In the

Supreme Court of the United States

MTM, INCORPORATED, et al.,

Appellants

v.

WILLIAM J. BAXLEY, etc., et al.,

Appellees.

No. 73-1119

Washington, D. C.
December 10, 1974

Pages 1 thru 37

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

MTM, INC., et al., Appellants	:	
v.	:	No. 73-1119
WILLIAM J. BAXLEY, etc., et al., Appellees.	:	

Washington, D. C.,

Tuesday, December 10, 1974.

The above-entitled matter came on for argument at 2:18 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., 2005 One Hundred Colony Square, Atlanta, Georgia 30361; on behalf of the Appellants.

HERBERT JENKINS, JR., ESQ., Assistant City Attorney, 600 City Hall, Birmingham, Alabama 35203; on behalf of the Appellees.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Robert Eugene Smith, Esq., for the Appellants	3
In rebuttal	35
Herbert Jenkins, Jr., Esq., for the Appellees	21

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1119, MTM against Baxley.

Mr. Smith.

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I think this case is a little different than the one you've just heard.

In this case there was an action brought by Mr. Jenkins, who is an Assistant City Attorney in the City of Birmingham, in Equity Court, seeking to permanently enjoin the maintenance of a nuisance at the Pussycat Adult Theater and a bookstore.

The State of Alabama, unlike the State of Ohio, was proceeding under the red-light abatement statute. There was no provision for a one-year closing, there was no maximum or minimum set. This was simply and purely going under the red-light abatement statute.

The proof in this case, as adduced by Mr. Jenkins, was that certain people who worked for the corporation had been convicted in the Recorder's Court, which is the first level of court, for violation of the obscenity laws of the City of Birmingham. They have a City Ordinance for violation

of the Obscenity Laws.

There were approximately 15 cases which had been made, most of which had been tried before the Recorder's Court; all of which had been appealed or were in the process of being appealed.

Since that time, the only three cases that were -- the appeal, Your Honors, goes de novo to the next court, the Circuit Court, in which there is a jury trial on the issue of obscenity. And, parenthetically speaking, the only three cases that have gone to trial all resulted in acquittals for the defendants. But yet it was this evidence of the violation, alleged violation of the law before the Recorder's Court -- and, incidentally, the other 12 or so are still pending and have not yet been tried in the Circuit Court.

So every -- what we have is the evidence of convictions at the lowest court, when appeals were allowable in the next level, the Circuit Court. That was the criminal process.

What the prosecution, or what Mr. Jenkins tried to do here was a civil proceeding, and a purely civil proceeding, which is not ipso facto, or necessarily, ancillary to the enforcement of the criminal laws. Because the criminal laws were proceeding, and the rationale was proceeding in the State Court.

But what he did was attempt to go in and to close up

the theater, because "yesterday you sold obscene books or films you exhibited, and tomorrow you may do so." The --

QUESTION: I gather that the nuisance statutes are in Title 7, and the obscenity statutes are in Title 14 of the Alabama Code.

MR. SMITH: Yes, sir, it's entirely different and --

QUESTION: But is there any provision which interconnects the two?

MR. SMITH: No, sir. And the State of Alabama has not interpreted its red-light abatement statute to include or exclude --

QUESTION: Now, why do you call it red-light abatement, because it's broader --

MR. SMITH: That's the term that it was given at the time it was originally passed, Your Honor. It was designed to close beer halls, saloons, pool halls, and places of prostitution, where you punish somebody for having gone and committed prostitution, they go back and open up again, and open up again, and open up again, you try to close them out of business.

QUESTION: It's a fairly old statute, then, is it?

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

QUESTION: Will you sort out for me what is the relationship of MTM, Incorporated, and Mobile Bookmart? It's

undoubtedly in here, but I can't --

MR. SMITH: There is an address that has a theater, that is operated by one corporation; there is a bookstore in the lobby, that is operated by another corporation, much like these GEM department stores, where there are leased sections in the store. This is what we had at this particular location.

Two corporations, one location; one operating the theater, one operating the bookstore.

QUESTION: Mr. Smith, did I understand you to say a moment ago that it's the Alabama Supreme Court has never decided whether its red-light abatement statutes apply to the theater showing this type of film --

MR. SMITH: Has never interpreted that question, whether or not their statute applies to theaters, adult theaters and adult bookstores.

QUESTION: Did you raise that argument in the Circuit Court proceeding, the equity proceeding?

