In the

Supreme Court of the United States

CECIL HICKS, DISTRICT ATTORNEY OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA, ET AL.,

Appellants,

v.

VINCENT MIRANDA, dda WALNUT PROPERTIES, ET AL.,

Appellees.

No 74-156

Washington, D. C.
March 24, 1975

Pages 1 thru 60

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v.	:	
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Appellees.	:	

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Monday, March 24, 1975

The abovel-entitled matter came on for argument at 11:56 a.m.

BEFORE:

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

APPEARANCES:

ORETTA D. SEARS, ESQ., Deputy District Attorney, Orange County, Santa Ana, California, for the appellants.

ARLO E. SMITH, ESQ., Assistant Attorney General of California, San Francisco, California, for the appellants.

STANLEY FLEISHMAN, ESQ., Hollywood, California, for the appellees.

SAM ROSENWEIN, Hollywood California, for the appellees.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-156, Hicks against Miranda.

Mrs. Sears.

ORAL ARGUMENT OF MRS. ORETTA D. SEARS

ON BEHALF OF THE APPELLANTS

MRS. SEARS: Mr. Chief Justice, and may it please the Court: I think listening to the consent case I have somewhat lost my voice. But hopefully as I proceed it will become clearer.

What is before the Court today is a many-issue case. However, I do believe that the Court .. by postponing jurisdiction to this day, that they wish to hear argument on whether or not there was jurisdiction in the Court.

In directing myself to that issue, I would like to proceed by arguing that both of the orders issued by the court below, be it the order of June 4th which required people to return the movies, or the films, and the order of September 30th which ordered the defendants to in "good faith" petition the State court for the return of the films, are injunctive.

In determining -- first of all, I would like to argue that a declaratory judgment/the defense in an action that involves a State statute is, to my way of thinking, per se injunctive within the context of 1253, within the context of 2281 and 2283.

A look at the birth of these statutes brings us back to Ex Parte Young. But when I read Ex Parte Young, and I started from there and I went back and reread the last of the very brilliant decision by members of this Court and by past members of the Court, I was impressed by one thing, that Ex Parte Young dealt with one portion of the Eleventh Amendment, not really, not at all the portion of whether or not a court, or the Federal court per se of the judicial system, had jurisdiction over certain causes of action. .. the first portion of the amendment.

But what that case dealt with, I think, is expressed best in Justice Harlan's dissent. It dealt with that second portion which says, "In those cases in which a State is a party, jurisdiction, original jurisdiction shall be in the United States Supreme Court." It was that second limitation that was argued in that case. The question was when it is a State statute that is attacked, through the Attorney General or through the State's personal representative, is it the State that is being attacked or is it the individual? And the majority in the opinion --

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock, Mrs. Sears.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mrs. Sears, you may continue.

ORAL ARGUMENT OF ORETTA D. SEARS ON BEHALF OF APPELLANTS (Continued)

MRS. SEARS: What I was trying to, or attempting to, point out is that in a very real sense what Ex Parte Young did was to take away a suit against the Attorney General of a State or a State officer in which the declaration or a statute is being attacked for unconstitutionality from the original jurisdiction provision inherent in the Constitution which states that whenever a State is a party to a proceeding, the jurisdiction of the Supreme Court is original jurisdiction.

It was to remedy this particular ill that in 1911 the original three-judge court provisions were enacted. I think probably the clearest showing of the intent of Congress at that time to provide full direct appeal in all of those cases where the decision was to be made by the three-judge court and where a finding of unconstitutionality was had, is found in the original provision in the 1911 provision in which the three-judge court which was sought to be empaneled was intended to be made up of at least one judge plus two additional judges, at least one of whom was going to be either a Supreme Court judge or a circuit court judge.

Now, quite obviously, once a decision has issued from a three-judge court, at least one of whom but possibly two of whom are Supreme Court judges, it would be rather incongruous at that point to go to a circuit court to have that decision removed.

Now, true, today the Act has been modified so that it does not any more say at least one of whom can be either a Supreme Court judge or a circuit court judge, but it does still say at least one of whom -- and again at least one of whom -- shall be a circuit court judge. Arguably, therefore, one could have a three-judge court with two circuit court judges. I suppose one could go to the Ninth Circuit and demand a hearing en banc, but I would question the wisdom of trying to overrule a two-judge court decision with two judges from the Ninth Circuit sitting on it and deciding the case. It would make it somewhat incongruous.

That is one of the points. The other point is that interestingly enough, the Act does not say prohibit. It defines injunction within the Act. It says, an injunction to restrain the enforcement, and so on and so forth. The word "restrain" as this Court has recognized does not mean just prohibit. It means anything less than an actual prohibition. It means anything which makes it difficult, which inhibits. I think this is true of the First Amendment cases and of all cases. It is certainly true that it will for

indeed that is what declaratory judgment is, is a restraint, especially in view of some of the new decisions which have stated that -- I believe it was the Second Circuit or the Third Circuit stated that after a declaratory judgment a proceeding against the person contrary to the declaration of unconstitutionality was automatically an action which was in bad taste.

Now,had I read that opinion, I would have been a lot more cautious before ever bringing a State proceeding after the declaration of a three-judge court. So long as that opinion exists, I am restrained in the future from ever doing it again even though in good faith I believe I am right, I still couldn't. So it is a real restraint.

Finally, if we speak about a case in which a three-judge court is properly convened and if we had a valid request for injunction and if the request for injunction is denied but the declaratory relief is granted, what are the results? The practical result is that the State who is the one that was sought to be protected, whose procedures are sought to be speeded all the way to this Court, will be the one defendant that will not be able to reach this Court directly. Whereas, if the relief had been denied, all of it, and the Act is unconstitutional, the defendant, the individual, will be able to come directly to this Court. And I think this inconsistency was not intended. I think that a declaration of unconstitutional

ity, unless this Court is willing to say that beyond 1201 we take 1202 and destroy it, it is there, a court who has the power to issue a declaration also has the power to enforce that declaration under 1201, and probably within the purview of 2283 as well. And it seems to me that then in that case we have a bypassing of the totality of the procedures.

Now, a point that is also somewhat important is the fact that there is another restraint that is possibly res judicata restraint. Now, that, too, is a restraint because if the State court feels, if the people feel that the declaratory judgment is going to be res judicata in the State court, there really isn't much point in bringing the proceeding. So therefore, I would submit that if we are going to allow a declaratory judgment to be given in these cases, and I think we have to, I don't think that's open to question, then I think the courts must preserve the right to appeal by declaring that a declaratory judgment is per se in this type of cases injunctive in that it restrains.

The second point, of course, is that both of these -- as far as the first order, the order to return, it is obvious under my rationale that it is injunctive. But the second order is probably even more injunctive, to my mind. It opens me to a contempt which I almost find inescapable. I cannot in good faith -- that's the impossibility, in good faith do that which I do not believe in. How do I in good

faith petition my court whom I have asked to do something and who has issued a valid order and has rendered a valid judgment, now I have to go back and say, "I don't believe I'm wrong, but they tell me I have to do it/in good faith, so,your Honors, I will do it."

QUESTION: You are talking about the second order.

MRS. SEARS: That's correct.

This type of a situation puts an immediate burden upon the individual and upon the Office of District Attorney. In California the District Attorney is an elected official. In California the District Attorney shall file all complaints. If a complaint, the people of the State of California under our constitution have a right to have the discretion of the District Attorney exercised and my .. says I shall attend the court, the Superior Court, the trial court on behalf of the people.

