court were to give further consideration to that matter, I would like to submit diffidently three reflections.

First, there is what I would like to call a "technological equalizer" in the nation, the media today, the same columnists in different newspapers, Newsweek, Time Magazine all over the nation, the ease of travel, et cetera, have reduced the diversity in the nation, not entirely, but have reduced it.

Secondly, I think there is diversity within the state and within the locality. Upstate is different from downstate in many areas and, indeed, in the locality the urban and the other citified aspect of even a small town is quite different.

Finally, in the Federal Obscenity Act, your Honor, and in other such areas as mail and transportation, international transportation, we take a national standard and I would think that we would not be unhappy if your Honors decided because of these considerations to perhaps set a national standard on a matter of this importance, but we urge only that the minimum standard ought to be the state or there would be hopeless confusion and more impact upon the First Amendment rights.

Time does not support me -- and I would like to lean on our brief with respect to due process, but I would

like to make just -- point a finger at two propositions.

First, Jenkins was charged with Section 26-2105, which is public indency. That was the only charge in the accusation.

Then the court below -- and that charge was approved by the Supreme Court of Georgia or else I wouldn't raise it here -- the court below charged the jury that it could also find him guilty of obscenity, which was another section and another crime, 26 01, not 26 05 and they could also charge him with pandering, which is quite preposterous, there is not even a word of evidence about that and this case does not fit pandering anyhow. It is not a close case, such as Ginsburg, where that became an issue and therefore, when the jury brought in a general verdict, noone can tell what they found.

In addition to that, the Supreme Court of Georgia construed 2105, which is public indecency, together with 2101, which is obscenity, construed them together. They have different penalty provisisions. They were passed at different times by the legislature. One of them even submits a tax for distributing obscene material. No one knows which penalty would apply and as construed together, 2101 becomes unconstitutional because it doesn't meet the standards of this Court and 2105 is unconstitutional because that only applies to conduct and shouldn't have even been submitted

with respect to dissemination of material.

Thank you, your Honor.

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

Mr. Hight.

ORAL ARGUMENT OF TONY H. HIGHT, ESQ.,

ON BEHALF OF APPELLEE

MR. HIGHT: Mr. Chief Justice and might it please the Court:

First, I'd like to, if I may, go back a little further in the chronology of the case to point out that sometime prior to the instant case, in a case involving Martin Theatres, which you'll find on page 66 of the record below, some remarks brought to it. This same film, "Carnal Knowledge," was involved in the city of Albany, Georgia, which is some approximately four hours drive south of Atlanta and after a hearing in federal court, after bringing the matter back to state court, the Martin Theatre chain and the district attorney reached an agreement concerning the film, "Carnal Knowledge," and Martin Theatre agreed not to show this particular film in Albany, Georgia and this is not an issue where the film, "Carnal Knowledge" is just thrust out for the first time in this particular case, but it was in the community. This was an issue in the motion picture industry and Albany, Georgia some time prior to that.

In the present case, prior to the matter coming

up for trial, the Court will notice that there were a number of demurrers filed to the indictment or accusation as such and there were six of these demurrers prior to attacking the accusation. At the trial itself, the film "Carnal Knowledge" was shown by the state. The state rested. There were other evidence presented by the defense in this particular instance of other books and et cetera on the local market, wich the Georgia court disposed of and said that it would not be relevant to judge one by some other particular matter.

But there was no more else. The only other thing that came in touching the film "Carnal Knowledge" was the unsworn statement of the Defendant stating that this was being shown or had been scheduled to be shown in several places in Georgia and reference to the fact that it had been acclaimed as one of the particular pictures.

As we pointed out in our brief, under the Georgia law, you cannot, by the use of an unsworn statement introduce evidence and make it admissible in probative value for the jury through the use of an unsworn statement. There are other means to get this material in evidence to bring in any critical reviews, anything that would go to show other facets as to the film, "Carnal Knowledge."

But what the jury had in this case, the jury that had to decide this issue, was the film "Carnal Knwoledge" and this was it.

I think if the Court will look at the record to see, this is what they had to decide it on, not any reviews by the New York Times or anywhere else, but they --

Q Mr. Hight?

MR. HIGHT: Yes, sir.

Q Excuse me for interrupting, but I was under the impression that the court instructed the jury that it could believe the unsworn statement entirely, if it so desired.

MR. HIGHT: Yes, sir, they can consider the Defendant's statement,but it cannot be used, sir, for the purpose of introducing evidence. That would have to be introduced in another fashion.