MR. SMITH: We -- in the equity proceeding, yes, sir, that was raised; but the judge issued a temporary restraining order. That is all that is involved here is the temporary restraining order, which we have placed at the beginning of the Appendix in this case, Order upon Prayer for Temporary Injunction.

Now, incidentally, Your Honors, --

QUESTION: Now, wait a minute.

MR. SMITH: Yes, sir?

QUESTION: You say Order upon Prayer for Temporary Injunction. My understanding of the temporary restraining order is something that's issued ex parte, without notice --

MR. SMITH: That's not always true.

QUESTION: If you -- is this a temporary, what I would call a temporary injunction, either affidavits or some testimony at least, after notice and hearing?

MR. SMITH: This was after notice and hearing, yes, sir. Much like our, I think Rule 45 of the Federal Rules of Civil Procedure kind of thing, where an attempt is made to notify the other people.

Now, in the -- what counsel then did on behalf of MTM and the other plaintiff, is to file an action in Federal Court prior to the issuance of the temporary restraining order. In which it asked for the convocation of a three-judge court to determine the constitutionality of the utilization of the red-light statute, either as written or as applied by the prosecutor in this particular case.

There was a co-defendant or -- sorry, a co-plaintiff, separate case, entirely different, by the name of General Corporation, which had faced the same problem in, I think, Huntsville, Alabama. And in that case they also were closed by a court order, and the three-judge federal court joined

both cases for the purpose of argument and disposition. And thus the decision, in essence, applies to both sets of cases.

Again, parenthetically speaking, we proceeded -- we meaning the MTM and the other corporation operating the theater and bookstore, -- proceeded by filing a jurisdictional statement and sought to seek the relief of this Court from the denial of the injunction.

The other corporation, General Corporation, decided to go forward in the State Courts after the three-judge court threw them out. When they did so, in spite of the comment by Judge Pointer in his decision, that there is a procedure in Alabama where you can sort of expedite your -- and that's at page A99 of the Appendix -- he said that, "In Alabama permanent injunctions are appealable, and temporary injunctions may be made appealable by appropriate motions, and both types of appeals are given expedited, preferential treatment by statute."

Let me tell you about the preferential treatment by statute.

QUESTION: Where did you say this is?

MR. SMITH: That's on A99 and A100, Your Honor, of the Appendix of Appellants.

QUESTION: Oh, yes, I see it now.

MR. SMITH: I'm quoting from Judge Pointer's ruling.

QUESTION: It's at the bottom, yes.

MR. SMITH: Yes, sir.

And what I submit to the Court is that the co-plaintiff, General Corporation, thereafter appealed to the Alabama Supreme Court.

QUESTION: Now, let's see, this is from the same judgment that you brought directly here?

MR. SMITH: Yes, sir.

QUESTION: Right.

MR. SMITH: No, sir, it was a co-plaintiff in the same case; it was not an appeal from the same judgment. That was in Huntsville.

QUESTION: Well, in the District Court --

MR. SMITH: In the District Court.

QUESTION: -- they combined the Huntsville case with your case?

MR. SMITH: Yes, sir.

QUESTION: Separate judgments entered in each?

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

QUESTION: And you brought your judgment here?

MR. SMITH: Yes, sir.

QUESTION: And Huntsville did what?

MR. SMITH: After the three-judge court denied the injunction, they then entered an appeal in the Supreme Court of the State of Alabama.

QUESTION: Right. From the --

MR. SMITH: Closing.

QUESTION: -- closing.

MR. SMITH: In Huntsville.

QUESTION: Unh-hunh. And the closing was pursuant to a temporary or permanent injunction?

MR. SMITH: Permanent injunction there, sir.

QUESTION: Right.

QUESTION: Did you ever appeal?

MR. SMITH: No, sir, we did not.

QUESTION: Had the time expired?

MR. SMITH: There is no --

QUESTION: I see.

MR. SMITH: We suggest there is no appeal for a temporary injunction in the State of Alabama. There is a -- you can file a separate motion to dissolve, which is a separate proceeding; but, Your Honors, we had filed our federal suit prior to that temporary injunction.

QUESTION: Well, tell us what happened to Huntsville.

MR. SMITH: All right.

QUESTION: He did take an appeal directly from whatever this injunction was, temporary or permanent --

MR. SMITH: After the three-judge court said, We deny the injunction; he then appealed to the Supreme Court of the State of Alabama. And, Your Honors, that appeal was

argued October 15, 1974, and there is no and has been no disposition.

