In the

# Supreme Court of the United States

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, As Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LIMITED,

Appellee.

No. 73-296

Washington, D. C.
December 10, 1974

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Washington, D.C.,
Tuesday, December 10,1974

The above-entitled matter came on for argument at 1:14 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:

JAMES J. CLANCY, ESQ., 9055 La Tuna Canyon Road, Sun Valley, California 91352; on behalf of the Appellants.

GILBERT H. DEITCH, ESQ., Suite 2005, One Hundred Colony Square, Atlanta, Georgia 30361, on behalf of the Appellee.

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# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Clancy, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES J. CLANCY, ESQ.

ON BEHALF OF APPELLANTS

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

The appeal herein in the Huffman v. Pursue, Ltd., places before this Court two dominant issues: The first is the question of the interference of Federal courts in State judicial proceedings. The second concerns the question of the constitutionality of the padlock provision of the Ohio public nuisance statute, as applied in this case to a theater showing pornographic movies as a continuing regular course of business.

QUESTION: We will get to the second point, if we agree with you on the first; is that correct?

MR. CLANCY: Yes, sir.

QUESTION: Is that correct?

MR. CLANCY: Unfortunately, yes, sir.

QUESTION: Why is that unfortunate?

MR. CLANCY: Well, I--

QUESTION: It depends on which way we would go on it.

MR. CLANCY: Well, what I'm saying here is I would much prefer that the second issue also be decided, but because

of other circumstances, I think the first is the more important issue, yes, sir.

QUESTION: And if we do agree with you on the first issue, we do not reach the second.

MR. CLANCY: That's right, Your Honor.

The particular situation here involved the showing of 16 pornographic movies in approximately a ten-week period. Notwithstanding the paramount importance of the second issue, that is that this Court should resolve the padlock provision, Appellants would urge this Court to decide the matter on the appeal on points 1 and 2 in the brief and hold that the Federal District Court had no jurisdiction, no subject matter jurisdiction, to consider the merits of the cause below because of two things: One, under the "in rem" or "res" exception, the "res" was under the jurisdiction of the State court which had exclusive jurisdiction to decide that matter to the exclusion of the Federal Court system. And, two, under the "Lis Pendens" Doctrine, Pursue, Ltd. took its interest as an assignee with notice and was concluded thereby from filing a declaratory judgment action in the Federal Court.

There are at least three reasons why the Court should assign priority to the first and decide the case on the first issue. First, this Nation is at the present time faced with an alarming rate of growth of pornographic theaters. They are in every hamlet, village, township in this Nation. Contrary

to the statements in some newspapers, they are not in a decline and I can explain why they are not in a decline.

Second, the public nuisance is the only way in which this vice operation can be brought under control.

Third, the defense tactics which were employed in this case, if allowed to continue as a modus operandi for defense attorneys for such cases will destroy the efficacy of the public nuisance approach. The opportunity for defense attorneys to engage in a volley ball offensive by using the Federal removal actions and, two, Federal equitable interference, as was accomplished in this case, must be withdrawn.

It was never intended by Congress nor the Constitution that the Federal Court System should sit in appellate review on State Court decisions, particularly when those State Court decisions were final.

Similarly, the opportunity for defense attorneys to avoid public nuisance findings in State trial courts and to provide a springboard for a Federal declaratory judgment action at law by successive assignments after they are in court on the merits, as was accomplished in this case, also has got to be stopped. The solution to the above problems is to be found in the well-recognized and widely accepted legal principle cited in points 1 and 2 of Appellants' brief: one, reaffirmation of the "im rem" and "res" exceptions which prevents Federal interference where the State action is

"in rem" to prevent the volley ball offensive which has frustrated the public nuisance concept. And I cite here Toucey v. New York Life, Orton v. Smith, Princess Linda of Thurn v, Thompson and Donovan v. Dallas.

In Donovan v. Dallas, as applied to a Federal case, this Court said that it was a matter of power or a lack of jurisdiction.

In Orton v. Smith that was an actual application or a consideration by this Court of a Federal Court saying that the State has the power, has the "res" and it should stay out of it.

Recognition of the "res"--

QUESTION: What do you conceive the "res" or "rez" to be here?

MR. CLANCY: Well, Your Honor, it's the property involved. The public nuisance concept attacks the property itself, the business location. In a "lis pendens" action, you are proceeding against a property. You are required to proceed against the property, all owners and give notice that this action does affect the title and use of the property.

QUESTION: Padlocking the building.

MR. CLANCY: That's the same thing. When you padlock the building,you're telling them that you are withdrawing or you are forfeiting the lease for a year, as is the penalty in all of these public nuisance statutes around the country.

They say that you're proceeding against a place. When you file a "lis pendens", you give notice to all persons and assignees with notice, that there is a good possibility that if it is found that the public nuisance does exist that they take with notice that the lease may be forfeited for a year. And any person, either the one who buys the property or the lease, takes with notice of that.

QUESTION: Is there no way they can purge themselves?

MR. CLANCY: Well, there is under the statute, very definitely. They can post bond. They can prove that the nuisance has been abated immediately if they are brought in under a preliminary injunction.

QUESTION: In other words, if they came in by posting a bond and showing that they were going to run a -- build a garage there, selling automobiles--

MR. CLANCY: No question but the Court would be forced to say that that use was entirely correct and permitted. In fact, that is exactly what has happened in the Southern California District and the Orange County Courts which have applied it. They have said it is precluded for the use of lewdness, but other uses are permitted.

Now turning to the consideration of the three-judge court opinion on the padlock provision, in essence, the opinion states that even accepting the fact that these 16 pornographic movie films were shown as a regular course of

business over a 10-week period, still the trial court could not padlock the premises for a year as a public nuisance because such would be precluded under Near v. Minnesota.

QUESTION: Are you going to spend more time, Mr. Clancy, on the question of the propriety of the District Courts acting at all?

MR. CLANCY: Yes, Your Honor. To get back to that--

QUESTION: That is a special question. I don't want to question you here.

MR. CLANCY: I'm just now touching upon why the opinion itself -- why it is wrong. Then I'm going to come back to the procedure.

QUESTION: I see. Fine.