Q Well, the court told the jury that "You may believe it entirely as true."

MR. HIGHT: Yes.

Q What is the difference between that and evidence?

MR. HIGHT: I think it is the part the court considers and has in the past and could support with the court as probative value in evidence in a particular case. The court says that you can believe his statements, his statements as to knowledge and et cetera, but as to the other facts, if it comes in, it would have to be brought in by some other means, such as the best evidence rule, he cannot utilize

his unsworn statement to introduce evidence that would have to come in through another means and in this case, there was no such problem because you had a situation where other evidence was introduced.

There was no question about him relying on an unsworn statement as his sole purpose. He could have brought in any other evidence in a proper manner and presented it before the court.

Q Mr. Hight, what was the difference of the role of the jury in this case and a board of censors?

MR. HIGHT: Well, sir, I think that is quite a different view. The jury -- I think a board of censors, as you may apply it to Maryland, may set down and say, "We have set a particular group." We make this particular distinction with a person having a review from that particular issue. But under our system of jurisprudence, the jury is the ultimate trial fact in a particular case.

Q And so they look at the movie.

MR. HIGHT: Yes, sir, they looked at the movie.

Q And they decided its obscene.

MR. HIGHT: Yes, sir, this is what the court decided.

Q And what is the difference between the censor looking at the movie and deciding it is obscene?

MR. HIGHT: Well, I think it is the -- just the

difference between the requirements of the two. The censor board would simply, in my estimation, just --

Q The censor board would say, you shouldn't do it and this jury says, you go to jail.

MR. HIGHT: This could be so.

Q But they perform the same function.

MR. HIGHT: No, sir, I don't believe so.

Q Well, why couldn't you take the board of censors and say that if the picture is obscene, the man goes to jail?

MR. HIGHT: Because this is not in our particular system. I think what they are doing, the court of Georgia does not have a board of censors as Maryland does, and I think you have certain reviews from the board of censors that you do not have from your juries.

Q You did have a board of censors.

MR. HIGHT: Well, we do have -- far back, we did, yes, sir.

But what I would point out to the Court is that this is the status of the case as it came up and as it left the trial court. Then when we came to the appeal in the case, there were basically two areas that was gone into.

The first was the six demurrers or the actions of the demurrers filed below and the only other issues raised in the Georgia courts were the judge either failure to charge or

a charge of error on what the judge, in fact, did charge.

In that particular case, the Court will notice that as to demurrers numbers one and two below, these were expressively waived in the Georgia court.

As to the demurrer number six, this was expressly waived in the Georgia court. On page 7 and 9 of the Appellant brief -- so what the court had before it in the Georgia court was an attack on the demurrer or the accusation as such, saying that this accusation did not include the particular language of 2101(B) and this was the attack in number three and/in number four, the attack was the fact that the particular accusation did not have -- or the statute on which it was based did not have this language contained therein. And the fifth one has been dropped on the basis of the Paris Theatre versus Slaton that this Court decided as to public and nonpublic place.

Now, this is what was raised in the court above, though. It was simply the judge's charge and the question as to whether or not the accusation -- not the statute but whether the accusation should have had this particular language included in the accusation.

Third, is the point that -- they said that this did not have -- or the statute/on which it was based did not have this language on it, they attacked the accusation and not the statute itself.

The Georgia court, in applying the Miller decision, used the very language of the Miller decision. It stated that local or state standards, the very, in fact, the very language of this Court in the Miller decision, "local or state standards," it did not go past that particular point.

So the State would argue to the Court in this case that there has never been a constitutional attack on the statute in the lower state court.

It has been an attack on the accusation itself and it has not been an attack on the statute for being overbald or being vague.

Now, an issue was raised in that particular area, as I pointed out, on the fact that the code section involved did not include the Georgia definition of obscenity. If the Court will look at the entire statute section, you'll see that it is defined as the distributing obscene materials section; that in this section 2105 is included and the definition of obscenity is included in the section 2101(B) as part of this particular provision and in 2105, the Georgia Court required that 2011 -- that means that you have got to go to the indecent exposure statute to see what the prohibitive acts would be under indecent exposure but in this particular section, it requires this and it has to be the distributing of obscene materials.

Now, in this area, the court charged in the lower

court -- it wasn't done in the Supreme Court for the first time -- the lower court charged the language of all three, told them that charged with the crime of distributing obscene material, that he was charged with these particular acts and then charged the jury in very explicit language -- and the court said, the question is not whether these acts were done as such, but if these acts were, in fact, done, would this be obscene under this provision of distributing obscene material?