QUESTION: It wasn't dismissed, anyway?

MR. SMITH: The appeal? Was not dismissed. That was the appeal brought by General, from a final order in their case --

QUESTION: From a permanent injunction, from a final order?

MR. SMITH: Yes, sir.

QUESTION: Not a temporary injunction.

MR. SMITH: That's correct.

But what I'm pointing out is that although Judge Pointer says that these things can be given expedited, preferential treatment by statute, the truth of the matter is that case still has not been decided --

QUESTION: Well, yours is being argued December 10th, 1974 --

MR. SMITH: Yes, sir.

QUESTION: -- and it hasn't been decided.

MR. SMITH: But I'm only saying, sir, that one of the reasons why the Court said, Well, maybe we ought not deal with this question, is because there is a basis where you can go for an appeal that is expedited and preferential. And I'm saying that although that may be true in theory, it is not true in fact.

QUESTION: Well, it may not be fact, but it exists -- I mean there is a State appellate process that is in working order.

MR. SMITH: Yes, sir, and that --

QUESTION: Do you mean they're waiting for us to decide this case?

MR. SMITH: It could be, Your Honor, but I'd say that October 15th was the day of the argument, and that's October 1974, and this decision by Judge Pointer was October 1973. So it took a whole year afterwards to give it that "expedited, preferential treatment", is what I'm talking about.

QUESTION: I take it you'd be here making the same argument if they had started a criminal case against your client?

MR. SMITH: No, sir, I think we have a different prospect here.

QUESTION: Well, a different prospect, but it would be just as slow in the State court process.

MR. SMITH: Yes, but then we have the Younger vs. Harris problem, which means --

QUESTION: Well, I know, but let's assume the three-judge court is quite right as to the applicability of Younger here.

MR. SMITH: Well, I just happen to think they're not.

QUESTION: Well, I know, but if they were, you're in trouble, I take it.

MR. SMITH: Yes, sir.

QUESTION: Well, that's --

MR. SMITH: We're not in trouble --

QUESTION: -- the issue we've got to decide here.

MR. SMITH: We're not in trouble, sir, because we still have that permanent injunction, which has not yet been heard.

QUESTION: But isn't the only question we have here the Younger issue?

MR. SMITH: We think that that's the primary question, Your Honor, --

QUESTION: Primary. I'm looking at the Jurisdictional Statement. That's the only question that's presented.

MR. SMITH: Yes, sir.

QUESTION: Is that right?

MR. SMITH: Yes, sir.

QUESTION: But aren't we bound, or we rarely disagree with the lower federal courts on their characterization of a State statute. And here the three-judge court said this State statute is aimed, it's a quasi-criminal and it's in service of the criminal law.

That's what it said, anyway, isn't it?

MR. SMITH: What they said, yes, sir.

However, of course, we disagree that it's quasi-criminal. Because this, unlike the --

QUESTION: You may, but don't we usually give great deference to the lower federal courts as to their view of State law?

MR. SMITH: I think it was the view that they placed on it, Your Honor, because they took the Fifth Circuit decision of Palaio vs. McAuliffe, and I think they misapplied that particular case.

Because if the Court will look at that case, what occurred there is there were independent seizures in aid of the criminal process, which was the first step in making a criminal case to have a trial, a criminal trial.

And counsel in that case rushed into federal court and said this was improper, and sought to seek the aid of the federal court. Judge Endenfield denied that aid, because he said this is part of the criminal process; you can vindicate your right ultimately in the criminal process.

We cannot vindicate our right in the criminal process, and I think that the Fifth Circuit case is not applicable to -- I say it's good law, but it is not applicable to this situation, because the criminal process is going on independent, Your Honors, of what is attempted here in this particular case.

This Court has said that even in a criminal case,

in Younger -- in Mitchum vs. Foster, referring to its Younger vs. Harris doctrine, it talks about the fact that even in a criminal case the Court clearly left room for federal injunctive intervention in a pending State court prosecution in certain exceptional circumstances, where irreparable injury is both great and immediate, and where the State law is flagrantly and patently violative of express constitutional provisions, or where there's a showing of bad faith, harassment, rather unusual circumstances that would call for equitable relief.

QUESTION: Well, that's only an argument, isn't it, Mr. Smith, that even if the interrelation that the three-judge court found under these statutes is what the three-judge court said it was, as a matter of State law; you say you're still within the exceptions of --

MR. SMITH: Yes, sir, that is correct.