MR. CLANCY: Touching upon my one answer to the opinion is that their legal reasoning is wrong and they ask themselves the wrong question. Our remarks on the legal reasoning are cited from Brumbaugh, "Legal Reasoning", pages 74 to 77. And we further point to the two cases cited by us in the Appendix Case A and B, Cincinnati Properties, Inc. v. Leis and People ex rel Hicks v. "Sarong Gal", we say the Court therein asked the proper question and devoted its legal analysis properly to that question.

In People of the State of California ex rel Hicks, the Court said, of course, just as the Court ordered for the incarceration of a convicted law-breaker impinges on all sorts

of constitutional rights, so does the abatement order. The order shutting down the property excepting for a limited use is specifically authorized, however, by Penal Code, Section 11230 which permits the closing of an offending building against its use for any purpose for a period of one year. The question is, therefore, not whether the order impinges on constitutionally-guaranteed rights, but whether the statute constitutes a permissible exercise of the State police power.

The Court then goes on to say, "The provision in Section 11230 authorizing closure of offending property to all uses for a period of one year, while harsh, is constitutionally permissible."

It then says, "It is to be remembered that the red light abatement procedures are directed against the offending property itself. Their purpose, it has been said, is to effect a reformation of the property itself."

In the Cincinnati Case, similarly, they directed their analysis to the proper question and they said, "There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year, padlock it on that basis."

The Court then went on to consider the issue itself and it said, "The constitutional power of a State to abate

what has appropriately been defined as a public nuisance has never been seriously questioned. Padlock remedies have been consistently provided for by most States in the areas of prostitution, gambling and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power, should be classified differently than obscenity."

They then cite Muglio v. Kansas, and the word--

QUESTION; There is some difference between abating a whore-house and a speakeasy and abating something that sells books just because of the First Amendment, isn't that --

MR. CLANCY: No, not necessarily, Your Honor. If you say that the public nuisance that you are going against is a course of business and you are limited to a type of situation where the entire business, or that part of the business, a substantial portion of it is directed entirely to purposes of lewdness, then you have proceeded against a -- in a proper manner.

If you would apply it on the sale of one book, then, of course, you would be in trouble. But where you have proof, and it is purely and simply a question of what is your proof at the trial level, have you established a public nuisance.

If you go in at the trial court level and the preliminary injunction, you show them that this is nothing but

an 8 x 10 building room with nothing but pornographic books, devices, films, et cetera, then you have met your burden of proof under the red light abatement as a legal statute, and it is a question of them coming forward and saying this is not a public nuisance, or if it was a public nuisance, it has been abated. It is simply and clearly a matter of proof at the trial level.

Now, if at the trial level, in a public nuisance or red light abatement action and you go in on the preliminary injunction with no more proof than you made a purchase or one hit, you're in trouble, or two books. You don't show what is a course or conduct which shows clearly that this is nothing more than a house of lewdness or house of prostitution or whore-house. It is purely and simply a matter of proof. It's not a question of whether or not the statute can be applied. It's a question of how the prosecutor directs his atoptical evidence. Does he show the Court that this in truth is a house of lewdness?

If the Court were to fasten its attention on the opinion alone, it would not really get a true picture of what this appeal is all about. The opinion itself only concerns itself with whether or not the padlock provision can be provided -- can be applied in view of Near v. Minnesota.

The Court did not consider any of the other matters which were before it. So if you want to see what the true

nature of this appeal is about, you have got to go to the record and see what was before the Court. The record--

QUESTION: I take it that what you're saying, Mr. Clancy, that while there may be a difference between a First Amendment case and some other kinds of cases, that once you have demonstrated the obscenity factor, then it is outside the protection of the First Amendment, as this Court has held, and it is like any other case.

MR. CLANCY: Absolutely. They'll come into court every time and say presumptively it is First Amendment. The presumption means nothing when the entire evidence shows that the presumption doesn't apply.

QUESTION: You'll concede that there was a presumption against prior restraint here, but that you have overcome it; is that your opinion?

MR. CLANCY: Yes, sir. In the record in this case, however, it shows that the Court avoided all discussion of those important facets of the case which give the case meaning, matters which were brought to the Court's attention repeatedly in the trial brief -- I'm talking now about the Federal District Court -- it was brought to the Court's attention in the trial brief, in oral argument, in motions for an immediate hearing on motions to dissolve the temporary restraining order, to dismiss the complaint as being a sham pleading, and dismiss the

complaint as failure to state a cause of action and in two motions for an immediate hearing seeking a remand to the State court which had reached final judgment, to remand it back to the State trial court.

See here, for example, the entire history of the State court proceedings is recited in the trial brief and the copy of the supporting papers thereto filed an appendix to the trial brief. See also the "lis pendens" arguments made to the Court in the trial brief at pages 13 and 14 and 22, and in the oral argument in the transcript at pages 33 and 34. The argument about "lis pendens" completely went over the head of the Federal District Court. It paid no attention to it.

Those matters, however, do not appear in the Court's opinion and it is as to these matters that I would now like to direct this Court's attention.

Passing on to the action that was filed, this matter began two years ago, September 18, 1972, with the prosecuting attorney of Allen County, Ohio filing an action in the Common Please Court against Dakota and everyone who had any kind of interest in that property, the real property owners, the known lessee, anyone that could possibly be identified as holding a recorded interest.

In his allegations, he stated that the Cinema One Theater which was being operated on that real property was

engaged in violation of the public nuisance statute and was showing obscene films.

At paragraph 7, he alleged that for a period of 10 weeks the Cinema One Theater had consistently shown obscene pictures and then recited in detail, not as in the application for a search warrant at Lee Arts Theater of Richmond, Virginia where they just said we have seen an obscene film and this is it and we want to pick it up. He said, "These are the films that were shown," "This is the period they were shown" and "This is what they show". He described in detail what the films were and, in addition, in the same paragraph he incorporated by reference time-motion studies of approximately 10,000 photographs, which made a time-motion analysis of what was depicted in those films.

He went on to allege at paragraph 10 that the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance as described in the public nuisance statute in the State of Ohio.

He then went on further to say that for the following reason and explained what depictions were in violation, what specific depictions were in violation of the State statute. And those are recited in detail at pages -- see pages C-12 through C-13 of the Appendix.

Now, having stated what the films were, having shown pictorially what they were, having described the acts

which were contained therein which were in violation of the State law, hen then asked for the following prayer: That the nuisance be forthwith abated by Order of the Court and that the defendants, and all of them, and all persons acting by or through them be restrained from exhibiting said motion picture films in the State of Ohio.