And the court charged him. It is not the question of public indecency or exposure, but it is the question if these acts that are depicted were done on the screen, does this, taking into view the Georgia statute and test on obscenity, does this show that this movie is obscene under those particular standards?

In the judge's ruling, the jury so found but to call the Court's attention first to one point, there was never any enumerations of error raised in the Georgia courts on the general grounds that the jury could not have found this particular film obscene under any standards, on the general grounds and Georgia courts have liberalized in the last few years its rules on bringing the matter before them, saying that any time before oral argument, before the court decides the issue, that any defects in the enumerations there or the notice of appeal can be accrued at that particular

time and there was never an attack made or any charge made in the Georgia courts that this film was not obscene. It was never an issue raised in the Georgia courts.

Q Well, you mean, not constitutionally obscene? Because, certainly, the Supreme Court of Georgia, both the majority and dissenting spent a fair amount of time on the subject, whether or not the film was obscene or not, didn't they?

MR. HIGHT: I think if the Court would review the enumerations of error you would find that there are a number of situations where the request was that a judge erred in making this particular charge because there was nothing in the evidence to support any such charge or any such findings by the jury and the court below in the majority opinion -- and I don't believe the court of Georgia has any problems citing where something is -- this is obscene and we find it to be obscene.

But in this particular case, the Court says, after reviewing the record and reviewing this court, we affirm -- hold the record in this case amply supports a verdict of showing the film "Carnal Knowledge" in violation of distributing obscene material and what I am saying to this Court now is this is an issue that has never been raised below in the Georgia courts by the Appellant in the proper manner --

Q Mr. Justice Rehnquist suggests that the Georgia court actually decided the question, anyway. I mean, if they dealt with the issue --

MR. HIGHT: Yes, sir, he suggested this. What I would suggest back is that the court did not reach this particular point because it was not an issue but it did reach the issues that were raised below and that was, whether jury could, on the basis of the charge of the court, could find this were included in the film itself.

Q Did the court say it was obscene?

MR. HIGHT: No, sir.

Q It didn't say that?

Q The court said, the jury found this obscene and we affirm.

MR. HIGHT: It said, we affirm the jury's finding of guilty.

Q The jury's what?

MR. HIGHT: Yes, sir.

Q Well, what did the jury find?

MR. HIGHT: It found them guilty of the distribution of obscene material, yes.

Q And the court of appeals upheld that judgment of affirmance on the question of obscenity.

MR. HIGHT: Yes, sir, but this issue, as I would point out to the Court, was not raised below.

Q Well, is it before us, now that the Georgia court has passed on it?

MR. HIGHT: No, sir. My opinion is that it is not, sir. It is that the --

Q Even though the Georgia court passed on it?

MR. HIGHT: I think what the Georgia court said was to go back and look at issues that were before them that they had to make such a ruling on.

Q And they did.

MR. HIGHT: Yes, sir.

Q Is that ruling before us?

MR. HIGHT: Yes, sir, the ruling they made is before you, yes, sir.

Q Well, I am a little confused, too. On page 30 to 31 of --

MR. HIGHT: Yes, sir.

Q -- a rather brief charge which embraces a large part of the relatively brief charge of the court to the jury, I note that the word"obscene" and "obscene conduct" appears five times at least.

MR. HIGHT: Yes, sir.

Q I may have missed some. So the judge certainly submitted the issue of obscenity to the jury.

MR. HIGHT: Yes, sir, the issue was submitted to the jury and the jury made a determination, if the

Court please. There was, as under the Georgia rules of the enumeration of error, that you have to delineate the issues that you are appealing upon for the court to reach a determination as this Court. This issue was not ever raised by any enumeration of error at any time prior to the court's determination.

Now, if the Court can say that by affirming the jury's finding in this fact, this does decide the issue of obscenity, then that would be this Court's decision that they did reach that particular point.

Q If you look at Justice Jordan's opinion at pages 53 and 54 of the Joint Appendix, he says the "Trial court correctly charged this definition of ofscenity as the guideline for the jury to apply in this particular case." He goes on to mention the Roth case, Memoirs against Massachusetts, our decision in Miller against California. You know, whether or not the Supreme Court of Georgia had to pass on that in view of whatever the bill of exceptions before them was, it seems to me that they did say that it was constitutionally permissable to find the film obscene.

Do you disagree with that?

MR. HIGHT: I think you could reach that assumption. What I am saying to this Court is that this was not an issue raised before that court as one of the issues in the case.