QUESTION: Mr. Smith, --

MR. SMITH: Yes, sir.

QUESTION: -- I hesitate to further complicate what seems to have become rather a prolix argument here, but are you familiar with the -- probably not -- but the decision this Court announced this morning, Gonzalez?

MR. SMITH: I had a brief moment to review it, and I note that the Court --

QUESTION: That case, of course, casts a substantial

doubt upon whether or not this appeal is properly here at all, because this decision by the three-judge court was not a decision on the constitutional merits, was it?

MR. SMITH: No, sir, it was not, but it --

QUESTION: It's a decision to dismiss because of its understanding of the Fifth Circuit law and the law of Younger v. Harris.

MR. SMITH: Right. But they did not say we did not have standing to be before the Court in that case. In fact, --

QUESTION: Beg pardon?

MR. SMITH: They did not say that we had no standing to be before the Court in that case.

QUESTION: Well, --

MR. SMITH: That we had not raised the substantial question.

QUESTION: Well, I'm sure you're not -- I wouldn't possibly expect you to be familiar with the opinion announced this morning, but the opinion at least raises questions of, and suggests doubts as to whether or not the case is like yours is directly appealable to this Court or whether it should go to the Court of Appeals. Since it was a decision, an action dismissing your prayer for an injunction by the three-judge court, on grounds short of a resolution of the constitutional issue that you raise.

MR. SMITH: Yes, sir.

The Court did say, and I point to A100 of the Appendix, that "There is a question as to whether the Alabama nuisance statutes here in question are 'flagrantly and patently violative of express constitutional prohibitions'."

And in this particular concept they go on to say, "it is quite possible that the Alabama Supreme Court might construe these statutes as inapplicable", so they express no opinion on the particular merits of this particular case.

So we say, Your Honors, that under the decision of Swickler vs. Koota, authored by Mr. Justice Brennan, we chose the forum of the federal courts. We did so because there was no finding -- there was no order against us at that time, so to speak, and this was, we think, a purely civil case; putting the title on quasi-criminal I think is a misapplication of the decision of the Fifth Circuit in Palaio vs. McAuliffe, and we feel that even if the Court agreed with the determination interpreting the statute as being quasi-criminal, we think that we still have demonstrated the extraordinary circumstances; and that is to say, that the total closing in succession -- and the point is, you can't operate anything. I mean, you can put in -- if you put in Carnal Knowledge, and Judge Barber felt that Carnal Knowledge might have offended the law prior to this Court's decision

in June, he could have held the employees in contempt and put them in jail immediately for civil contempt, because they had shown a movie which he later thought might possibly be obscene.

And the theater has been closed from May 1973 to the present time.

QUESTION: Mr. Smith, was the time sequence in this case that first Mr. Jenkins filed his action in the Equity Court, --

MR. SMITH: Yes, sir.

QUESTION: -- then you filed your action in the three judge district court, --

MR. SMITH: Yes, sir.

QUESTION: -- then the Equity Court issued the temporary injunction?

MR. SMITH: Yes, sir, that's correct. And of course when we participated, counsel participated in the proceedings before Judge Barber, he did so in citing, of course, England vs. Board of Medical Examiners: we were there because we had to be, we do not wish to abandon the jurisdiction of the federal court that we're trying to acquire; and tried to promote our cause that way.

QUESTION: Have you filed a protective appeal in this case to the Court of Appeals?

MR. SMITH: There is no need to, sir, nor could we.

QUESTION: Well, that's the very ultimate question that I suggested to you.

MR. SMITH: Because we have a temporary injunction, there is no appeal from a temporary injunction. We must do something affirmative, that is to say, file a motion to dissolve it.

QUESTION: Well, you have a dismissal of your prayer for an injunction is what you have in the three-judge district court.

QUESTION: On the Fifth Circuit opinion.

MR. SMITH: Yes. I'm --

QUESTION: And have you filed a protective appeal from that in the Court of Appeals?

MR. SMITH: No, sir, we haven't.

QUESTION: For your Circuit.

MR. SMITH: No, sir.

QUESTION: Thank you.

QUESTION: Have you moved to dissolve the State court injunction?

MR. SMITH: No, sir, we took the position that under England vs. Board of Medical Examiners, if we took that affirmative action, we might very well be then usurped of the jurisdiction in the federal courts. And thus, we can't very well take the affirmative action in citing England vs. Board of Medical Examiners at the same time in order to go

forward.