At the same time, having filed a civil action, he asked for a provisional remedy which is allowed under the statute and that is a motion for a preliminary injunction. If filed, the hearing must be had within 10 days and upon 5 days' notice.

He did file the motion for a preliminary injunction and the matter did come up for hearing, at which time the Court viewed four films which had been under subpoena. The Court viewed the entire four films and, on October 24th, issued, and this was in an adversary hearing in which the defense counsel appeared and responded and provided -- and offered their defense. The Court issued -- filed its order on October 24th in which he said the nuisance does exist, as alleged by the prosecutor. He then ordered the Cinema I theater closed forthwith for any purpose of lewdness, to wit the projection or screening of lewd, indecent, liscivious or obscene films.

But, in addition, having closed it temporarily, he said, "The Court orders that the Defendant show cause, if

any they can, why this closing Order should not be made as of this date, having found that a public nuisance did exist after a trial on the merits, the Court under the statute was required to -- the Defendants were required to come forward and show that the nuisance had been abated or give bond. The Order on October 24th to the Defendants was to come forward and show either that the nuisance has been abated or give bond, or come forward with some other remedy you may have under the statute.

Instead, the Defendants marched over to the Federal Cuurt and filed an action William Dakota v. Fair & Garlock, the investigators involved in which they pleaded the complaint itself. They set before the Federal District Court a complete recitation of what was involved in the State court proceeding. The Federal District Court knew exactly what was in the State Court.

QUESTION: Does the Federal District Court in this case sit in Lima or did he have to go to Toledo?

MR. CLANCY: Toledo, Your Honor.

QUESTION: But in the Allen County proceedings, the State proceeding was in Lima?

MR. CLANCY: Yes, Your Honor.

In this action a hearing was held before -- correction -- the matter came up and out of that hearing an Order was issued by Judge Walinski interfering with the preliminary

injunction which was issued by the State Court and he ordered that the State injunction be stayed insofar as it affected showing films which had not been held to be obscene in a prior adversary hearing. So he said, "You can't padlock it."

So at that point the prosecutor went in and filed a motion and he said -- he brought before the Court two other films, "Sexual Freedom Now" and "Shootout at Beaver Halls", and started another proceedings, forgetting all about the preliminary injunction.

At the end of other adversary hearings in which the defense counsel was present, and after presentation of evidence on 12 additional films, the Court entered its final injunction on November the 30th, finding the allegations of the Plaintiff's complaint, verified complaint showed and finding that he had engaged in a course of conduct of displaying motion picture films at the Cinema I Theater which were obscene, and that the course of conduct and the continuing exhibition of the films constituted a nuisance under the statute, he permanently enjoined and restrained them from conducting the said nuisance, and he continued to pay no attention to what the Federal Court did, he continued his Order with padlocking.

Thereupon, having filed the final Order, the Defendants could have taken appeal, but, now, they left

that matter stand and they went back into the Federal Court this time with a different defendant, Pursue, Ltd. saying that Pursue, Ltd. is a new assignee. He purchased his interest on November 17th while this matter was entrain and now he wants to litigate the same thing over.

Thereafter, Mr. Huffman, in a series of moves in which he moved for a further relief, he was completely frustrated either that having filed on December 1st, the Court issued a temporary restraining order, once again nullifying the padlock provision.

Following that then, the prosecutor went back again in the State Court and started hearings again. What did defense counsel do but he removed the case entirely to the Federal Court again so the State Court couldn't do anything.

QUESTION: Was there a motion to remand made?

MR. CLANCY: There were two, not one, but two. There was a motion to remand and a motion for immediate hearing. They were made on December 18th but nobody paid any attention to it.

In February, two months later, February 12th, another motion for immediate hearing on the remand. Nothing was ever done to it. That case was not remanded. It was dismissed under the Pursue, Ltd. decision and that case now is on appeal to the Court of Appeals.

In addition, on the motion to dismiss the complaint

as a sham pleading, the prosecutor made the claim. He said, "This is a sham pleading.'' If you have before you the complaint in the trial court, you know what the evidence was in the trial court. You know what has been shown by the defendants. Under the Federal Court Order restricting the stay action, they continued to show the pornographic films and took time-motion studies and brought them before the Federal Court and said, "Here is what they're showing under the cover of your Order." And still nothing was done about it.

QUESTION: It may appear somewhere in this record, voluminous as it is, but I have missed it, does the State's Attorney General figure in these proceedings or is each county or district autonymous?

MR. CLANCY: He took no part, Your Honor. He is required to -- they are required to name him under the attack on the statute, but he took no active part, Your Honor.

QUESTION: Under the statute, the prosecuting attorney can initiate the action or any private citizen?

MR. CLANCY: That's correct, Your Honor.

QUESTION: But not the State Attorney General except insofar as he may be a private citizen?

MR. CLANCY: That's correct, Your Honor. Oh, I see what you mean, as an original--

QUESTION: Initiating this nuisance action.

MR. CLANCY: I was thinking about a different thing, Your Honor.

QUESTION: Any county prosecutor--

MR. CLANCY: Private citizen or a prosecutor, right. Yes, Your Honor.

QUESTION: And Ohio is like the majority of the States, that the Attorney General does not control all the litigation in all of the counties and districts.

MR. CLANCY: That's right, Your Honor.

QUESTION: The prosecuting attorney is in control.

MR. CLANCY: Yes, sir.

Well, Justice, this Honorable Court, the history of this Lima action which I have just recounted on September 18, 1972, over two years ago, those matters are not yet resolved. And this is not an exceptional case. It is a modus operandi for defense attorneys all around the country. There's carbon copies for this in every State in the Union, really. And I know from personal example that the State of California and the County of Los Angeles is in a similar mess and this Court has just noted jurisdiction in a similar case Hicks v. Miranda.

Now, the jurisdiction on that case would not begin to recount the events which are occurring in the Federal District Court there. That is simply a limited question on peripheral matters. I think, as I said before, this is not

an exceptional case and I think it is, in the sense the prosecutors here have stayed with it, Mr. Huffman and Mr. Herman have really stayed with it doggedly through all of the Federal interference and have pushed it along as they have.

In my opinion, they do not -- they should not be treated as they have in the Federal Court as, for example, being brought before that Court on an Order to Show Cause why they should not be held in contempt when, following this Court's decision in June of 1973, and the failure of this Court to give them extraordinary relief, they came back and they said to the Court, they filed another action, and attempted once again, they were stopped immediately in the Order to Show Cause why they should not be held in contempt. It seems unbelievable to me that such a result should be obtained under the Civil Rights Act of 1871 when this Court in 1850, just 21 years before the Civil Rights Act was adopted, said in Phelan v. Commonwealth, "The suppression of nuisances injurious to public health or morality is among the most important duties of Government. It is a principle of the Common Law that the King cannot sanction a nuisance. The atoptic evidence which was before the court below on the motion to dismiss the complaint as a sham pleading, et cetera, brought to the Federal District Court clear knowledge of what was involved in the Allen County Common Please Court.

And it seems to me, if this condition is to prevail, then it must be concluded that the Federal system of justice is underwriting, to put it crudely and bluntly, cock-sucking and whoremongering which, to me, is completely in violation of my thinking about American way of life and American justice. Now, that's the first time I have ever used those words in my entire life and yet I think it is appropriate that I use them now so that this Court understands what is occurring in the Federal Court system. I say the majority of this Court does not want this to come about. I know the Miller decisions in '73 and the Hamling decision clearly say this is not the way it should be. They have cut the defenses away from all of the defense attorneys. They have taken away everything they have and I just hope they will recognize the sincerity of this appeal and can do likewise and see that the defenses are taken away from them in the public nuisance approach.

QUESTION: Mr. Clancy, I don't think I heard you mention the case of Younger against Harris. Do you think that's--

MR. CLANCY: No, Your Honor, I think it should be decided on the matter of the "res" exception, which is a jurisdictional matter. As I understand it, Younger v. Harris has to do with we have jurisdiction, but you are not to exercise it; that is, the case is properly before the Federal Court -- I am saying that it is not properly in that Court.

There is no power. In Donovan v. Dallas, this Court so held that the power of the State Court -- when it is in the Federal Court the State Court has no power to act in that case. Similarly, in Orton v. Smith, they said when the State Court has it, the Federal Court has no power. The net effect of this will be to permit the prosecutors to take this in the State Court and take it up through the United States without interference. And this thing has got to come about if it is going to be whipped.

QUESTION: So you don't think Younger v. Harris has any relevance here?

MR. CLANCY: If you abandon my -- I think it does. That's another argument, but I would prefer to place all of my -- res exception, because the entire body of the law in this area says that that is the law. I think that if this Court does follow what the law is on this matter, it has to apply it.

MR. CHIEF JUSTICE BURGER: Mr. Deitch.

ORAL ARGUMENT OF GILBERT H. DEITCH, ESQ.

ON BEHALF OF THE APPELLEE

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

First of all, firstly, Mr. Justice Stewart, the Attorney General of the State can bring the action to abate a nuisance under .03 of this statutory scheme. Either the

Attorney General of the State, the prosecuting attorney or private citizen.

QUESTION: Ordinarily, is it true in Ohio as it is in most States that the Attorney General leaves it to the local prosecution?

MR. DEITCH: Honestly, Mr. Chief Justice, I being a Georgia lawyer and not an Ohio lawyer, I don't know, but on advice of Ohio counsel, that is the case.

Briefly, with regard to this action, Mr. Huffman, as prosecuting attorney, filed a suit to close Cinema I Theater in Lima, Ohio under the 3767.01 and following statutes.

Interesting to note, it is interesting to note that under the Ohio scheme a tenant, a pure tenant, has no right once a temporary injunction is issued to abate. Has no right to get a bond. Only one, the real property owner or, two, a personal property owner. So, if Pursue, Ltd. or United Artists has a right only to do business within the theater, once a temporary injunction is issued, that entity is foreclosed pending final decision.

This is exactly what happened in the State action. Once there was a hearing, a temporary injunction issued, Mr. Dakota went into Federal Court because he had no relief in State Court.

QUESTION: Well, don't you have a right to appeal from the Order of the Court of Common Pleas granting the

injunction to the Ohio Court of Appeals?

MR. DEITCH: Not a temporary injunction, Your Honor.

QUESTION: Not a temporary injunction?

MR. DEITCH: No, sir. And according to I think it is Z-22 of the Appendix, there was a motion made by Mr. Dakota's counsel to stay the order, the temporary injunction, which was denied.

QUESTION: Well, of course, you can apply to an Appellate Court for a stay and it can be denied, but that doesn't mean you don't have a right to appeal even if the Appellate Court won't grant you a stay.

MR. DEITCH: The Supreme Court of Ohio in 1973, in State ex rel Ewing v. "Without a Stitch", said that it was error for the trial judge to allow a motion picture to continue to show pending -- after a temporary injunction, pending appeal.

So if a rationale is carried to a whole -- to the establishment, then it is error to allow the establishment to stay open or to grant a stay pending final determination.

QUESTION: That doesn't go to my brother Rehnquist's question as to the right of appeal, does it?

MR. DEITCH: It is my understanding of Ohio law that there is no right of appeal at this stage of the proceedings.

QUESTION: It would be one of the very, very few jurisdictions I have ever heard of where after a temporary injunction was issued on a hearing, you didn't have a right to appeal. I don't claim to know Ohio procedure.

QUESTION: Well, I passed the Ohio Bar exam once and unless the law is changed, that was my impression that there was a right of appeal.

MR. DEITCH: At this point in time, when the Federal lawsuit was filed, it was -- there were theaters which had been closed, I think it was a case of first impression of the Allen County Court of Appeals, the appeals court sitting in that county, and it is purely discretionary with that Court whether to grant a stay of the trial court's order or not.

QUESTION: Well, that means that we have an Ohio case involving Ohio statutory or Ohio procedure with a California lawyer on one side and a Georgia one on the other.

MR. DEITCH: Well, let me explain this, Mr. Justice Black. Mr. Dakota was not represented by myself. Mr. Dakota, in November, transferred his right to do business to my client, Pursue, Ltd.

QUESTION: Well, frankly, I would like to know whether under the Ohio procedure there is a right of appeal here. And all you are able to say, according to your understanding, there is none. Now, what is the answer to that question?

QUESTION: Very simply, we'll have to look it up.

MR. DEITCH: Or I will provide to the Court an interpretation --

QUESTION: It was your position that--

MR. DEITCH: Legislatively or judicially.

QUESTION:--when you have an abatement of a nuisance there is no right of appeal. That's what you said.

MR. DEITCH: Yes, sir.

QUESTION: Well, now, the "Without a Stitch" Case did go all the way to the Supreme Court. It had to get there somehow.

MR. DEITCH: Permanent injunction, yes, sir.

QUESTION: That's your permanent injunction?

MR. DEITCH: Yes, sir.

QUESTION: If I am not mistaken, we have another petition for certiorari pending here. Maybe it's that case from the Ohio Supreme Court involving this same nuisance statute.

MR. DEITCH: Possibly, but its position with regard to Younger v. Harris, which Your Honor has been inquiring of Mr. Clancy. It is the position of the appellee in this case that now Younger will not apply notwithstanding whether it's a quasi-criminal activity or civil activity, the Ohio Supreme Court has held this very statutory scheme to be constitutional, based, as Mr. Clancy said, would cause trouble

on one motion picture. And it said that if that motion picture is shown to be obscene the Court shall issue a temporary and then shall issue a permanent injunction, closing the theater, selling the assets and permanently, well, for one year closing the premises down. Upon temporary and permanent injunction, or permanent injunction, the real estate, the real property owner or personal property owners can come in and, at the discretion of the trial court, they can be released of the lease or thepersonal property, such as a pop-corn machine or book racks, or whatever, if it's a bookstore or a theater.

Now, with regard to the state of proceedings when this civil case was filed against Mr. Dakota by the prosecuting attorney, once the temporary injunction was filed, his counsel, based upon the fact that he had no standing as purely licensee or lessee to seek a bond from the trial court, he did ask for a stay, which was denied, and the question of appeal at that point is, I will admit, open. However, at that point in time his attorney had to make a choice what do I do now to keep this padlock provision from coming into play. So he went to Judge Walinski, he went to Toledo and, Mr. Justice Rehnquist, I have made the trip. It is about an hour by car. The District judge, upon a 1993 (sic) action did not stay or enjoin any criminal prosecution. He did not enjoin or stay the injunction against certain motion picture films.

He merely said that as far as the closing of a theater, I'm going to stay that portion of the injunction until -- I'll consider abstention -- this is in his Order -- until the trial court has a final hearing and looks at this case in light of Near v. Minnesota. So the State was free to prosecute. The State was free to file contempt charges for showing certain motion pictures at that point in time. This is October 26th, Judge Walinski issued this Order.

QUESTION: Mr. Deitch, at what phase the court enforce its temporary injunction?

MR. DEITCH: Not to padlock the theater, which it did. The sheriff of Allen County went out and put a padlock on the doors and when Judge Walinski's order was issued, they were taken off and the motion picture theater continued to do business under the stay. Thereafter--

QUESTION: You say the State was free to bring contempt charges?

MR. DEITCH: For certain motion pictures which had been found to be obscene by the trial court -- the State trial court.

QUESTION: I thought the injunction was against further stayed action.

MR. DEITCH: No, sir, it was against--

QUESTION: Padlock--

MR. DEITCH: --the closure, purely the padlock--

QUESTION: --the continued padlock.

MR. DEITCH: No, once Judge Walinski's Order was issued, the padlock was taken off.

QUESTION: Well, if the padlock is taken off, how can you get contempt?

MR. DEITCH: Well, as Judge Walinski said, this does in effect, an injunction against Exhibits A through Z or Exhibit 1 through 45, which the trial court found to be obscene; only against those movies which had not been adjudicated to be obscene.

QUESTION: And that's final now, isn't it?

MR. DEITCH: Well, after Judge Walinski issued this Order--

QUESTION: With that, this Federal Court Order,that injunction is final.

MR. DEITCH: No, that was a temporary injunction at that point in time.

QUESTION: Had they had a hearing since then?

MR. DEITCH: Yes, sir, once Judge Walinski issued his Order, then--

QUESTION: How long was the temporary injunction in force? No use in me asking. I was going to ask how long is a temporary injunction valid.

MR. DEITCH: The temporary injunction was issued on December--

QUESTION: How long is it valid in Ohio?

MR. DEITCH: Until the final hearing on the permanent injunction.

QUESTION: It will last forever?

MR. DEITCH: Well, the statutory scheme says this case -- you don't have to bring it on within 10 days or 15 days. It merely has priority over all cases except criminal cases and a few other cases.

QUESTION: So it is still in effect except for the Federal Court Order?

MR. DEITCH: Well, it was still in effect at that time except for the padlocking.

QUESTION: How about now?

MR. DEITCH: Well,since that time, the matter came on for permanent injunction.

QUESTION: That's what I thought.

MR. DEITCH: But before the permanent injunction, Mr. Dakota transferred the lease to Pursue, Ltd.

QUESTION: Yes.

MR. DEITCH: And then at the permanent injunction hearing, Judge Like (phonetic) notwithstanding Judge Walinski's Order, issued a permanent injunction closing the theater for one year and ordering the $300.00 taxation--

QUESTION: How does that stand now?

MR. DEITCH: So after that permanent injunction,

Pursue, Ltd. went back into Federal Court, as party plaintiff, and sued Mr. Huffman and noticed the Attorney General, not naming him as a party defendant and asked for declaratory relief, an injunction not against prosecution, but only against the padlock provisions of 3767.01 et seq. And the three-judge court declared only 3767.04 and .06 to be unconstitutional. That is the padlock provision. And it left open an injunction against a named motion picture which could be brought by Mr. Huffman enjoining the showing of a named motion picture upon proof. And it didn't affect any criminal prosecution whatsoever. It is our position that under this statutory scheme it says, it follows a civil procedure, and at subsection 11, the legislative enactment says that these procedures can come into play after a criminal prosecution. So that if one motion picture film is -- an individual is indicted for showing a motion picture film and convicted, then the entire theater can be closed.

QUESTION: Where is this statute? I didn't find it in the Appellant's brief, which is where it ought to be.

MR. DEITCH: The Appendix, Your Honor, at page B-3, through B-10.

QUESTION: Thank you.

QUESTION: After the permanent injunction, before -- after that the case was started in the Federal District Court. There might have been an appeal where, in the Court

of Appeals of Ohio?

MR. DEITCH: Yes, sir, there could have been an appeal from the permanent injunction. However--

QUESTION: There could have been and that was not taken, I take it?

MR. DEITCH: No, because when Mr. Dakota filed his suit, when he was the tenant, the Court issued the injunction for temporary restraining order and then once the permanent injunction came down, Pursue adopted, in our complaint, the allegations and we are said to be bound by a "lis pendens"-- and we assume the same position--

QUESTION: Could Pursue, at that juncture, after the permanent injunction have appealed the permanent injunction to the Ohio Court of Appeals?

MR. DEITCH: It could -- well, it wasn't a named defendant, merely served with papers by the sheriff. It was not named as a party defendant in a State action.

QUESTION: Well, who could have appealed the permanent injunction?

MR.DEITCH: Well, I would imagine that Mr. Dakota could have appealed in namesake only--

QUESTION: Pursue went into Federal Court, is that it?

MR. DEITCH: Yes, sir.

QUESTION: And sought a restraint against enforcement

of the padlock injunction?

MR. DEITCH: Yes, sir, merely the padlock, not to enjoin--

QUESTION: They could have gone into Federal Court to do that. If you could go into the Federal Court, as you did, why couldn't you have taken an appeal from the injunction?

MR. DEITCH: A matter of the First Amendment. And the discretionary aspect of the Court of Appeals--

QUESTION: That doesn't answer my suggestion. Why could you not -- Pursue not have appealed the permanent injunction?

MR. DEITCH: Technically--

QUESTION: Not technically. Could it have?

MR. DEITCH: It could have appealed.

QUESTION: But it chose not to but to go into Federal Court.

MR. DEITCH: Federal forum to ask for declaratory relief and injunction against the padlock provisions.

QUESTION: Does that raise a Younger question?

QUESTION: Sure.

MR. DEITCH: I believe that Younger is not applicable because this is purely a civil proceeding and this Court left the question open in Younger.

QUESTION: Haven't all of these issues that you've raised in the Federal Court already been decided in the State

Court? Why should you have an opportunity to relitigate them in the Federal Court?

MR. DEITCH: Well, the matter -- as Dakota was already in the Federal Court, he chose his forum where to be heard. He could have filed a certain declaratory judgment in the State Court.

QUESTION: Well, but quite apart from his filing in a suit, weren't these issues litigated in a nuisance proceeding? Didn't you raise these defenses there?

MR. DEITCH: No, not Pursue, Ltd. because I, as counsel for Pursue, appeared at the permanent injunction hearing and Judge Light asked me if I was a member--

QUESTION: Let's assume the property hadn't changed hands just for a moment.

MR. DEITCH: Yes, sir.

QUESTION: Wasn't there a final judgment in the District Court?

MR. DEITCH: But the Federal litigation had been commenced before final judgment.

QUESTION: I know, but what's the rule on res judicata? The State proceeding in the State nuisance action finished before the Federal action did?

MR. DEITCH: No, sir, the Federal action was started before the permanent injunction.

QUESTION: But wasn't concluded.

MR. DEITCH: No, there was a temporary restraining order.

QUESTION: Well, if there are two suits going on at the same time, covering the same issues, the one that finishes first normally becomes res judicata of the other.

MR. DEITCH: Well, if that's the rationale, Dakota would be precluded from going on appeal -- The Federal Court will say, you're going up--

QUESTION: Exactly.

MR. DEITCH: --on-the--

QUESTION: Of course.

QUESTION: So is every other party that once litigates in one forum and seeks to transfer in mid-stream.

QUESTION: Did Huffman interpose a defense to the Federal suit res judicata?

MR. DEITCH: Not to my knowledge, Your Honor.

QUESTION: Well, I suppose that's the answer to the res judicata question, isn't it? That's a defense, isn't it, that he would have had to interpose--

MR. DEITCH: I do not believe he raised that as a defense in Federal Court.

QUESTION: If he didn't, I suppose that's out of the case, but that doesn't take the Younger question out, does it?

MR. DEITCH: It is our position there is a Younger

question, but following Younger--

QUESTION: Your position is that the Younger principles apply only to pending criminal prosecutions.

MR. DEITCH: That's correct.

QUESTION: And not to this civil.

MR. DEITCH: And if the Court--

QUESTION: And as I understand it, this civil, if that's what it is--

MR. DEITCH: Yes, sir.

QUESTION: --proceeding is in aid of a possible criminal prosecution, isn't it?

MR. DEITCH: No, that's separate and distinct from a criminal prosecution.

QUESTION: Not an aid of--

MR. DEITCH: Well, it refers in the last subsection that this is a separate procedure from criminal procedures. It is our position that if the Court says, this is a "criminal proceeding", then the exceptions, we would submit under Younger v. Harris are there; that is the great and immediate irreperable harm.

QUESTION: First Amendment argument?

MR. DEITCH: Yes, sir, the closing of the theater.

QUESTION: To what extent was that tried out -- was the content of these films tried out in the State courts?

MR. DEITCH: The content of the films was at this point in time, at the filing of Mr. Dakota's complaint, the

filing of Pursue's complaint to final judgment by the Federal Court on April 20th, 1972, the only procedures, to my knowledge, against the defendants in the State action was a civil proceeding.

QUESTION: Did they try out the issue of obscenity of the films?

MR. DEITCH: The judge, sitting without a jury, did say these films presented to me are obscene.

QUESTION: And that's his final judgment?

MR. DEITCH: That was his judgment. Now the question is allowing the State to go through the civil proceeding, one, changes the burden of proof and, two, disallows the defendants in the State action a right to a jury trial. And this Court has said part of the test of obscenity to be the contemporary community standard. So at least this should allow -- that should not be allowed with regard to this case, for a judge to say, to rubber stamp, this is obscene, this is obscene, this is obscene. We should have a right to a jury trial.

QUESTION: Would you read the community standard language in the various obscenity opinions of this Court as mandating a jury trial in a civil proceeding where the State doesn't choose to provide one?

MR. DEITCH: I'm saying that to allow the State Court to padlock an establishment based upon one judge's--

QUESTION: Are you going to answer my question?

MR. DEITCH: I'm sorry, Your Honor, Mr. Justice Rehnquist, would you please repeat it?

QUESTION: Do you read the community standard language of the various opinions of this Court dealing with obscenity as mandating a jury trial in a civil proceeding where the State doesn't choose to provide one?

MR. DEITCH: No, sir. But I'm saying that at least the members of the community should have the opportunity to pass upon the motion pictures.

QUESTION: They have indirectly, as Mr. Justice Rehnquist suggested, by the State Legislature having vested the powers to decide that factual issue in a single judge instead of a jury of six or twelve people.

MR. DEITCH: And a single judge for the motion pictures presented to him. But then you get to the question of the over-breath of the statutory scheme and his Order, closing in future, in futuro, the showing of any motion picture.

QUESTION: Well, I know some have argued that the First Amendment requires a jury trial. You can't say ' in a sole proceeding the Seventh Amendment because the Seventh Amendment has never been extended to the States. But there have been some who have argued that because of the First Amendment overtones of the obscenity field, that there is a constitutional First Amendment requirement of a jury

trial. This Court has never said that, has it?

MR. DEITCH: I don't believe so.

Now, with regard to Younger v. Harris, I would like to reiterate that the State Court of Ohio, the State Supreme Court in Syllabus 4 of State ex rel Ewing v. "Without a Stitch", in the Syllabus or Syllabi of the opinions -or the law of the State has ruled that the theater -- a theater can be padlocked based upon that one motion picture film. Therefore, to send the matter back down to the District Court to, say, await a State Court proceeding, this is futility because the State Court has passed upon the statutory scheme.

And as early as 1971, the Supreme Court of Ohio--

QUESTION: The litigant of that case, I gather, did not go to a Federal Court, it just went up through the State Court system; is that right?

MR. DEITCH: Yes, sir.

QUESTION: And now has petitioned for certiorari here; is that correct?

MR. DEITCH: Yes, sir.

QUESTION: And, presumably, if this Court should find the question to be worthy of a grant of certiorari , we would grant it and decide the constitutionality of it. Correct?

MR. DEITCH: That's correct, but the highest judicial body of the State of Ohio has ruled--

QUESTION: --subject to certiorari jurisdiction.

MR. DEITCH: Yes, sir.

QUESTION: And I think a petition for certiorari has been filed and is pending; isn't it?

MR. DEITCH: I do not know.

QUESTION: In other words, the fact the State has ruled against you hardly, in and of itself, makes it appropriate for the Federal District Court to rule, doesn't it, under the--

MR. DEITCH: Well, it is my understanding that so far as an authoritative judicial construction by the highest court of the State, if this Court says that court is wrong, that would change it. However, at this point in time, until this Court says that, if the District Court -- if this Court ordered the District Court to abstain or dismiss the case, then there would be an immediate reimposition of the padlock provisions until --

QUESTION: The law of Ohio, which is the law of that State until or unless it is reviewed, revised or reversed by this Court; isn't that right?

MR. DEITCH: Yes, sir.

QUESTION: Or it can be changed by that court.

QUESTION: By their Supreme Court?

QUESTION: Yes.

MR. DEITCH: On remand it could.

QUESTION: No, it might change it in this case.

QUESTION: In the decision of the Ohio Court in the case of "Without a Stitch", this statute was construed more narrowly than it had been construed previously, was it not?

MR. DEITCH: Your Honor, reading the Syllabus 4, maybe I don't understand the import of the question, Mr. Justice Powell.

QUESTION: Wasn't there an original State injunction directed not merely to films that had been found to be obscene, but also to any films that might be shown in the future, and without original injunction, wasn't it?

MR. DEITCH: In Lima, is that what Your Honor is referring to?

QUESTION: The case that's before us today.

MR. DEITCH: Yes, sir. Yes, sir.

QUESTION: Now the Ohio Court in the case that I referred to, "Without a Stitch", as I read that opinion, limited the effect of the statute only to films that had been found to be obscene; is that correct?

MR. DEITCH: No, sir, I don't read the opinion as that limited. It said that film is obscene and that film is enjoined. However, the statutory scheme in Ohio says the Court shall issue an order closing the theater and selling the personal property, imposing a tax of $300.00.

QUESTION: And to close the theater for a year.

MR. DEITCH: That's correct.

QUESTION: Subject to a bond and then the property owners can come in during the year and say that they have repented and they're not going to do this anymore.

MR. DEITCH: The property owners, but not the tenant who doesn't have any interest interest in the property in the theater. And with regard to appealing the matter through the State channels, it could be argued by the State that if the dockets being heavy the matter may take more than a year to reach final resolution and become moot.

QUESTION: You didn't go to the Supreme Court of Ohio with this case because the result was a foregone conclusion after the Supreme Court of Ohio's decision in "Without a Stitch"?

MR. DEITCH: No, at the time this permanent injunction was issued, we felt that to go into Federal Court because the Supreme Court of Ohio in an earlier case in 1971 had said the motion picture film can be enjoined and the nuisance provisions under these schemes can be invoked. So based upon that judgment--

QUESTION: Well, maybe I have the wrong reference. It was not in the "Without a Stitch" decision but in another decision of the Ohio Supreme Court.

MR. DEITCH: Yes, sir.

QUESTION: Merely that it's because of that decision that you went into the Federal forum instead of

going to the Ohio Supreme Court?

MR. DEITCH: That was part of the rationale. And once the temporary or opinion and order of Judge Walinski was entered staying the closure, we felt there was no reason to go into State Court and have the State come in and say, "Look, they've appealed it in State Court" and dismiss it for these reasons. We chose our forum.

QUESTION: The "Without a Stitch" decision was announced by the Supreme Court of Ohio on February 27th of this year. You didn't have the benefit of that at the time.

MR. DEITCH: No, sir.

QUESTION: This litigation in Lima, Ohio, did you?

MR. DEITCH: No, sir. Part of the rational was State ex rel Keating v. "Vixen". It was a procuring opinion and the Court said that they could enjoin the showing of "Vixen" and apply the3767 provisions which they said .02 et seq which included the abatement.

QUESTION: And contrary to the suggestion in the question of my brother Powell, instead of nolling this statute, the Supreme Court of Ohio in the "Without a Stitch" case seens to have broadened it, if I read paragraph 1 of the Syllabus correctly, It says, "The exhibition of a single obscene motion picture is sufficient to render a theater a nuisance as defined in Revised Code" and the numbers, which means on the basis of a showing of a single picture

this place could be closed up for a year.

MR. DEITCH: As Syllabus 4 says. The Court shall issue an Order permanently closing. And it construed in "Without a Stitch" shall means just that.

QUESTION: You are not an Ohio lawyer, as I understand, but I understand the Syllabus is the law.

MR. DEITCH: Yes, sir.

With regards to the merits of closing a theater, I think that Mr. Clancy's position is abominable. I don't agree with that at all. How can you label a theater a nuisance and enjoin just as in Near the showing of any motion picture. In Near it said whether it's a race problem, whether it's a personal property problem enjoining people, Near said look at the substance. Look at the substance of what the injunction is. And, obviously, the injunction is against people, people showing motion pictures. And that the Court feels that it should pass upon the merits, I think it should, I think the three-judge court probably passed upon the merits. I think the decision of that Court was proper. I think this Court should affirm that decision based upon prior restraing in this statutory scheme being in violation of the First Amendment and the Fourteenth Amendments of the Constitution.

QUESTION: Could I ask you, I see in the Appendix, page 018 and 019, it says that on November 30, 1972 the

Court of Common Pleas issued a permanent injunction closing this theater. And then on December 1, the Federal Court issued a temporary restraining order ordering that there be some adversary hearing.

MR. DEITCH: That the order, the padlocking order be stayed pending three-judge court hearing, just the padlock provision. The order closing the theater.

QUESTION: I'm just saying the three-judge court issued its -- an injunction on December 1st.

MR. DEITCH: That's correct.

QUESTION: And it ordered some adversary hearings in the State Court.

MR. DEITCH: No, sir.

QUESTION: That's what this motion says. Are you in dispute with this recitation?

MR. DEITCH: The Federal Court on December 1st merely stayed the padlocking. It didn't order the Court to have adversary hearings. It said that if there are adversary hearings as the motion picture, that injunction is not bothered at all.Only the padlocking provisions pending the three-judge court. And on November 30th--

QUESTION: Anyway, on November 30, I take it there was a permanent injunction?

MR. DEITCH: Yes, sir, issued by the State Court, after Judge Walinski said--

QUESTION: Don't you think that was appealable?

MR. DEITCH: Well, based upon the fact--

QUESTION: Was it or not?

MR. DEITCH: That Order was appealable but, based upon the fact we were already in Federal Court--

QUESTION: Yes, well, you preferred to get an injunction the next day?

MR. DEITCH: That's right rather than go to the discretionary -- the discretion of the appellate court to grant us a stay and the time limits. That was a decision made going to court based upon what Judge Walinski had earlier ruled.

QUESTION: Younger v. Harris applies to a civil action.

MR. DEITCH: I beg your pardon?

QUESTION: I say if the Younger v. Harris principles apply on the civil side, are you in difficulty?

MR. DEITCH: No, sir, I believe we have the requisite great and immediate danger, obviously. The judge issues an Order at 2:00 o'clock that the theater is closed by 3:00 o'clock--

QUESTION: Despite the right to appeal on the permanent injunction issue on November 30th.

MR. DEITCH: Yes, sir.

QUESTION: You're not in difficulty.

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

QUESTION: Younger v. Harris itself involved First Amendment.

MR. DEITCH: Relating to criminal prosecution.

QUESTION: I understand your argument is you are clearly within the exceptional circumstances envisioned in Younger v. Harris, even assuming Younger v. Harris applies.

MR. DEITCH: Yes, sir.

QUESTION: What is the situation right now? Are the movies -- is it operating or isn't it operating?

MR. DEITCH: I don't believe Pursue is operating in Lima at this time. I believe the corporation still qualified to do business in the State.

QUESTION: Is there anybody operating the theater now?

MR. DEITCH: I think the theater is in operation. There is one other theater in Lima and if the argument is the corporation can go elsewhere and show the movies, that theater was well-engaged, I belive, "Last Tango in Paris". So we would be precluded. There's but one other walk-in theater in the town of Lima, Ohio.

MR. CHIEF JUSTICE BURGER: You have two minutes.

REBUTTAL ARGUMENT OF JAMES J. CLANCY

ON BEHALF OF APPELLANTS

MR. CLANCY: Yes, Your Honor. I would like to make something clear about how this preliminary injunction issues and read now from C-5. I think the Court has a misconception of what happens.

It says here if at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, then he issues the injunction. But at the time he finds that, is a public nuisance exists, the defendant can abate, say, "I have abated it. I am withdrawing the film". In the case of "Without a Stitch" the defendant there notwithstanding the trial judge finding it was an obscene film continued to show it and the court said no you can't do it. So I suggest that under the circumstances in this case, had the defendants come forward and said, "We're going to stop showing these pornographic films", they would not have been foreclosed because they would have shown -- at least they could have told or given some evidence to the judge that the public nuisance complained of had been abated.

The Ohio Supreme Court has said that if the defendant comes forward and does not show "Without a Stitch"

then that nuisance has been abated and the place cannot be padlocked. But it said that if there is a finding by the trial judge that a public nuisance does exist, then he must padlock it.

Now there has been at least three cases filed in the Toledo area, one is "Deep Throat" and the other is "Stewardesses" and the other is "Without a Stitch". All three of those have gone through the system and the theater is still in operation, notwithstanding the fact that the Order stands that it must be abated. That theater has not been closed. Justice Stewart was asking whether or not a stay would prevent the business from being closed.

Now, taking a look at 3767.11 as to whether or not this has remained in the statute 00 in the criminal law -- 3767.11 says procedure where nuisance established in a criminal proceeding. In case the existence of a nuisance is established in acriminal proceeding, the prosecuting attorney shall proceed promptly under Section 3767.11, which clearly says--

QUESTION: As I understand your brother on the other side, he says that going up through the State court system gives him insufficient remedy, assuming he has a good First Amendment claim because the State of Ohio Supreme Court has held that under this statute it is error for the trial court to promote the continued showing of the movie

pending appeal. And that was held in this "Without a Stitch" case.

MR. CLANCY: I am saying there is no right to show under Constitutional principles--

QUESTION: I know that's what you're saying--

MR. CLANCY: After the trial court finds that "Without a Stitch" is obscene, the trial court finding is the determination.

QUESTION: And pending an appeal from that finding, the Supreme Court of Ohio says it is error under this statute to grant any sort of a stay and to permit the continued showing of the film. And reading it from 37 Ohio State 2d, page 104.

MR. CLANCY: Right, I am saying that the Ohio Supreme Court says that after the trial court finds that "Without a Stitch" is obscene--

QUESTION: Right.

MR. CLANCY: --there is no stay from it.

QUESTION: Right (inaudible) stay.

MR. CLANCY: Yes, that the theater owner has got to pull it then. He has had his day in court and he's got to take it up on appeal. That's the only thing the Ohio Supreme Court has said.

QUESTION: You and I agree.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 2:17 the case in the above-