Q But our rule on review is that even if the Supreme Court of the State might not have had to deal with the thing under its procedure, if it in fact dealt with it, then it is before us also, or at least, that is my understanding.

MR. HIGHT: Yes, sir, and my point in -- I may be wrong, but this is what I read in the entire facts, in going back through the entire view of the thing, is that issues were raised as to the requested charge that the court had to find that certain evidence was available for the jury to consider on other matters that did not reach the issue of obscenity. Whether this is wrong, then it would be -- if I am wrong, then it would be considered.

In any case, the state below -- or the Georgia Supreme Court below stated that as they have done in a number of cases, as in the Miller versus California case, the test of obscenity is in another provision. It is not in the same provision they were charged with. A definition section is otherwise.

In Georgia, you also have in your murder cases, situation as to murder, we have got some other sections that go and limit murder when you get into the question of justifiable homicide, which would apply in a particular case.

In this case, the Georgia court said only that in 2105, since this was under the distributing obscene

materials, that the entire code section had to be considered together, which included the definition of obscenity in 2101(B) and that particular provision it just delineated the Georgia obscenity test and incorporated that as part of the 2105.

Now, this is not a new ruling. It is not something they brought out for this case. This has been the same thing for a number of years where they have to consider the entire code section and not just pull out one section, if you are to construe it as the same basic materials.

And the Georgia court considered them together and we urge to the Court that this decides if the court did reach the question of obscenity as to 2105, that this does cover that particular matter -- material on nonfederal grounds, that the state court has so construed and included in the definition of obscenity 2105 and the 2101 tied together and that should solve that particular matter.

The only other thing raised below other than the charge itself knowingly, as I pointed out before, was waived. On page 7 they have made an issue that the use of the word "knowingly" in 2101 was not properly done and was specifically waived.

But in this particular case -- if the Court please -- there was no attack below on the Georgia statute involved here on the question of overbreadth of the

particular statute or any vagueness on the statute. This was not raised before the Georgia courts. There is nothing in the Georgia court's determination of the case as to overbreadth or vagueness.

Getting into the area of due process, if the Court pleases. In this particular area, the Georgia court, as I pointed out to the Court as to the facts of the situation, this is not something that just simply jumped out at these individuals at this one time. This is something that had been pending in Albany, Georgia for some time.

This statute was on the book and the same statute that had been applied previously in the Martin Theatres case.

The Georgia court had previously said much before that point, that this, in each case when you have got a code section that pertains to the same matter, that you have to construe the entire code section together to reach a determination as to what the contents would be and the court reached and said that when 2105 -- and it falls on the area of distributing obscene material -- applies, that the definition that is given in the code section on distributing obscene material would apply in that particular case. This is what they did in that particular case and it was not an unforeseen or something that would not particularly come out in that particular area.

Going into several areas, if the Court please,

particularly in the area of national standards as to local standards, the only issue raised below as to any type of standards was the question whether the trial court erred in charging national as versus local standards.

There was no issue raised at all anywhere as to a state versus local. In the Georgia court, the trial court refused to charge national standards.

The court did charge, in that particular instance, the same community standard that has been the test since Memoirs used it in the community. That is to say, local community, they use the same language that has been used throughout most of the nation as to community standards.

But they didn't define it as local. In this particular instance, the Georgia court did not reach the issue again because there was no issue raised as to state or local. The court simply held, the trial court was correct when it said that national standards would not apply and this is the only issue as to state versus local standards raised below, was as to local versus national, there was nothing raised here.

I think the thrust of the state's argument, if the Court please, is basically is that all of these points raised here are raised ab initio before this Court for the first time and they were not properly raised below in the state court, that the state court did not have the

opportunity to pass upon them in the issue they now raise. The state court didn't meet the objection raised in the local state court.

Now, I think if the Court would look at the difference in the enumerations of error in the arguments made below to the state court and the arguments made at this time to this Court, the Court would see there is two entirely different set of arguments and a complete new set of points that are being raised to this town.

One further thing I would like to call to the Court's attention is the question as to the jury. We feel that in the Miller case the court for the first time placed the obscenity area in a situation where the jury would make a determination as to standards and judge the film to eliminate a lot of review by the jury having a standard that worked very much like your reasonable man theory where the jury would make a determination and the court, having the opportunity to review if there is a constitutional question involved, the court then reaching it on that particular case and on those limited number of cases.

We think that the fact that the court has delineated the fact that local or state standards applies and that the jury has an important part makes a great step forward in the area of the obscenity cases.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:42 o'clock a.m., the case was submitted.]