So we did not go forward that way. For that reason, sir.

QUESTION: So you took no action to dissolve the temporary injunction?

MR. SMITH: No, sir.

MR. CHIEF JUSTICE BURGER: Mr. Smith, since it's not likely that we'll finish this case today, if you wish you may file any comments or observations you have about the applicability of the Gonzalez case to this case tomorrow morning, but you won't be confined to that. Would three or four days be enough if you can't do it tonight?

MR. SMITH: Yes. I would appreciate that, sir.

MR. CHIEF JUSTICE BURGER: It's not a long opinion, but you can file it either in the morning or later.

MR. SMITH: I'd like to have until Friday, if the Court please.

MR. CHIEF JUSTICE BURGER: Very well.

MR. SMITH: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jenkins.

ORAL ARGUMENT OF HERBERT JENKINS, JR., ESQ.,

ON BEHALF OF THE APPELLEES

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

There have been several comments made during Mr. Smith's presentation that are misrepresentative of the procedures that occurred in this case. I don't know whether -- I don't believe they were intentional, but, for one thing:

The first thing they did, I filed an injunction procedure in the Circuit Court on March the 7th to set up a hearing for March the 13th, and gave them notice of it; and the next day, or the morning of the hearing, their local counsel was in the federal court securing a filing of removal petition. And he came to the hearing, and with the bond or whatever, the removal order, and presented it to the Circuit Judge, who -- for some reason; I forgot the technicality -- wouldn't accept it.

But they had to go back to the court and get that perfected. In the meantime, he said that we're going to have a hearing, and we had the hearing, while he was over there getting the thing removed; so they did remove it, and I filed a motion to remand immediately. And we had a hearing on that, and got the case remanded to the Circuit Court, and proceeded to set another hearing that we were going to have.

In the meantime, they filed this present action.

It involved -- there was already pending another case he talked about, that is on appeal, and it was argued at the Alabama Supreme Court, which was separate from this case, the City of Huntsville case, and there had already been filed another case by Earl Morgan, the District Attorney of Jefferson County, in a separate case which involved the Mobile Bookmart, which is a store, a book store located downtown, across the street from the Federal Building.

This theater that I filed an injunction against is located in the eastern section of the City of Birmingham, and contains in the front of it a little book store, in addition to the theater. And that's operated by MTM, Incorporated.

This whole title of the case got switched around. The other party, the Huntsville case did not appeal from the three-judge court order in this case, electing to go ahead and perfect their appeal in the State court.

And this case was appealed. Attorney General Baxley was named, because he's required to have notice in these type actions, and Earl Morgan was named, because he is the party upon whose relation this case was filed on behalf of the book store downtown.

Now, that case, there was a motion to -- they removed that case also to the federal court, and there was a motion filed to remand in that case, which was never ruled upon, because this hearing, or this case was filed, and they

consolidated them immediately, all three of these cases; and on the basis of this jurisdictional question of whether or not the federal court could intervene in the matter. And set it down for hearing in due course.

Now, it's very complicated, the record is not here before the Court as to what exactly happened, and of course, I guess, to consider this particular narrow question of whether the Younger vs. Harris principle applies in this particular case, it wouldn't be necessary.

But in order that this Court might consider the principle of Younger vs. Harris, whether or not it involves a criminal prosecution, I would like to state that in my complaint -- he made a statement that there were some 15 cases, but, on the contrary, we began this matter when the theater opened in September of 1970, and it went to March of 1973 when the injunction in the Circuit Court was issued.

And up till that time, they showed something like 125 to 30 movies, and which every one of them was named in my complaint before the Circuit Court, and it was made an exhibit to their complaint in the federal court. And they started per dates, except for about two months when the newspapers refused to take advertisements.

But interspersed during that time, over the 125-30 week period we made 30 cases, some we skipped a few weeks, but they were interspersed between the whole period of time,

130 cases. Some might -- they might go five weeks, and some of them less; but we did get a good sampling of them.

Some of the titles were: Ranch Hand in the Cellar; Sex and the Single Vampire; Gemini Peg; Early to Bed; Class of '69; Daughters of Satan; Models for Love; Harvey Swings; Bitter Cherry; Flesh to Flesh; I Do Everything; Lolita's Iollipop; Mind Blower; Cinder Baller; Lovely Housewife: and so on.

And including the ones, the 30 cases we had.