How can I go into one of those courts representing a party, not the people? And in this case, if I go in and petition, I would be representing a party, not the people.

QUESTION: The District Attorney -- there is one District Attorney in each California county?

MRS. SEARS: That's correct.

QUESTION: Elected by the people for what, a four-year term of office?

MRS. SEARS: That's correct, Mr. Justice White.

QUESTION: And the deputies and the assistants are appointed by him?

MRS. SEARS: That's correct, and act only in his name.

Those are the considerations that I felt were probably most important. I do realize that there have been problems, procedural problems, numeral problems. A petition was filed under rule 60, noticed, however, for July 1. I have read as much as time and physical limitation allows as many of the opinions, and I came to the conclusion that the rule part of the problem did not seem to be so acute. Perhaps I am wrong, but I felt that since the case is here totally and there is nothing more to be done downstairs, in any event, I did not feel that I need go too much into that point. If the Court feels that I should, I will address it more specifically.

Now, the one point that I would like to make is the facts of this case. The State court magistrate issued four search warrants. I as the head of the Writ and Appeals Section automatically direct my deputies. They were issued over a weekend, however, or a Thursday or Friday and a weekend interfered. On Monday I felt very strongly that the mandates of this Court require an immediate hearing as soon as possible. And I felt very strongly that under rule 41 analogy, rule 41 and 1538.5 .. are almost identical,

if not identical, in scope and language. And I know many cases, Second Circuit cases, other cases, that have held that rule 41 does allow the court to have that kind of a hearing at the instance of the District Attorney. So I asked for that kind of a hearing.

The defendants in the State action, in that hearing, arose and said, "Begging your pardon, Court, you have no jurisdiction. Good-bye."

Well, at that point we proceeded with the hearing. ? Probably wrong, I feel very strongly that that kind of issue belonged in the State court and that the court in granting ? relief actually showed itself prudently .. in the courts to do their job, the State courts. In addition, ? if we are ever going to have a .. of decision. I tried again, and again they came in and said, "Begging your pardon, but we don't feel bound by this court."

I think the hearing of August 12 which has been brought up as part of the record by the appellees is graphic of what has been happening. The Federal court in that case, although it did not pursue the issue further, asked the defense, the plaintiff's counsel, why didn't you appeal? Don't you think the courts, the Supreme Court of the State of California would have gone your way?

He says, Yes, he thought that he would have won. He thought that this procedure was something that was wrong and

that the State courts would have gone his way. And he was asked, well, why didn't you do it? And he said, "Because I have a choice, and I choose to go to the Federal Court. I just didn't want to proceed in the State court."

And that is part of the problem. I will submit that this type of action does frustrate the relationship between the courts, especially when you have proceedings in the municipal courts at the same time.

Now, there are many factual points that counsel has made. I don't think they are relevant. First of all, they are points of California law and they are points that should have been made in the State court but were not made. I don't know under what provision he has a choice to argue the validity of a search warrant either prospective or already issued before a Federal court rather than before a State court. I have found no case that indicates that this is the law. Perhaps I have overlooked something.

Since I would like to retain a few minutes for rebuttal and I would like to defer to the Attorney General, unless you have questions, I would --

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Smith.

ORAL ARGUMENT OF ARLO E. SMITH ON BEHALF OF THE APPELLANTS

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

Court: This is a complex case. In fact, it would be a perfect plot for a Gilbert and Sullivan parody on the administration of justice. By that I mean no disrespect for either the Federal court or the State court. Because it presents the very fundamental problem of the jurisdiction and authority of Federal courts to interfere with the administration of State justice.

Mrs. Sears has briefly outlined the facts, and I hope to outline them a little more fully. I would like to address myself to two problems: First, the application of the doctrine of the cases of Younger v. Harris to this matter, since the three-judge court felt that this was not that type of case; secondly, I would like to address myself to the question of harassment which the court found without a hearing.

Let's start as Mrs. Sears did. On Friday, November 23, a magistrate, a California municipal court judge, issued three warrants. In each instance on sufficient affidavits and twice on the viewing of the films involved as to their obscenity, a practice under California law which indeed was followed out by a case brought in Municipal Court, which counsel for the plaintiff here instituted.

QUESTION: The magistrate had himself viewed the film?

MR. SMITH: Yes, your Honor. That's correct, on two occasions. And this is the procedure under California law

which is designed to protect the defendant and particularly protect the possibility of a First Amendment right. He cannot -- in California an officer may not seize a film as obscene on an arrest. It must be pursued to a search warrant.

Secondly, the magistrate cannot issue that warrant without either, one, personally viewing the film or other material, or, two, without an affidavit that is specific in terms of the nature of that material.

On Saturday, a fourth warrant was issued, and in each instance, the warrant recited that there were differences in these films.

QUESTION: Same title, though.

MR. SMITH: Same title, but different ..

On Monday the 26th, the District Attorney instituted a proceeding which has been characterized variously as injunctive, restraining, whatever, but a proceeding quasi-criminal in nature designed to lead to an order of seizure of these films.

QUESTION: That was a statutory proceeding?

MR. SMITH: No, it is not. It is not. But California law on that, I think, is unclear. That's quite correct. But the point is that under the procedure as alleged in this complaint, the defendants here, Miranda, Walnut Properties, Pussycat Theatres, had an opportunity to come into the Superior Court of California and raise every objection that

they made in the Federal district court -- the constitutionality of the State statute, the validity of the procedures in that court, the validity of the seizure, the validity of the -- the question of the identity of the film. Indeed, they could have raised the obscenity question. They refused to take part in that proceeding. They appeared and contested the jurisdiction of the court and walked out.

QUESTION: And the ultimate object of that proceeding would have been the permanent, what, the destruction of the film?

MR. SMITH: No, indeed. It resulted in the seizure of those films and held at the Pussycat Theatre.

QUESTION: As ancillary to some other proceeding or as an end in itself?

MR. SMITH: Either way I don't think it makes any difference. The question presented here. There was an adversary hearing offered under this proceeding prior to the restraining order issued. There are questions of California law I concede, but that is precisely why the Federal court should have abstained, precisely why. All of these questions could have been raised in the appellate courts of California, including the Supreme Court of California.

Finally, of course, they make a complaint that is completely unfounded. They refer to some abatement cases. It is correct that our courts have held that the red light abatement

action is not applicable to film, it's only live conduct. But of course they don't point out that the California Supreme Court has before it now a case involving the nuisance type of injunctive proceedings under 270 of our penal code, nuisance section. The Los Angeles Court of Appeals in Los Angeles for the Second Appellate District held the procedures utilized by the Los Angeles District Attorney to be proper under California law.

Two weeks ago our Supreme Court granted a hearing in that case. Some of the very issues that they raise here.

Finally, two days after this hearing, of which counsel walked out, they filed a complaint in the Federal court. The allegations are that this proceeding that we have just discussed violated their rights. Secondly, they complained that the seizures pursuant to the warrants violated their rights.

Immediately prior to that, of course, complaints were filed against the theater manager of Pussycat Theatre, the managers who were exhibiting the films.

A hearing was held before Judge Lydick, the Federal district court judge, on the temporary restraining order, and he determined that there was no bad faith, no harassment, that the officers had acted pursuant to valid State warrants. However, --

QUESTION: Mr. Smith, somewhere can you straighten

out for me the juxtaposition of Judge Ferguson and Judge Lydick?

MR. SMITH: Yes. I'm glad you raised that.

The case was originally assigned to Judge Ferguson. And the record reveals that he refused himself on the ground of possible bias. It was then assigned to Judge Lydick who heard the request for a temporary restraining order.

Now, on December 28, 1973,he issued an order denying the temporary restraining order and finding no bad faith, finding no harassment, finding no irreparable injury.

He did,however, and we suggest in our brief that he erred, because he found that the question was not fully without merit, some substance, some perhaps Federal question. But he also determined that the question of abstention, he felt, was a question for the three-judge district court. We feel at that point he should simply have denied the action, dismissed it. The appeal here would have been to the Ninth Circuit court. Of course, if he were wrong, it would have been back to the three-judge district court.

QUESTION: He certified the necessity for the three-judge court.

MR. SMITH: Correct. We suggest he erred, in spite of the correctness of his decision overall,procedural error.

However, the order appointing the three-judge district court did not include Judge Lydick, the district judge to whom it was assigned.

QUESTION: And who certified.

MR. SMITH: And who certified. Rather, it was assigned to Judge Ferguson, another U.S. district court judge, and a circuit court judge and a third judge.

We raised the question that that is jurisdictional under the statute. I prefer not to devote any additional time to that question.

QUESTION: Why not?

MR. SMITH: Why not? Because I feel that there are -- maybe I misjudge when I feel there are more critical issues in the case. We feel that we have a right to have, we feel it is important and we have raised it, but we feel that we have a right to have the district judge who heard this matter sit. Indeed, if it's referred back, obviously to whom do you refer it? That's a very good point.

QUESTION: I am just wondering what basis do you have for criticizing it?

MR. SMITH: The statute is very explicit. It says it shall include the district judge who certified the matter, before whom the case was brought.

QUESTION: That's all I wanted to hear you say. I was just wondering why you didn't say it.

QUESTION: Did you ever object to the three-judge court that was actually convened, that you thought there had been a jurisdictional error?

MR. SMITH: I can't say that we did, no. I don't believe the record reveals that we did.

QUESTION: How do you think this came about? Chief Judge Chambers surely knows what the statute says.

MR. SMITH: Well, I think it came about, if you look at the proceedings on December 6, 1973, six days after this action was filed, you will notice that this same panel was assigned a number of consolidated cases, and in those cases they discussed abstentions, California statute. There were a number of cases, seven or eight involving other counties in California and other defendants and other plaintiffs.

QUESTION: Also obscenity cases?

MR. SMITH: Also obscenity cases. Apparently they were assigned, apparently by the Ninth Circuit, to handle these issues. That's the only explanation I have.

QUESTION: If you prevail on this point, you win your lawsuit, don't you?

MR. SMITH: Yes, and we urge it and we urged it in the briefs.

QUESTION: Are you going to touch on the question of Judge Ferguson's change in position about the refusal?

MR. SMITH: Well, I think it speaks for itself. I think he certainly was biased when he refused himself. He then sits on the very same matter. I don't wish to infer beyond that. I think it improper.

QUESTION: Well, it's not unheard of that a judge has a misapprehension about whether or not he owns stock in some company or whether or not he thinks he may know some of the persons involved and it turns out to be another person by the same name.

MR. SMITH: That was not so here. If you will notice, the order of refusal, it refers specifically to the fact that he has knowledge of and is acquainted with and otherwise biased with reference to the parties in this action. It happened to be officers of the city of Buena Park who were some of the defendants here. And you may draw the inference that the bias was perhaps in their favor. I suggest that that may not be the correct inference to be drawn on the record in this case and on the record incident to which refusal referred.

QUESTION: Isn't it conceivable, too, that a judge figured you could have come to me or one of the other fifteen judges of the Central District and say, "Possibly, I am biased, I won't sit." Then it goes up and is certified by the Chief Judge of the Ninth Circuit, comes back and says you and you and you will make up this court. Well, the thing is a little further along the road at that time. You might take another look and say, well, in those circumstances, as long as Judge Chambers has said, I am going to sit.

MR. SMITH: That's possible. Apparently he did.

QUESTION: Mr. Smith, what is your position as to

finding by the district court of harassment?

MR. SMITH: The district court, Judge Lydick, the three-judge district court?

QUESTION: The three-judge court.

MR. SMITH: The two-judge court simply recited the facts with reference to the warrant and said they speak for themselves. Judge Lydick, of course, found that this was good faith execution of a lawful warrant by a judge, a magistrate in a California court.

I think that that question of harassment does deserve extended discussion here. To begin with, of course, the burden is upon the plaintiff to establish it. It must be by clear and convincing evidence, because the presumption under Fedder and all of the cases is presumption of validity and proper action by the State officers.

The recitation of these facts that I have just recited in reference to the search warrant is the only basis apparently for the three-judge court's determination of bad faith. It's simply the enforcement, in our view, of good faith, the performance of a duty by the officers, a duty compelled by the statute in California by the valid warrant in California, the valid enforcement of our State law.

QUESTION: Mr. Smith, was there any hearing on this issue of harassment?

MR. SMITH: No, excepting to the extent there was a

hearing on the TRO by Judge Lydick prior to the convening of the three-judge court. He held a hearing and he found good faith. It was submitted to the three-judge court on the affidavits before Judge Lydick. That question is expressly submitted.

QUESTION: Are you saying, Mr. Smith, that the three-judge court which now did not include Judge Lydick overruled --

MR. SMITH: That's precisely what I am saying, yes. Correct. That's precisely what happened.

QUESTION: Well, they had more to go on. They had affidavits.

MR. SMITH: No, indeed. The very same affidaits.

QUESTION: The same affidavits.

MR. SMITH: The same, in fact, the counsel were present before Judge Lydick and argued the matter. The same affidavits were presented. No, they held no hearings of any kind or character.

QUESTION: They didn't hear counsel at all.

MR. SMITH: No, they did not. They did offer counsel the opportunity to present additional affidavits and additional materials, but no additional material was in fact presented.

Now, what evolved in this question of harassment is another question of State law and procedure which was presented to the State court, because you know meanwhile back in the State court the proceeding is going on. The complaint was

filed against the employees of Pussycat Theatre.

QUESTION: Criminal complaint.

MR. SMITH: Criminal complaint.

QUESTION: When was that filed in relation to the date of the filing of the Federal?

MR. SMITH: The criminal complaint against the employees was filed prior to the Federal action. The criminal action with reference to the plaintiffs here was filed -- it was signed three days before -- it was in January to be specific, January 9,and January 14 it was filed, it was three days before service of the summons on the District Attorney. It was filed the day after. It was signed two days before.

But the proceedings were held in the meanwhile under our statute, the 1538.5 or rule 41 procedure, to suppress the evidence and return the property was in fact heard by the Municipal Court in Orange County. That court ruled in their favor as to two counts. I want to make it clear that we are dealing here with each film is a subject of a separate count. We are not talking about four films in one count. We are talking about four films which are alleged to be and are in fact different.

The Municipal Court judge ruled in their favor. He ruled that it violated Heller v. United States, that in fact two of these films were sufficiently identical that they should be suppressed. In fact, an affidavit was filed before the

three-judge district court by counsel for plaintiffs to that effect.

QUESTION: Were the appellees in this case parties to that Municipal Court proceeding?

MR. SMITH: Oh, absolutely. At that point they had been named as parties. They had been named as defendants in the criminal action.

That matter was certified -- and this is in the record -- was certified. Appeal was taken by the people on those two counts.

QUESTION: Were they different prints of the same film?

MR. SMITH: No, they were the same title, but they were different --

Apparently what happened was, as pointed out here at page 48, that what they did as in another instance came out with what they call a soft version first and the warrant was issued. I want to make it clear that, these records make it clear that, the procedure in Orange County is that after one seizure on the same film that the procedure is to be the issuance of a citation for every subsequent violation and not an additional search warrant and seizure. However, the officers here, as indicated at page 48, they went back a second time. It was a harder version, if you please. It contained additional acts of sexual intercourse, et cetera, that were not contained

in the first film. It was a harder version of the same film with the same titles, if you please. And the same thing happened on the third and the fourth. And that issue was before the Municipal Court in California, and they prevailed on that question. However, the people appealed. And they went to the appellate department of the Superior Court in Orange County, and the appellate department ruled to the contrary, they reversed the Municipal Court, holding that on the affidavits and the material presented, the motion to suppress, that in fact their contention was not well taken.

The appellees here, the plaintiffs in this Federal action, pursued their remedy in the State courts? They could certify the question to the appellate court for San Diego. No, they did not. They come back to the three-judge district court with their same contention, that all of this violates State law. So we have a ruling in the State court which they did not appeal. We have two rulings that they did not appeal or seek to review. One, this restraining order, if you please, or order of seizure. They refused to participate. They refused to appeal. Secondly, they declined to further appeal the determination concerning the identity of these films. And they consistently refused to present to the State court the question of obscenity. It's set out here in the record very plainly. They say, we are not presenting and do not intend to present the question of obscenity to the State courts.

I would like to read in connection with, I think, the basic issue here one portion of the proceeding on August 12 in the appendix here before Judge Ferguson, sitting presumably as a member of the three-judge district court.

The question present: Have you taken that order up to the California Court of Appeals? Referring to the order here of seizure of the additional copies, this quasi-criminal action.

QUESTION: And referring to the State court of appeals in San Diego.

MR. SMITH: In San Diego.

He said, the answer by Mr. Brown: No, we have not.

Why not?

Because, your Honor, initially back in November when this first occurred, the day after the hearing, we filed a complaint in this action, this Federal action, and one of the bases for relief alleged in the complaint was the deprivation of constitutional rights.

He goes on to say that once we had invoked the jurisdiction of this court properly, we sought relief in this court, and we did not protest the matter further in the California State courts.

At that point he says, the judge asked him: When you go half-way shouldn't you be required to go all the way? Referring to the same proceeding.

Mr. Brown said: It was our -- this is at page 15 -- it was our purpose in the beginning not to litigate these claims in the State court.

I submit, your Honor, that that is precisely the problem created in this type of litigation where --

QUESTION: Is that in the appendix?

MR. SMITH: Yes, it's in the appendix. In fact, we are very happy that it was brought to the attention of this Court by the other side.

QUESTION: I don't have a document like that. What is that you are reading from?

MR. SMITH: I am reading from the transcript of the proceedings of August 12, 1974, before Judge Lydick.

QUESTION: Is that filed here in this Court?

MR. SMITH: Yes, it is. It's not in the appendix, I'm sorry. It was after -- we requested it.

QUESTION: My question was is it filed?

MR. SMITH: Yes, it is filed. It is part of the record in this Court, but it's not the printed appendix, is what I wish to say, because the appellees here requested this be made part of the record and it was not part of the original printed record.

QUESTION: But it's filed --

MR. SMITH: It's filed, yes, indeed.

MR. CHIEF JUSTICE BURGER: The time is consumed now.

MR. SMITH: I regret that I didn't --

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Fleishman.

ORAL ARGUMENT OF STANLEY FLEISHMAN ON BEHALF OF APPELLEES

MR. FLEISHMAN: Mr. Chief Justice, and may it please the Court: I will address myself to the district court holding in which the court declared the California obscenity statute as construed by the California court unconstitutional. Mr. Rosenwein --

QUESTION: Would you address yourself to the question of the personnel, the composition of the three-judge court? Are you going to get to that?

MR. FLEISHMAN: Yes, your Honor, although that is Mr. Rosenwein's domain. I know that and I can and I will.

QUESTION: Oh. Very well, we will wait for him.

MR. FLEISHMAN: No, I will do that, because I was there.

The way we do it in California, your Honor, is you file a case and you draw by lot a judge. We drew Judge Ferguson at that time. At that time we had a complaint in which we asked for injunctive relief and for money damages. Judge Ferguson stated that he had been the city attorney of Buena Park where all of this occurred, that he in fact had founded the charter of the city and did not want to do anything

that would seem improper under the circumstances. And therefore he refused himself.

Subsequently, after the three-judge court was convened, we withdrew from our complaint all requests for money damages so that damages were then out of the case. And within that framework, where there was no longer being any money asked against the chief of police whom Mr. Judge Ferguson had previously represented, Judge Ferguson felt that there was then no longer any reason for him not to sit.

QUESTION: In the interim had Judge Lydick come into the case?

MR. FLEISHMAN: Yes. When Judge Ferguson withdrew, it was assigned to Judge Lydick. But then, as I say, the complaint was amended to withdraw from it the money damage aspect, and again in this connection, Judge Chambers selected the court and gave to the parties an opportunity to object if they had any objection to the composition of the court. No objection was filed at all. So Judge Ferguson was in fact the correct judge, it had been assigned to him in the first instance by lot, and whatever objection there had been in the first instance by reason of the fact there were money damages no longer existed once we amended our complaint.

QUESTION: And then the court ended up Ferguson, Lydick and Ely?

MR. FLEISHMAN: No, it was Ferguson, Ely, and East.

QUESTION: And Lydick was out.

MR. FLEISHMAN: And Lydick was out.

QUESTION: What of the requirement of the statute? He certified. Judge Lydick had certified the necessity for a three-judge court. Isn't it the practice ordinarily that the certifying judge is a member of the three-judge panel?

MR. FLEISHMAN: The practice is the judge to whom the case is originally assigned. Judge Ferguson was originally assigned to the case. Judge Ferguson was no stranger to the case.

QUESTION: No, that's not my question. I'm trying to find out how Judge Ferguson could have been appointed by Chief Judge Chambers.

MR. FLEISHMAN: I think part of the explanation, Mr. Justice Brennan, is --

QUESTION: Under the statute may he do that? It may require to assign the certifying judge.

MR. FLEISHMAN: I think not, your Honor.

QUESTION: I see. I guess we will have to decide that in this case, won't we?

MR. FLEISHMAN: That may be a question, although I hope that in deciding it, your Honors keep in mind that Judge Ferguson was drawn by lot. Judge Ferguson was no stranger to this litigation at all.

QUESTION: But he was drawn by lot as a single judge,

was he not?

MR. FLEISHMAN: And under the three-judge court statute, then he should be one of the members of the three-judge court.

QUESTION: But when he refused himself, there may be a question of whether he was not out of the case then for all purposes, and when Judge Lydick came in, then the authority had attached to Judge Lydick. Is that not a question?

MR. FLEISHMAN: Yes, it is a question, or answer to the question, as I have indicated.

QUESTION: Well, you rely also that no objection was made when opportunity was given.

MR. FLEISHMAN: Absolutely.

QUESTION: For both sides, I gather, to object when the panel was composed.

MR. FLEISHMAN: Exactly, your Honor.

QUESTION: If it's jurisdictional, that would make no difference, would it?

MR. FLEISHMAN: Ordinarily jurisdictional questions are not waived, although that is not a universal rule either.

If I may go to the substance of the question, Mr. Justice Marshall, because Mr. Rosenwein will handle all of the procedural problems.

The important question on the substantive question is whether the specificity requirement announced by this Court in

Miller just two years ago has any continuing viability. Miller held, as we read it, that to meet due process requirements a statute must specifically enumerate a carefully itemized list of various forms of sexual conduct the depiction of which may be prohibited.

Memoirs

Mr. Justice Brennan expressed the sentiments of the Court, I believe, when he said that under the Roth Memoirs test the situation had become intolerable, not only because it makes bookselling a hazardous profession, but as well because it invites arbitrary and erratic enforcement of the law.

There were other problems arising out of the vagueness of the law of obscenity. Appellate courts, including this Court, had been forced to act as a board of censors and nobody was pleased with that position. Law itself came into disrespect because courts were acting arbitrarily in this area of obscenity because nobody knew what it was.

It was against this background that Miller was decided and by a five-to-four vote it was decided that it was possible to define obscenity in a manner which would at the same time afford protection to First Amendment material and give fair notice to those subject to its provision. Four of the Justices, of course, felt that it was impossible to do this and that 16 years of experience had demonstrated beyond question that obscenity was in fact not a definable concept.

Now, it is important, as we see it, to remember that

at the same time that this Court abandoned Roth Memoirs as unworkable, as indeed as being vague, the Court set in motion a test which it thought would cure the vice.

QUESTION: We held in .. we have not said in Miller that Roth Memoirs was vague, didn't we?

MR. FLEISHMAN: I read that as saying that Roth Memoirs with the Miller specificity read into it was not vague. I have always read Miller and indeed Hamling as saying that a statute without specificity in it did not meet due process requirements which Miller said was necessary.

QUESTION: You don't mean written in the statute itself. You mean construed.

MR. FLEISHMAN: Construed, oh, yes. I don't mean -- the attack here is not that it is not in the statute. Everybody can see that it's not in the statute. But what was involved here is that even as it was construed by the California courts there was no itemized list of sexual conduct. Indeed --

QUESTION: Where has there been an itemized list in the construction of section 1451 by this Court? There hasn't been.

MR. FLEISHMAN: Well, the A and B that have been given as plain examples of the kind of materials.

QUESTION: But there has been no itemized list. And surely the courts in California have as much freedom in administering an obscenity statute written by the California

legislature as this Court does in administering one written by Congress.

MR. FLEISHMAN: I haven't any doubt about that. The problem is this, Mr. Justice Rehnquist, in Hamling this Court read into the statute the A and B given in Miller. In California the court of appeals in Enskat said, "We don't engage in that kind of judicial legislation. We will not read into our California statute something that the legislature did not put into it." So that there was no attempt made in Enskat which is the authoritative case decided in California after Miller was decided, there was no attempt there to say we are going to put specificity into the law if it was not otherwise there. So that there is no question but that if the California courts had chosen to give specificity to the statute similar to the kind of specificity that your Honors gave to 1461 by reading Miller into 1461, it would be an entirely different case. But here the California court conceded that it didn't have -- really conceded that there wasn't the requisite specificity either in the statute or in the prior decisions. And what they said in Enskat was you don't need that kind of specificity because California retains in its law the Memoirs utterly without redeeming social value test, and because that Memoirs test was retained, the Enskat decision said there was a fair trade-off. We got more than the Constitution requires, having the Memoirs value test, therefore,

we didn't have to get all that we were entitled to under Miller. So that the question comes back to the fact that the statute on its face plainly is defective, it does not have any itemized sexual conduct, and the decisions that existed in California at the time that Enskat looked at the statute did not have particularization. What we have in California are generalizations, not particularizations. And this is what the court said in Enskat. They said, for example, that Miller was satisfied because in California we have a hard core pornography test because it has been ruled previously that only graphic depictions of sexual conduct could be reached and because nudity without sexual activity would not be deemed to be obscene.

Those are the guidelines.

QUESTION: Is that any less of a guideline than our construction of 1461 in the Reels case and Hamling?

MR. FLEISHMAN: I would say so, if Miller's requirement of specificity, Mr. Justice Rehnquist.

QUESTION: We said in Hamling, and Miller wasn't a legislative drafting then, you didn't have to do exactly what Miller had said.

MR. FLEISHMAN: No, but you also had said that Miller was a constitutional requirement, as a constitutional requirement, that due process required that there be specific sexual conduct itemized either in the statute or by judicial construction.

Otherwise, I submit, your Honor, that the attempt to cure the vagueness by Miller was nothing at all. It was a mirage. Because in other respects, in every other respect, Miller made the obscenity law more vague, not less vague. For example, in Miller we shifted from national standards,which were generally thought to be applicable,to local standards. Now, local standards are less certain and are more vague. In Miller the requirement that the prosecution come on with expert evidence to prove its case was withdrawn, rendering it possible for findings of fact, judge or jury, to make determinations based on personal predilections rather than some kind of objective standard. In Miller there was a shift to the jury as the board of censors instead of having an appellate court acting as board of censors.

Now, it's true that boards of censors, be they appellate courts or juries, are not in high esteem. The fact of the matter is that censorship by jury is less certain, it's less predictable than censorship by an appellate court which everyone can look to and know what the law is.

QUESTION: Mr. Fleishman, Enskat or a similar case has not yet been taken by your Supreme Court?

MR. FLEISHMAN: As a matter of fact, after this Court had taken this case, and I have called it to the Court's attention, just about two or three weeks ago the California Supreme Court has taken a case called People v. Nissinoff.

where that issue is finally coming up to the --

QUESTION: What court has decided that last case?

MR. FLEISHMAN: Nissinoff was decided by another intermediate court. Enskat has been decided by a court of appeals in Los Angeles, and Nissinoff was decided by a court of equal level up north.

QUESTION: Did the Nissinoff court follow Enskat?

MR. FLEISHMAN: Exactly.

QUESTION: I see. So the Enskat issue is now before the Supreme Court of California?

MR. FLEISHMAN: Exactly.

QUESTION: That hasn't been argued?

MR. FLEISHMAN: That has not been argued.

Now, after and only after the California court construedits statute and found that it did not violate constitutional requirements, did the district court consider the validity of the California statute as it was construed by the California courts. And in rejecting the Enskat argument that had been the requisite specificity, the district court said exactly what I was saying to you a moment ago, Mr. Justice Rehnquist, that all that Enskat said was that the statute reached hard core pornography, graphic depictions of sexual activity, and did not reach nudity without sexual activity. The court said, quite properly so, that the cliche "hard core pornography" added nothing. Hard core pornography has all the vagueness that

we find in the term "obscenity." The district court quoted the statement made by Chief Justice Warren in Jacobellas? where Chief Justice Warren stated we are told that only hard core pornography should be denied the protection of the First Amendment, but who can define hard core pornography with any greater clarity than obscenity? In the case of Commonwealth v. Horton?, a case where the highest court in Massachusetts declared the Massachusetts obscenity statute unconstitutional in light of Miller, the same argument was made. It was argued before that court that in Massachusetts only hard core pornography could be condemned, and the court ruled that's a mere cliche, that doesn't mean anything, and struck down the Massachusetts statute.

Similarly, the district court found that the requirement of graphic depictions of sexual activity clearly did not meet the requirement of some kind of a list which would give some kind of guidance to everybody so that you would know if it was this, you were in the troubled waters, and if it wasn't that kind of conduct, you were not in trouble. The court pointed out that there were many acts of sexual activity that may even be utterly without redeeming social value which are so innocuous as not to be included on a list enumerated by a legislature. Examples come to mind, of course. Since in California we say that it's nudity with sexual activity, the question comes to mind, Can you reach a nude couple kissing

mouth to mouth? That would not seem to fit the plain examples that we find in Miller, and yet it would fit the general language of the California statute. One thinks in terms of kissing toes, fingers, nose, neck, ears,hair, breast, all of which under the plain examples of Miller would not be covered and yet which could be covered under the general language that we find in the statute.

Now, the Attorney General takes the position out front and says that we do not need a blueprint, we do not need a blueprint of sexual activity. To use the language of the Attorney General, Miller's demand for specificity does not require a detailed statutory enumeration and description of all of the types of sexual activity sought to be protected. Such detail is not required under law. And then we are back again, would Roth without Miller read into it satisfy the due process requirement today in light of Miller? And I submit with all deference that Roth without Miller read into it is unconstitutional under the Miller rule.

And then the Attorney General says, relying on a statement of this Court that the Constitution does not require ultimate God-like precision, he says therefore it is unnecessary that to avert the Constitution's infirmity of vagueness, the statute must recite a detailed blueprint of the proscribed conduct.

So the question that we have here is when concededly

the State statute does not have any itemized list and when concededly the prior decisions of the State court do not have any itemized list and where the State court does not seek to correct the statute in any fashion because the State court recognizes that is a legislative function and not a judicial function, whether under those circumstances the statute was correctly found to be unconstitutional as it was by the district court. And we believe that the court plainly was correct in its conclusion.

The court stated, the district court stated, that this Court in Miller sets forth important First and Fifth Amendment principles central to a fair and reasoned system of criminal law when it insisted that an obscenity statute have an itemized list of the types of sexual conduct that may be reached under the obscenity laws.

We respectfully submit that unless that portion of Miller is to be overruled, the district court was plainly correct in its conclusion. And I would say to your Honors that if that specificity portion of Miller is to be overruled, then we are worse off than we were before when this Court said that Roth Memoirs had created a state of chaos because then we would have even more chaos than we have had before.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Rosenwein.

ORAL ARGUMENT OF SAM ROSENWEIN ON BEHALF

OF THE APPELLEES

MR. ROSENWEIN: Mr. Chief Justice, and may it please the Court: My responsibility is to take care of the procedure. I do think that perhaps it would be helpful to make a statement, a very brief statement of the facts which appear to have been overlooked by my colleagues on the other side. And they are simply this:

What happened here was that in the city of Buena Park there came the news that "Deep Trouble" was going to be shown in that city. Unwilling to have that film shown in the city, the District Attorney sent two officers to look at the film in Hollywood where it was showing and had shown to over 800,000 patrons. They viewed the film, came back, and prepared an affidavit which stated -- all typed up -- which stated that they saw the film, watched it for 16 minutes and it was nothing but one sexual act after another. No mention is made of theme or anything else. That's what they saw.

They then presented that to a Municipal Court judge and with the judge together with the officers proceeded to the theater in Buena Park. They went in and saw the film. The findings of the district court below is that they stayed there 45 minutes, did not wait to see the entire film, came out and in the street the judge directed the issuance of the warrant, and at the same time where a cameraman was taking a

photograph of the scene ordered that the film be taken out of that camera because the municipal court judge was performing a judicial function.

Now, after that they proceeded to seize the film, and this was now at about the first showing on November 23, 1973.

Two hours later another print of the film is at the theater and it's being shown. They had been told by the District Attorney, Look for any difference, any difference at all, and then you can get another warrant to seize it.

QUESTION: Who is "they"?

MR. ROSENWEIN: The police officers.

QUESTION: They had been told.

MR. ROSENWEIN: They had been told by the District Attorney.

QUESTION: They who had been told were the --

MR. ROSENWEIN: Police officers. The police officers had been instructed before they went out, this is in the record, they had been instructed, Look for any difference and then seize.

They now take the same affidavit. They go and view the film now, assumedly now for the 60 minutes. They view the film now and use exactly the same form, the same typed form that they had originally with respect to viewing the Hollywood film, and then they write in themselves in their own handwriting, "Your affiant further states that said film was seized" --

QUESTION: What page are you on?

MR. ROSENWEIN: I am on page 5 of my own brief, but that actually also appears in the findings of the court. You will find that in the appendix to the jurisdictional statement. Anyway, on page 4 and 5 of my brief we recited the findings. In fact, 4, 5, 6 and 7.

I should point out that at the first seizure, they not only seized the film, but they took out of the cash box all the receipts of that day, $305. Then they come back and write, "Your affiant further states that said film was seized on November 23, 1973, at approximately 1:30 p.m. after being viewed by Judge Smith," was the name, "with the exception of certain portions being edited different than the first film seized. Your affiant states that this copy of the film "Deep Throat" consists of (1) additional acts of sexual intercourse and numerous small changes at different portions of the film." Whether this was a second, a minute, one doesn't know. They had checked 60 minutes of nothing but sexual acts. The first time they looked at only 45 minutes, and now they are saying they found one more. That is a finding of the district court.

Having seized those two, there is now a third film. Your Honors will recall, of course, the decision in Heller v. New York, of which, of course, my colleagues were entirely aware. My colleagues who cannot do some things in good faith and go to the courts, et cetera. In any event they come with

a third warrant now and they seize the third one. And what do they put in their affidavit? Exactly the same language. Not a change. They don't even say the third is different from the second.

QUESTION: That's because the conclusion was after viewing it that the pictures were essentially the same.

MR. ROSENWEIN: The pictures were the same and they had not seen anything additional. I am going to come, Your Honor, finally to their concession that they were identical. But I just want to point out here --

QUESTION: I hope you are going to give some time to whether or not we have jurisdiction of this case and whether Younger should have been followed.

MR. ROSENWEIN: Well, let me just say, and I will come to it.

QUESTION: I gather these things are all irrelevant if we decide we don't have jurisdiction to hear this appeal.

MR. ROSENWEIN: Yes. But these four seizures were all done, we say, of the identical film, and in addition some month or two later at the criminal trial and pretrial proceedings for the purposes of the trial, they conceded that these films were identical and they needed only one. There was therefore here a massive seizure, the theater was closed after the fourth seizure. There was a massive seizure before any prior adversary hearing, clear violation held.

And now your Honor's question is?

QUESTION: What is the appeal here from? What order?

QUESTION: May I emphasize what Mr. Justice Brennan is asking? There seems to be a great desire on the part of both sides of the counsel table to avoid this issue. Will you direct yourself to it.

MR. ROSENWEIN: Now, let me start this from the beginning, then, on that. You have the selection of Judge Ferguson by lot. You have him then refusing himself. Now, I want to make clear that he didn't refuse himself because he was biased. That is an implication there that is really unfair. What he did say, you will find it on page 20 of the record, all he said was that he had been a city prosecutor in Buena Park, had helped to organize. And the chief of police there was someone who he had helped appoint. Now, the chief of police was a defendant in this case.

QUESTION: Mr. Rosenwein, if I may tell you what bothers me.

MR. ROSENWEIN: Yes.

QUESTION: This is a direct appeal from an order to this Court, and if it's properly here, it's because there was some kind of injunctive order below. Was there or wasn't there an injunctive order below?

MR. ROSENWEIN: There was an injunctive order, but

I don't think -- I say literally there was, of course, an injunctive order.

QUESTION: I am speaking of the two orders from which this appeal is taken.

MR. ROSENWEIN: There is only one really before the Court, I think, the amended judgment. What it did say was that the District Attorney should in good faith petition for the return of .. And in that sense it was.

QUESTION: And that's an injunctive order.

MR. ROSENWEIN: Yes.

QUESTION: You agree. And an appeal is taken from that order here.

MR. ROSENWEIN: Yes. And I am saying --

QUESTION: Now, the next thing I am interested in, if we have jurisdiction, should the three-judge court have followed Younger and --

MR. ROSENWEIN: I don't think in this case. I don't think Younger was applicable here.

QUESTION: Why not? There was a pending, as I understand it, at least at the time of any order in the three-judge court, there was a pending criminal proceeding, was there or not, in the California State court.

MR. ROSENWEIN: At the time the amended judgment was filed?

QUESTION: Yes.

MR. ROSENWEIN: Yes, at that time there was.

QUESTION: And when with relation to the filing of the Federal suit was that State criminal proceeding begun?

MR. ROSENWEIN: The State criminal proceeding against the two employees was begun first. Then came the Federal complaint. Six weeks later, six weeks later, after service of the complaint, they amended to include these two appellees.

QUESTION: Right. But it's after that before you had the first judgment order of the three-judge court.

MR. ROSENWEIN: I think that's correct.

QUESTION: And meanwhile there had been additional proceedings involving these appellants in the State court?

MR. ROSENWEIN: Yes, but those had nothing to do with the problems that were then in the Federal court.

QUESTION: Why do you say in that circumstance that Younger does not apply?

MR. ROSENWEIN: Well, for this reason: First, if we follow Steffel, we had filed first,our complaint filed for these two appellees was filed first.

In the second place, the predicate for Younger has always been that one could get a disposition of the case in the State court on some question of construction of the State law which might not be clear. Here Enskat, they came into the district court and said Enskat has decided this.

QUESTION: May I suggest I don't understand Younger

that way. This is not the classic abstention situation in which a construction of the State statute might avoid a Federal constitutional question. That's not the circumstance to which Younger is limited, is it?

MR. ROSENWEIN: Well, we couldn't have -- I'd say, relegating us to that court would have not resulted in an answer to the constitutional -- it would have been just one way. Enskat governed all courts at that time and they said so. They said so.

QUESTION: You could have petitioned for a hearing to the Supreme Court of California if the San Diego Court of Appeals had decided against you on your constitutional claim, couldn't you?

MR. ROSENWEIN: Which case are you referring to?

QUESTION: Well, had you taken your case up through the California court system, you say that the court of appeals would have decided on the basis of Enskat.

MR. ROSENWEIN: Yes.

QUESTION: But you could have then asked the Supreme Court of California for a hearing if you had lost in the court of appeals. You could have petitioned this Court if you had lost in the Supreme Court of California.

MR. ROSENWEIN: Yes, but I assume one could say that one could go through the entire situation again, but Enskat had just been decided, the defendants, the appellants here had

themselves come and said to the district court, Enskat has decided this and there is nothing that you can do about it. And moreover the court found, there was a finding made by the three-judge court that this was a deliberate attempt --

QUESTION: Mr. Rosenwein --

MR. ROSENWEIN: -- to --

QUESTION: Oh, I'm sorry.

MR. ROSENWEIN: I was going to say the three-judge court found it was a deliberate attempt to circumvent --

QUESTION: With an exception.

MR. ROSENWEIN: They wanted to circumvent the jurisdiction of the court.

QUESTION: You mean there was a finding of harassment within the Younger exception, is that what you mean?

MR. ROSENWEIN: No. I mean there was a finding that the filing of this amendment to their criminal complaint to include these appellees six weeks after they had started their action was intended in bad faith to circumvent the jurisdiction of the Federal court which we had invoked. And we had invoked simply a violation of the Heller rule, the Heller opinion.

Now, we are entitled to the return of our three films. That's what's before this Court.

QUESTION: Mr. Fleishman has told us that some other litigant has succeeded in getting the Enskat issue before the California Supreme Court. Had you proceeded through the

Court of Appeals, I guess it would be the same Third Division, would it, the Los Angeles Division?

MR. ROSENWEIN: Yes.

QUESTION: Then perhaps you might have succeeded as did this other litigant in getting Enskat before the court.

MR. ROSENWEIN: Mr. Justice Brennan, here is our situation on that. You have an Enskat decision there. You have all these people coming in and saying this is the binding law, we understand to be the binding law. I might say, a petition for writ of habeas corpus was filed prior to the recent taking of this case and was denied by the Supreme Court citing Enskat and Hamling.

Now, everybody -- now, I agree that the courts can always change their mind. This Court has itself --

QUESTION: I gather you are suggesting that means your Supreme Court is going to follow Enskat. But then you would come here, wouldn't you, or try to get here?

MR. ROSENWEIN: All I am saying is the time nine months ago when we were there before the district court, they had a clear situation of an attempted circumvention. It had an Enskat case that was the binding law everybody agreed that it was. And we had filed our complaint first and had invoked the Federal court's jurisdiction before.

QUESTION: You suggest that the Younger doctrine is limited to where the case law, or where State courts

haven't decided the Federal question that is in the case. But if the State courts have already taken a position on the Federal question in the case, you may ignore Younger. Is that it?

MR. ROSENWEIN: No. What I am saying is that we had one of the reasons. I'm not saying we mustn't show bad faith.

QUESTION: No, no, it wouldn't be a question of bad faith. You just say we don't need to go to the State court because they have already decided the issue.

MR. ROSENWEIN: We simply said that one of the reasons why it would be purposeless for the Federal court to relegate us back to the State court is you've had a ruling from the State court today, yesterday, which says our statute as we construe it is constitutional. Now, there the Federal court, what is the Federal court to do? They are asked by appropriate plaintiff who says to them, under the Civil Rights Act of 1871,Congress has passed a law, the law of the United States and the supreme law of the land, we claim a violation of our constitutional rights, and we ask that there be a declaration that this statute is unconstitutional.

QUESTION: This was a 1983 suit?

MR. ROSENWEIN: Yes, it was a 1983 suit.

QUESTION: Mr. Rosenwein, did your original application ask for a three-judge court?

MR. ROSENWEIN: Yes, it did.

QUESTION: It did? Which judge asked for it?

MR. ROSENWEIN: Judge Lydick certified.

QUESTION: Well, the statute says that on the finding he shall immediately notify the Chief Judge of the Circuit. That was Judge Lydick, right?

MR. ROSENWEIN: Yes.

QUESTION: Who shall designate two other judges to sit with him. Is this compliance with this statute?

MR. ROSENWEIN: Well, if this were to be considered mandatory, and I consider it directly not mandatory, but --

QUESTION: This is a statute.

MR. ROSENWEIN: I know, but,your Honor --

QUESTION: A non-mandatory statute.

MR. ROSENWEIN: If it's not mandatory, we have a situation -- I tell you what the situation is, it's in the record.

QUESTION: "Who shall" is not mandatory.

MR. ROSENWEIN: Shall and may, as your Honor knows, very often vary in meaning. But my point simply is we have had a number of three-judge court actions pending at the time, and I think as a matter of judicial economy the Chief Judge decided that he would refer to the three-judge court Judge Ferguson, Judge Ely, and Judge East,and put in there if there is any objection to it, let yourself be known. And there has never been any objection. The first time they have raised it

is here on appeal.

QUESTION: Mr. Rosenwein, are you departing now from your associate's posture? I thought that he took the position that under the statute it was Judge Ferguson to whom the application for injunction or other relief was originally presented.

MR. ROSENWEIN: Yes. Well, I think that would be another reason why it was appropriate for Chief Judge Chambers to appoint Judge Ferguson as one of the members. Without objection, unless it would be considered mandatory, and I've never considered -- I can visualize judges becoming ill, judges being incapacitated for one reason or another.

QUESTION: That's one I have never heard of before. I know I haven't been on any court too long, but I have never heard of a three-judge court that didn't include the one who asked for it.

MR. ROSENWEIN: Yes, I think that is true. I think in most cases that is true.

QUESTION: I assume it's because of that statute.

MR. ROSENWEIN: Yes, that would ordinarily be followed. But unless it's mandatory, I would not conceive it as something.

Now, I just wanted to say counsel on the other side spoke of the declaratory relief action as being injunctive in character and therefore this Court has jurisdiction and made

a complete argument concerning Ex Parte Young, et cetera. But I have understood from decisions like Young and Mitchell and others that this Court had decided that if only declaratory relief was handed down by a three-judge court, that was appealable to the Court of Appeals. And I might say that in this case where questions of harassment and bad faith and so on are being mooted one way or the other, the mediating effect of a Ninth Circuit opinion might have been very helpful. But this Court has decided that the mere declaratory relief is not enough to warrant an appeal.

Now, that's all we really have in this case. All we have is declaratory relief plus the direction to proceed to the municipal court who have had stipulations before returning all the money. Over $5,000 was seized. And who would assumedly, if they asked, would say in the light of the district court's direction that the Heller violation was palatable would direct it to be returned with ...

QUESTION: (Inaudible.)

MR. ROSENWEIN: Yes, it is. This Court has said that 1253 is the kind of statute that should not be literally construed, that there may be cases where it would be helpful for judicial economy, et cetera, to permit the appeals to go through the Ninth Circuit. I think this is one. If this Court should decide not to take jurisdiction, of course, it's a matter really of discretion and policy whether this case involving

basically the return of the three films is --

QUESTION: Did I understand you to say it's a matter of discretion whether we take this case?

MR. ROSENWEIN: Well, I'm ..

at least policywise that one could say that we would not take this thing because this is not an injunction that restrains the enforcement of a statute because of its unconstitutionality.

QUESTION: Nevertheless, I should think on the face of the facts, unless there is an injunctive order, we have no jurisdiction.

QUESTION: And if there is and if it was a three-judge court that was required to be convened, then we do and must.

MR. ROSENWEIN: You have jurisdiction, but I thought from the cases there have been indications that you could if you wanted to refer it to the circuit court. Nevertheless, despite all that, if the Court decides to take jurisdiction, our argument is that the district court below, and properly, decided that it could consider this case, that this was a situation, the Steffel situation, a situation of bad faith in that the subsequent amendment was intended to circumvent the jurisdiction --

QUESTION: That situation was one in which there was no criminal proceeding pending. Here you have got an actual criminal proceeding pending.

MR. ROSENWEIN: With a finding.

QUESTION: That's within an exception. You are suggesting that there's a finding which brings it --

MR. ROSENWEIN: Exactly. Harassment. And in addition with respect to all of what has been said about the adversary proceeding so-called in which they went, form shopped, to a judge in Orange County, a Superior Court judge who had no jurisdiction, no statutory references. California, as this Court well knows, has only one way of trying an obscenity case, and that's a criminal trial. There is a specific provision that you cannot condemn any property, any so-called obscene material, until there has been a final affirmance of a conviction. They proceed to improvise this kind of a proceeding and get the order restraining us entirely from showing the film, clear prior restraint, and then proceed to say we are holding a hearing in which .. the prosecutor testifies as an expert that has no redeeming value, and the judge says, well, I have seen these stag movies before. This is no different, .. maybe, but snap up every -- get rid of the whole thing, and here is my order.

Now, is that bad faith or harassment? We submit the district court properly held that there was, properly intervened as a result to decide that the statute was unconstitutional.

QUESTION: Judge Lydick had a different view at one

time, did he not?

MR. ROSENWEIN: Judge Lydick didn't have before him the evidence. They keep on saying he had the same evidence. He didn't have the evidence that in the criminal trial two months later they stipulated, they stipulated that the films were identical. They needed only one. Now, if they need only one, your Honors know under Heller v. New York that's all they are supposed to have. We are supposed to show the film thereafter until they have a criminal trial and convict us.

QUESTION: Mr. Rosenwein, at what stage did your Heller argument in the Federal court turn into an attack on the constitutionality of the California obscenity statute itself?

MR. ROSENWEIN: Well, when you say that. Let me just say this: When we came there, when we came originally before Judge Lydick,asked for a temporary restraining order -- and by the way, they already knew who the plaintiffs were, they already knew who the plaintiffs were and they waited six months -- six weeks. There has never been an explanation of why they waited before they brought this criminal action against us. Well, when we came before there, there was the potential, there was simply a potential that --

QUESTION: When did you first pray for a declaration of injunction as to the unconstitutional --

MR. ROSENWEIN: In the complaint.

QUESTION: Your original order.

MR. ROSENWEIN: The original complaint.

MR. CHIEF JUSTICE BURGER: You have two minutes left, Mrs. Sears.

REBUTTAL ARGUMENT OF MRS. ORETTA D. SEARS

ON BEHALF OF APPELLANTS

MRS. SEARS: Mr. Chief Justice, and may the Court please: I wish to answer by referring the Court to certain passages of the appendix that I think the Court may have been wondering about.

In the appendix at page 82 shows the reason why we were not able to object to the three-judge court composition. We were notified on February 8 of the existence of the three-judge court, and the three-judge court order designating it, which is found on pages 84 and 85, is dated January 8 and gave us two weeks from the January 8 date to complain about the three-judge court. I found that was futile to attempt to do anything about that.

Number two, the appendix at page 89 shows that of course we did not have an evidentiary hearing because we were ordered to submit affidavits and points of authority then without oral argument. As a matter of fact, I have never seen the three-judge court ever. I know it exists, but I have never seen it.

Page 36, John Smith's affidavit. That is the magistrate's affidavit. Pages 76, 77, 78, and 79 of the appendix show the true status as to the stipulation of the identity of the pictures. There was a stipulation for purposes of trial only.

Page 45 of the appendix shows that which has been our consistent policy in these cases, one seizure, and subsequently an adversary hearing.

And one more thing that I wish to correct. Counsel states that the court in the district was bound by Enskat. Only in the superior court, only in the municipal court. We are in the Fourth District Court of Appeals. Enskat in the Second District Court of Appeals has persuasive value. It is not binding on the Fourth District Court of Appeals. They could have gone that way.

QUESTION: Mrs. Sears, you said, if I understood you, that you had never appeared before or even seen this three-judge court.

MRS. SEARS: That is correct.

QUESTION: Did any counsel for Orange County have that privilege?

MRS. SEARS: No, sir.

QUESTION: There was no hearing of any kind, no argument of counsel?

MRS. SEARS: No, sir.

QUESTION: Were briefs filed?

MRS. SEARS: Yes. By order of the court on March 20 we were notified that the matter would be submitted upon affidavits, the issue of harassment would be submitted upon affidavits and the issue of the constitutionality of the State statute was on briefs, and that was it.

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

[Whereupon, at 2:31 p.m., the argument in the above-entitled matter was concluded.]