Out of those 30 cases, there were 30 convictions in Recorder's Court, all of which were appealed to the Circuit Court, to the Criminal Division, for trial de novo.

Out of those 30, there were 18 cases that were tried, and there were reconvictions in every case. There's some -- the rest of them are still pending except for three cases that he mentioned, which did result in acquittal of the defendant, just recently, which of course I could ex plain to the Court, but -- it's -- the jury returned one verdict in a case said that they were reluctant to find him not guilty because of the rulings of the Supreme Court of the United States.

Another one was that they didn't think our pre-Miller ordinance had the -- defined to the man, to the defendant exactly what he could or could not do, or the specificity matter.

But, anyway, the matter came on to be heard before the three-judge district court, and on the face of the bill filed in the district court, showed that this was a criminal matter, that was filed in accordance with the State statute that's been mentioned, which is in Title 7, and it does -- has a different section in there, I think Mr. Clancy read it, and it required --

It says: A nuisance established in a criminal action proceeding under this Article; in case the existence of such nuisance is established in a criminal proceeding, in the court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this Article to enforce the provisions and penalties thereof, and the findings of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against the defendant as to the existence of the nuisance. And so forth.

QUESTION: Does that take a separate equitable proceeding in that circumstance; does it?

MR. JENKINS: Sir?

QUESTION: Does it take a separate equitable proceeding to get the injunction in that --

MR. JENKINS: It just says that in a --

QUESTION: No, but -- what's your Alabama practice?

MR. JENKINS: Yes, sir, you do, you have to go

into the --

QUESTION: Yes.

MR. JENKINS: -- Equity Court after you have the conviction --

QUESTION: Your Alabama judicial structure has a separate Equity Court, does it?

MR. JENKINS: Yes, sir. Not -- well, since July of '73 we've adopted the Civil Rules of Practice, --

QUESTION: I see.

MR. JENKINS: -- which are similar to the federal, and now they've done away with it, but we still have a division.

QUESTION: That's when the judge puts on his Equity hat, doesn't he?

MR. JENKINS: That's right.

QUESTION: Yes.

MR. JENKINS: But we still keep it divided. The Equity judges are still there, and they still handle -- they automatically refer them to the Equity Division, anyway.

QUESTION: So, in any event, the statute contemplates a separate, independent equitable proceeding, even in the circumstance of a conviction?

MR. JENKINS: That's right. Even after we had these --

QUESTION: Yes.

MR. JENKINS: -- thirty convictions, it contemplates a separate action.

QUESTION: Yes.

QUESTION: Can the Equity Court or the chancellor take some sort of notice, or is there some sort of res judicata effect that I gather from your reading of that language, as a result of the criminal conviction?

MR. JENKINS: Well, I played it safe, I introduced certified copies of the convictions both in Recorder's Court and in -- of those that we had convictions in the Circuit Court, and in addition I had the Recorder's Court judge and the Circuit Court judge who heard all those cases testify.

QUESTION: Were they admitted in the equity proceeding?

MR. JENKINS: They were admitted, and they were evidence and proof of the convictions previously mentioned.

Whereupon the judge issued a temporary injunction, not a temporary restraining order, as Mr. Smith mentioned; and the Title 7 in the other provisions of appeal from those types of injunction provides that within ten days of the issuance of such an order an appeal may be taken to the State Supreme Court.

And there is an accelerated procedure for filing the transcript and the briefs.

This appeal was not taken, as I stated, this suit was filed in the federal court ih the interim, and so no appeal was taken from that order.

Then, upon my having applied for a permanent injunction, they wanted to await the decision of this case and, by agreement, we continued, and it's still being continued, pending the outcome of this matter.

But he's still entitled to a permanent -- hearing on a permanent injunction. And, incidentally, after six months, if no one does push for final hearing, under ordinary circumstances, the temporary injunction will expire.

But that was by agreement, by continuing also.

QUESTION: But it takes a stipulation of the parties to the injunctive action, in order to continue the permanent injunction beyond six months?

MR. JENKINS: Yes, sir.

QUESTION: And there was such a stipulation?

MR. JENKINS: Yes, sir.

Because of the pendency of this litigation.

QUESTION: Has nothing to do with the temporary injunction?

MR. JENKINS: No, sir. They lost that, because they only had ten days and they did not take advantage of it.

QUESTION: Well, I thought you had ten days to appeal the temporary injunction, but that it would expire of

its own force without any appeal in six months, unless it was stipulated that it would be continued beyond --

MR. JENKINS: A temporary restraining order, which was not issued in this case, would have been issued ex parte; this was not issued. This temporary injunction was issued after a hearing, and based on verified complaint, which they by-passed by skipping in order to go to the Court to get --

QUESTION: What's this six-month time that you --

MR. JENKINS: Well, after the temporary injunction is issued, and there is no appeal taken from it within ten days, which is provided by the statute, then, after the six months, if either party hasn't attempted to set it down for a final hearing on the question of whether the injunction shall be made permanent, which is permanent until such final hearing, then it automatically expires, if no attempt is made to have it set down for a final hearing.

So it would not be in effect after six months.

So, in the district court, a three-judge court was appointed, and the matter was taken under advisement as to Younger vs. Harris principles being applicable, and we argued there in brief that it was a quasi-criminal matter, that it was in aid of the criminal statute, the nuisance statute that I've mentioned, under which it was proceeded -- the procedure was instituted.

And the three-judge court ruled that it was, on the basis of several things. They talked about Mitchum vs. Foster and said that they required the irreparable injury or the unusual circumstances which didn't exist in this case, and they stated that in the order that's in the Appendix, that he referred to previously.

It stated, in fact, that this case did not involve that. I think they surmised that there were ordinary circumstances inherent in this particular type of a proceeding, naturally a nuisance is going to involve loss of profit and those things.

But the court deemed this to be an action in the nature of a criminal proceeding. Of course, the ruling that -- or reciting several Fifth Circuit cases, mainly the one of Duke vs. Texas, 477 F.2d, in which the Fifth Circuit told that court that applications of the principles of Supreme Court's Younger vs. Harris decision, involving the matter of a federal court enjoining a State court proceeding, should not depend upon such labels as civil or criminal, but rather should be governed by analysis of the competing interests, that each case presents.

And so that is that the Younger principles of equity, comity and federalism apply to federal intervention in State civil as well as criminal proceedings, even where the exercise of First Amendment rights is involved.

So the question that has been raised here several times this afternoon, regarding the application of Younger vs. Harris, I think was pretty well covered in the order by the Fifth Circuit, and in those cases cited. And I adopt that argument, and I support it, and I think that the facts of this case indicate that if we don't have some kind of a stop to people running to the federal court in these particular instances, that we're in effect being precluded from stopping any kind of pornography because, as indicated, they showed these films over a two-and-a-half-year period, and we undertook as much prosecution as we could, and they wanted us to resort to individual prosecutions in each case where obscenity occurred.

Which we did. And it's voluminous, it's tedious, it's weary, and it's exasperating --

QUESTION: And unpleasant.

MR. JENKINS: -- and unpleasant. And you cannot stop pornography that way.

And if it is against the law, as the Court says, over and over again, then I think the -- there is some equity and comity and federalism upholding this Court's decision in this case.

This case was taken and instituted in the name of the State of Alabama, on my relation in my case, and on the relation of Earl Morgan in the other case, and I think

the court overlooked my argument in that, in regard to the fact that I think it's an action against the State of Alabama, and one which would fit under the reasoning of Larson vs. Domestic & Foreign Commerce Corporation case at 69 Sup.Ct. 1457, in that I did not act ultra vires, I had the authority to do what I did.

It, in fact, says that I shall do it. One of the reasons we didn't do it sooner was because these cases came up before Miller, and some of us were afraid at that time that this Court might render an opinion making pornography legal for consenting adults.

They operated this theater with those -- that limit. That is, they advertised "For Adults Only".

And also that if it's unconstitutionality that they are questioning in such an action, they must state that they have a legal right, or legal protected right, which is being denied by the State.

In this case, if they -- if pornography is illegal, as I believe it is, then -- and the ordinance, the statute that's involved has been held, in Eighty Drive-in Theaters vs. Baxley, and the State cases I cited a minute ago, holding that this -- by the State of Alabama, that this is a quasi-criminal matter, then it's not an unconstitutional statute, it's merely one that they are claiming it may have been applied unconstitutionally.

And also an attempt to avoid the State forum from deciding the issue.

So if this is a State matter, the State is not a person under Section 1983, and they would have to jump those two hurdles to get out from under that; so I think that we're not really a proper party, anyway, and that we should have been dismissed even on that ground.

But the Kenosha vs. Bruno case held -- it was a municipality case, but it did hold that neither equity relief nor damages would be applicable to a State or civil division -- I mean to a municipality. And I think that that also includes the State county or municipality, or the reasoning would. And so the equity relief that they're seeking, even though they're not seeking damages, would be improper against the State of Alabama.

So the Gibson vs. Berryhill case --

QUESTION: You want us to overrule Ex Parte Young?

MR. JENKINS: Ex Parte -- sir?

QUESTION: Young.

MR. JENKINS: No, sir. I don't know Ex Parte -- you're not speaking about the Younger vs. Harris?

QUESTION: No.

MR. JENKINS: I'm not sure I'm familiar with Ex Parte Young.

QUESTION: I gather from your argument you might

not be.

MR. JENKINS: Well, I read -- I was just merely -- I offer that as an alternative to some extent to show that I think that -- of course, I realize that the State officials can be sued, but I was trying to say that it was an action against the State and not myself, and that should -- could be a consideration.

But the title of that Act is not a red-light act, as someone mentioned. I did want to clarify that. It's -- the title of it is Abatement of Certain Nuisances.

And they define a nuisance as a place upon which -- as defined above, on which lewdness, assignation or prostitution is conducted, permitted, or continued, or exists.

So it's not just that, and definition of lawdness has been held to be synonymous, I believe, with obscenity, and it's a word broader than assignation and prostitution. It involves open and public indecency, and includes, I think, obscenity.

So I think this action is properly brought, and is a quasi-criminal matter, and the principles of Younger vs. Harris do apply to it.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Smith, we'll try to finish tonight, in spite of what I said. You've got about eight minutes left.

REBUTTAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SMITH: All right, sir. Thank you.

I will only take about three.

The counsel referred to the decision of Eighty Drive-in, Inc. vs. Baxley. This was a decision of the Fifth Circuit Court of Appeals. It's in the brief. 468 F. 2d, 611.

In that case, the federal court, Fifth Circuit held that the State has a right to use its nuisance law, public nuisance law, in a manner to where here there was a drive-in theater that was showing X rated films, there were traffic problems being created; and in that specific instance, much like, I think, the case of Carmen Baby from the State of Washington, Rabb vs. Washington, where Mr. Chief Justice Burger, I think, pointed out that that could be a special problem that might be resolved by nuisance actions.

That is not involved here. We have a theater that's closed.

QUESTION: That was confined to the traffic aspect, though.

MR. SMITH: I know, sir. There were young people going by, and of course the same thing would be necessarily true here.

So I don't think that this decision of Eighty Drive-In, Inc., vs. Baxley -- and I was referring to the Court's concurring opinion in there, where you talked, I believe, about the fact that this could be -- might be dealt with as a nuisance; and I think that's what that decision holds for, and I don't think it's applicable to the case here at bar.

Secondly, I understand from counsel that there has been no stipulation entered into by the parties, that the Judge, on his own motion, Judge Barber, on his own motion, has continued the hearing on any permanent injunction. We are not going to ask for it, lest we be usurped from our federal court jurisdiction. And I suppose that the prosecution has not asked for it.

And we suggest, in final conclusion, that the Court dismissed our case, and we feel that if they felt that the State Supreme Court should rule on the matter, and they abstained, then they should have retained jurisdiction under the theory of law that this Court has espoused, including more recently American Trial Lawyers Association vs. New Jersey Supreme Court.

We think the court erred by absolutely flat out dismissing the case, and should have retained jurisdiction.

QUESTION: Well, doesn't England type of abstention for a State law question mean retention of jurisdiction, but

Younger vs. Harris has meant dismissal, hasn't it?

MR. SMITH: Yes, but if the Court -- if you will remember the opinion of the judge, they suggested it was a mixed bag, that in this instance we have not gotten to our Younger vs. Harris problem, or we haven't gotten to the special circumstances there, because the State court could construe the statute in a manner which would take the federal constitutional question out of it.

And if it did that, then the special circumstances of Younger v. Harris are not present.

So that's why I'm saying it is relevant, and that's the point I was making, that I felt that under those circumstances then, this is not -- they were not deciding it on pure Younger grounds. But I think under those circumstances they should have retained jurisdiction, even if not dismissed.

Thank Your Honors. And may I have till Friday, then, to respond to the Court's recent decision?

MR. CHIEF JUSTICE BURGER: Yes, you may have until Friday.

MR. SMITH: Thank you.

[Whereupon, at 3:01 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -