In the

# Supreme Court of the United States

Chester Mc Kinney,

Petitioner,

V.

Alabama

No. 74-532



Washington, D. C.
December 15, 1975

Pages 1 thru 48



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CHESTER MC KINNEY,

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v. : No. 74-532

ALABAMA

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Washington, D. C.

Monday, December 15, 1975

The above-entitled matter came on for argument at 2:06 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT EUGENE SMITH, ESQ., Suite 2005, 100 Colony Square, Atlanta, Georgia 30361
For Petitioner

JOSEPH G. L. MARSTON, III, ESQ., Assistant Attorney General of Alabama, Montgomery, Alabama 36130
For Respondent

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-532, McKinney v. Alabama.

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

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.

ON BEHALF OF PETITIONER

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

This is a case started back in 1970 when a Mobile judge -- Mobile, Alabama which is approximately 265 miles from the City of Birmingham, in a civil proceedings, found a publication among a series of publications to be obscene under the law as it was being interpreted at that time. This was a civil proceeding against a bookstore operator in Mobile.

This would have been in approximately February, I believe, of 1970.

Pardon?

QUESTION: The bookstore was not operated by --

MR. SMITH: Not the Petitioner nor was there any allegation of a relationship, your Honor, directly or indirectly.

Then, shortly after the proceedings in Mobile, the Assistant Attorney General of the State, Mr. Barnes, I

believe, walked into Petitioner's bookstore in Birmingham and handed him a letter to advise him that certain publications were obscene and had been found obscene by a judge in Mobile. Now --

QUESTION: May I ask --

MR. SMITH: Yes, sir.

QUESTION: -- some questions. Was there any appeal from the Mobile judgment?

MR. SMITH: No, sir. It was conceded that there was none and of course, our Petitioner was not in any way involved.

QUESTION: I understand that.

MR. SMITH: Yes, sir.

QUESTION: The second question: What was the burden of proof in the Mobile litigation?

MR. SMITH: It would have been the civil burden of proof and that is to say --

QUESTION: Well, what was it, not what it would have been?

MR. SMITH: I am told it was the preponderance of the evidence. I was not privvy. There was no appeal. There was no transcript written up at that case and of course, our decision didn't come down from the Supreme Court of Alabama until May of 1974, long after --

QUESTION: But was it by preponderance of the

evidence?

MR. SMITH: Preponderance of the evidence. That is all that is required in any civil proceeding under Alabama law and there is no reason to believe it is to the contrary and at the time of Mr. Ferris Ritchey, Counsel, questioning Mr. Charlie Barnes, at the time of the proceedings in this case, he tried to get into what happened at the trial and the judge said that was not relevant any more so he foreclosed him from having an opportunity to go into any issues whatsoever so we can take, I believe, the presumption that it was a civil burden of proof and that is a preponderance of the evidence.

QUESTION: Does that mean, Mr. Smith, that had Mr. McKinney in some way been associated or involved in the Mobile proceedings, you would still be here today?

MR. SMITH: On that issue, yes, sir, on that issue. But I think our position would be, whereas we are arguing, let's say, one of three or four factors today, we would be foreclosed from several of them.

Well, as I said, on March 10th, 1970, the Attorney General went in, as I said, Mr. Barnes, and gave a letter to Mr. McKinney.

Approximately a couple of weeks later, they went back in, Mr. Barnes together with an investigator and found one of the publications on this list of approximately

10 were still on the racks available for sale and whereupon they purchased it and shortly thereafter filed a complaint.

Now, the notice provision --

QUESTION: Would it make any difference if it was one or 10?

MR. SMITH: No, I'm -- well, your Honor, somewhere along in the Attorney General's brief he says that this is a reckless disregard. He was given notice and he didn't find all 10 publications there. That is what I am saying. So we are talking about one out of 10 of the publications.

He may have had all 10. He may not have had all 10. I don't know. I was just making that as the fact that he wasn't recklessly laying everything out that had been found obscene down in Mobile and said, okay, now do what you want. That is not the kind of attitude he was presenting.

So this letter was given under the provisions of the 1969 Act. The 1969 Act, your Honors, is found at -- I think, page 40 of the brief and argument of Respondent reply to amici curiae in the appendices and on page 46, under C --

QUESTION: What color is that brief?

MR. SMITH: That is white, sir -- "Brief and Argument of the Respondent and Reply --" page 46, Section 2,

subparagraph (c). This is the only time this statute has got anything to do with this case because they talk about the fact -- and this is sort of an inclusion in here -- "Nothing in this section shall be deemed to apply to mailable matter unless such mailable matter is known by such a person to have been judicially found to be obscene --" okay -- "under the provisions of any ... Alabama statute."

Okay, that, and, of course, Section 6 on page 47 says, "The provisions of this Act are cumulative and shall be in addition to any and all --" other laws that are enacted.

Curiously enough, this case was decided May 9, 1974. On May 9, 1974, the Alabama Supreme Court, in a decision in another case, said that notice provision was unconstitutional because that represented a prior restraint, much like the Bantam Books decision of this Court in a by-gone era.

QUESTION: Which was that? Section 6, that you said they found unconstitutional.

MR. SMITH: The Section 2(c). And Section 4, your Honor.

QUESTION: Found which?

MR. SMITH: Section 4.

QUESTION: That's the one that was found --

MR. SMITH: Section 4 was found. Yes, that's

correct, section 4, I'm sorry, was found, which also has the notice provision and they found that unconstitutional on the same day in the case of Ballew versus the State of Alabama. That was case number 480 and that was in a decision by the Court.

So this gentleman, Mr. McKinney, was tried under the provisions of a different law and that was a law that was enacted in 1961 and I direct your attention, your Honors, to page 20 of the Brief and Argument in Opposition to Petition for Writ of Certiorari, also white.

And this is a section which permits a civil equity proceeding whereby an injunction can be obtained against the dissemination of a particular publication found to be obscene.

QUESTION: Now, what are you telling us, Mr. Smith? This is the statute under which the Mobile proceedings was --

MR. SMITH: This is the statute under which Mr. McKinney was convicted.

QUESTION: Oh, so --

MR. SMITH: Notice provision was given pursuant to the 1969 Act but as I say, that is the last time we deal with the 1969 Act. We get back into the '61 Act which is really what we are here before the Court today saying is unconstitutional.

QUESTION: And we are talking now about the Section 4 appearing on page 20.

MR. SMITH: Yes, sir, correct.

QUESTION: And that is the -- what you have given us so far is really a preamble to this, isn't it?

MR. SMITH: Correct. And I merely say there are two sections. There are two remedies that can be applied. There is a civil provision which reaches under Section 11 on page 25, your Honors and then there is -- and that is, of course, punishable by contempt and then there is the criminal provisions and penalties which is Section 4 under page 20 and --

QUESTION: And the crime there, I take it, is not selling an obscene material but selling some material that has been declared to be obscene.

MR. SMITH: That is right.

QUESTION: At least, that is what it says on its face.

MR. SMITH: "Any mailable matter known by such person to have been judicially found to be obscene under this Act."

QUESTION: Where were you reading that from?

MR. SMITH: At page 20, your Honor.

QUESTION: The same --

MR. SMITH: No, sir, that is the"Brief and

Argument in Opposition." The other white one. That's it.

It is Section 4 (1) and halfway down the page, your Honor and it starts, "Or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of misdemeanor --"

QUESTION: And that was the conviction in this case.

MR. SMITH: Correct. Now, for which Mr. McKinney received 515 days for failing to pay his fines, a 365-day sentence and 19 days for court costs.

QUESTION: And it was the letter, was it, that gave him the required notice?

MR. SMITH: Yes, sir.

QUESTION: That it had been held obscene.

MR. SMITH: Correct, sir.

QUESTION: So as Justice White said, the question of obscenity is not before us, but only the question of whether he had noticed that it had been held to be obscene in the Mobile court -- the Mobile proceeding.

MR. SMITH: You say before your Honors?

QUESTION: Yes.

MR. SMITH: Well --

QUESTION: That is the question, is it not?

MR. SMITH: We think the question of obscenity, of course, is present. We think the statute is

unconstitutional because he did not have a chance to litigate the question of obscenity and we say, for example -- now, here is a part of the confusion about the Mobile decree. Now, taking my Appendix, which we take a page 100 --

QUESTION: Now, your Appendix, you mean this one?

MR. SMITH: Yes, sir, the Appendix, page 100 and 101. We have the State's Exhibit Number D and under that, if you look down there, the State of Alabama versus, we see several magazines and one of which is entitled "New Directions," No. 14 Volume 4, No. 4 and over in the decree they say that "New Directions" No. 16 Volume 4, No. 4 is obscene.

So I am saying that we start out with confusion from the wording of the decree or the heading of the decree as well as the inconsistency in the decree.

QUESTION: Suppose state law says, "It shall be a criminal offense for any person to sell any material as human food that has been declared to be unfit for human consumption by any court of the state," and a gentleman is given notice in a letter that this material which I see on your shelf here has been declared to be unfit and the man sells it anyway and he is charged with a crime.

Do you think he then has to have the opportunity to prove -- may he demand that the state prove again

that food is unfit?

MR. SMITH: No, sir, I don't think so but I think this Court has already said that in cases in which you have distinguished any requirement as scienter --

QUESTION: Yes.

MR. SMITH: -- between First Amendment matters and matters of scienter.

QUESTION: So you really aren't relying on this typical criminal law or res adjudicata.

MR. SMITH: No, sir.

QUESTION: You are saying that the First Amendment --

MR. SMITH: Correct.

QUESTION: -- requires that in this prosecution --

MR. SMITH: That obscenity be allowed to be litigated and it was not allowed to be litigated in this question.

Now, Counsel suggests in his brief that at the time that the publication was offered into evidence, Mr. Ferris Ritchey objected. Well, Mr. Ritchey objected because at the beginning of the case we had, first, a demurrer filed challenging the constitutionality of the law, which was denied. We had a motion to quash challenging the constitutionality of law,which was denied, going into this issue and even during the proceedings, when Mr. Ritchey

was trying to get into some factors in his argument; at page 81 of my Appendix the Court says, halfway down the page, "I think I can cut your argument short. I have been thinking about it. This Court is not going to turn over any question to the jury as to whether or not any magazine is obscene," and here there is a charge the man sold"a certain magazine, that that had heretofore been adjudicated as obscene.

"The Court is of the opinion and so rules, that the magazine .... would be evidence of ...purchase--" and they say for that reason he will allow it to be introduced into evidence but he said, "The Court feels that it would be the Court's duty to limit the purpose for which the magazine is admitted and to instruct the jury not to determine any questions of obscenity of the magazine."

And later on, the judge goes on to say that "This is not a jury question. Time and time again the question of obscenity in this case is now a question of law. It is no longer a question of facts."

QUESTION: Then you would be making this argument, and you are making the argument, even on the assumption that the magazine in this case was precisely the same issue as declared obscene in Mobile?

MR. SMITH: Correct.

QUESTION: Yes.

MR. SMITH: Because of the -- for a variety of

reasons.

QUESTION: You are going so fast that you are losing me.

MR. SMITH: Yes, sir.

QUESTION: Go back to what you were on a few minutes ago, if you look at page A100 of the Appendix and you see that the caption of the case is the State of Alabama against, among others, "New Directions"No. 14, Volume 4, No. 4 and then you pointed out, over on page 101 that the holding, the judgment is against "New Directions" No. 16, Vol. 4, No. 4. Now what, if anything, are you making out of that?

MR. SMITH: I am saying that it would be a confusion if someone would have to rely upon, to verify and rely upon the concept of the heading of the style of the case down in Mobile. One of --

QUESTION: Well --

MR. SMITH: -- the points we make, your Honor is, for example --

QUESTION: I just wonder what are you making out of that which you have called our attention to?

MR. SMITH: If a defendant, as Mr. McKinney is here, wanted to verify;he just gets a letter, doesn't get any really substantive facts, he gets a letter and he says, "Under the decision of the Court in suchandsuch a case and

this number, this publication was found obscene," I am merely pointing out that there would be some confusion if he were to get a copy of the decree --

QUESTION: Well, what is the magazine that was picked up in the city store? Was that 14 Volume 4?

MR. SMITH: That's 16, your Honor.

QUESTION: That is 16, Volume 4.

MR. SMITH: Yes, sir.

QUESTION: And that is what he got the notice about.

MR. SMITH: Yes, sir.

QUESTION: Sixteen.

MR. SMITH: Yes, sir.

QUESTION: And that is what the judgment was about.

MR. SMITH: Correct, sir.

QUESTION: Sixteen.

MR. SMITH: That's correct.

QUESTION: So that really, I hope you are not trying to get much mileage out of that.

MR. SMITH: No, I am not, your Honor. I am only saying that there was some confusion that could exist in the minds of --

QUESTION: Well, I'd be interested in what your arguments are and what you are relying on.

MR. SMITH: Yes, sir. Now, at the time of this decision -- strike that.

At the time of the prosecution of Mr. McKinney, the Alabama law as interpreted by the Court of Criminal Appeals -- and had not been changed or modified -- with regard to the extent of community standards -- unlike what this Court, or people were saying the Court was saying -- was the community from which the jury was drawn.

So in the City of Birmingham versus Jones, 45 Alabama Appellate 86 in 1969, Judge Cates said, and I quote, "The Community standard is to be measured by the area from which the jury veniremen are drawn."

Now, that is Birmingham; 265 miles away and a different burden of proof, we have Mobile, Alabama.

QUESTION: Well, Mr. Smith.

MR. SMITH: Yes, sir?

QUESTION: Maybe I am wrong, but I thought what you were arguing here -- and I might tell you in all candor it is the issue which particularly interests me -- is whether there may be a criminal conviction based upon this finding in a civil proceeding, whether it is 265 miles away or somewhere else --

MR. SMITH: Yes, sir.

QUESTION: -- reached on a preponderance of evidence in a case to which the criminally accused is not a

party, whether it is compatible with due process, to convict a man of a crime in that circumstance. And I thought that is what --

MR. SMITH: That is one of the arguments, yes, sir.

QUESTION: Well, I hope it is the one you will give most of your attention to as far as I am concerned.

You have been here several times before --

MR. SMITH: Yes, sir.

QUESTION: We have been all through these other --

MR. SMITH: Yes, sir.

QUESTION: -- questions that you raise.

MR. SMITH: I was trying to give background to this Court.

QUESTION: I can understand that you were.

QUESTION: But to argue that, you have to first convince somebody that -- including the majority of the Court -- that the issue of obscenity has to be in the criminal case.

MR. SMITH: Yes, sir.

QUESTION: Because the statute on its face doesn't make an issue out of -- doesn't make obscenity an issue and you have to say that it is an issue.

MR. SMITH: Yes, sir, we say, first, obscenity should have been an issue and the statute is unconstitutional

because the defendant would be denied his right to a trial by jury on a material element of the offense -- the alleged offense here.

QUESTION: What material element?

MR. SMITH: It would be obscenity.

QUESTION: Well, that isn't what the statute says. The statute says, if you sell something that has been declared to be obscene.

MR. SMITH: Yes, sir, but in a proceeding where a man is not entitled to a jury. So how can the legislature -- for example, suppose, your Honor, the -- in Mobile, Alabama, in which it was determined Playboy was obscene in a civil proceeding in which somebody consented to it, that would have been a judicial declaration of obscenity because there was a consent order and someone who may have sold Playboy in Huntsville, Alabama after being given notice would be denied a jury trial.

QUESTION: What is the difference between this case and the food case I gave you? You would say that --

MR. SMITH: We have no scienter here, your Honor. We have not allowed for the man to have exercised the right of scienter.

QUESTION: Well, there is no -- scienter is a --

QUESTION: He was given notice.

QUESTION: He was given absolute notice of what

the crime -- of the elements of this crime. He was told that this -- and it is true -- that this particular publication had been declared obscene in the court.

MR. SMITH: Yes, sir.

QUESTION: Now, he knew that.

MR. SMITH: He was told that.

QUESTION: And the statute says if you sell one of those things you are guilty of a crime.

MR. SMITH: Yes, sir, and we say that in the concept consistent with due process, that he should be allowed to litigate the issue of obscenity by virtue of the denial of the jury trial, the denial of the right of confrontation, the point that I made about the difference of application of a different local community standard we have that is involved and implicated here and there is just -- he is not allowed to have any scienter.

Now, in Kingsley Books versus Brown, you all said it was in a case in where the man was part of the same proceeding. He was given his civil notice. Later on the statute excluded him from being able to raise, as a question of scienter, his lack of knowledge as to the issues obscene.

So if the publication were found obscene in a criminal case, his scienter was gone.

QUESTION: Mr. Smith --

MR. SMITH: Yes.

QUESTION: I still would like to hear again your answer to Justice White's question as to how you distinguish this from the food case. Is it because this is in the First Amendment area and food is not?

MR. SMITH: Yes, sir, I said --

QUESTION: Is that the difference?

MR. SMITH: It is one of the differences, the principal difference, I think, because we are dealing with the penumbra of the First Amendment.

QUESTION: Well, what -- is there any other difference?

MR. SMITH: The tainted food, your Honor, would have been scientifically, I suppose, determined to have been tainted and unfit for human consumption. I don't think we are dealing, in the printed word or pictures, that we are talking about things which are so capable of exact determination and the public welfare requires that tainted food be immediately removed from the marketplace, lest somebody get sick and somebody fall ill and die or such like that. We are not dealing with the same compelling urgency.

QUESTION: But if the gentleman who is told of it says, "I wasn't a party to that proceeding. Terrible lawyers in that case. Bad scientists. And furthermore, there was only the civil -- only the civil standard was

there. I am sure that nobody could convince a jury beyond a reasonable doubt that food -- that this is not fit for human consumption." So he goes ahead and sells it.

And he tries to, in certain of the case, the issue of whether the food is fit or not and the Court tells him that that is not the issue here.

MR. SMITH: Yes, sir.

QUESTION: The issue is whether you sold something that you knew had been declared to be unfit.

MR. SMITH: Yes, sir.

If you take Section 11, your Honor and you read Section 11, the injunction provision, Mr. McKinney could not have been found to have been in contempt, applying the injunction provision -- could not have been found guilty of contempt if he had sold the publication unless he had been a named party to the case.

But yet, in a criminal matter, without having a chance to litigate the question of obscenity, he can be found obscene. He can be not permitted to show the difference in community standards to a jury of his peers and be able to try to ascertain that issue and I think that's the difference, the key difference between the food matter which you suggest and the other matter.

QUESTION: Do you find any comfort for your position in the dissent of Chief Justice Heflin?

MR. SMITH: Well, of course, yes, we do. We think that Chief Justice Heflin --

QUESTION: Well, what was that?

MR. SMITH: -- has --

QUESTION: Well, of course, his approach was a little different from that which you have been giving us, I think.

MR. SMITH: Chief Justice Heflin, of course, has taken the three points that I mentioned, that is, that, number one, there was no trial by jury permitted this man. This man received a sentence of one year plus fine. That, certainly, under the decisions of this Court, that the man should be entitled to a trial by jury and he was not entitled to a trial by jury on that issue of obscenity.

And we say that that -- that is one of the points, I think, he talks about. He also talks about the burden of proof.

QUESTION: Well, do I misread him as having suggested that under our decision in Winship, every element of the criminal offense has to be proved by the --

MR. SMITH: Beyond a reasonable doubt.

QUESTION: Beyond a reasonable doubt and that the deficiency in this conviction was that the element of obscenity was not.

MR. SMITH: It was excluded by legislative fiat.

That is correct.

QUESTION: Mr. Smith, supposing you have an ordinance that proscribes parking in an area where there is a no parking sign and you have done that and you go into court and you say, well, I have got a right to relitigate the question of whether there should have been a no parking sign there because that is an element of the offense.

Isn't it open to the state, at least in that case, to say, that simply isn't open. That is not an element of the offense. The presence of the sign alone makes the only element of the offense, did you park there or didn't you?

MR. SMITH: Well, most states treat parking offenses, your Honor, in a different category, I think, than an absolute criminal statute so I think that that becomes an ordinance more often than not, as versus the statute and secondly, I do think it would be open for someone to come in challenge the city council's right to have passed that ordinance in the event that it went beyond the enabling clause granted them by the legislature so I think there would be other grounds.

QUESTION: Well, perhaps beyond the enabling clause. But would they be able to relitigate in court the question of whether the city council should have decided that that was a no parking space?

MR. SMITH: Assuming all of the things had been foreclosed and there were no other -- there was no bottom line, yes, I don't think he would be able to relitigate that question. But that is as to a matter involving a no parking sign.

But here we are talking again -- and this Court has time and time said again that these questions regarding explicit material or simulated material depends on the difference between communities, as the Chief Justice has pointed out, I think, in the Miller case, regarding the difference in various communities and different state communities to the tolerance of material and I think here one of the things is, he was not allowed to litigate this under the Birmingham standard and, of course, the right of confrontation Justice Heflin refers to was also denied counsel in this particular case and the law in Alabama is clear, that in a judgment in a civil suit cannot be admitted in a criminal prosecution arising out of the same transaction so we have one standard that applies to the same parties in the case and yet another standard if it is going to apply to somebody who had no participation whatsoever directly or indirectly in the litigation and we say that that is the explicit difference in this case and even Justice Heflin, in pointing out what Judge Harwood said -- on page A14 of our Appendix -- Now Justice Harwood said,

"It is clearly settled by the doctrines of our cases that a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction."

But Justice Harwood found no difficulty in joining the prosecution or the majority of the panel and Judge Faulkner's decision in this case.

I'd like to reserve whatever time I have left for rebuttal, if it please the Court.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Marston.

ORAL ARGUMENT OF JOSEPH G. L. MARSTON, III, ESQ.

ON BEHALF OF RESPONDENTS

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

Rather than chance forgetting it, I would like to respond to something Counsel pointed out, this point in the Appendix where Judge Gibson told Mr. McKinney's counsel, "I think I can cut your argument short." Counsel cites --

QUESTION: What page?

MR. MARSTON: Page 80. A81, in the precise middle of the page. "(The Court) I think I can cut your argument short."

Counsel argues that that snows that the trial judge was flatly refusing to consider any question of

obscenity. We don't -- the statement has to be taken in context and the context was that this was the point in the trial where the state offered this magazine into evidence at Mr. McKinney's trial without any bounds. The state simply offered it in evidence and Mr. McKinney's counsel objected on the grounds that obscenity was not for the jury and judge heard some arguments and then he told counsel, "I think I can cut your argument short."

In effect, I sustain your objection. I will not let that question go to the jury. I will let the magazine in on the issue of sale alone.

So I would call that to the Court's attention.

QUESTION: Well, are you suggesting that he had the opportunity to litigate it and he not only avoided it, but insisted on avoiding it?

MR. MARSTON: Yes, sir, frankly. I believe -- now, I believe there are --

QUESTION: But did he really insist that before you put this to the jury, Mr. Judge, you have got to decide what it constitutes. That is what the Constitution requires. Is that what he was saying?

MR. MARSTON: Yes, sir, I --

QUESTION: That was the basis of his objection. It was not, as I understand it, that anything related to that civil proceeding in Mobile, was it?

MR. MARSTON: No, sir. I believe his objection was that the question of obscenity was simply not to the jusry in this case. It was not a question of fact.

QUESTION: That's right.

MR. MARSTON: Now, I will say this about the question of obscenity in this criminal prosecution. Under Jenkins versus Georgia it seems to me that where you have a determination of obscenity that is outlandish, where the material clearly is not obscene, that any court confronted with that has a right and a duty to go into that and I think we see this in Mr. Justice Faulkner's decision; they write at length about what "New Directions" contained and I think they did review and see if there was a question of obscenity at least.

Now, I am not saying that you open up the whole thing and go back and start all over but you can look, the Court would be under a duty to look at the material and see if at least arguably there is a question of obscenity.

QUESTION: But the judge said specifically the jury could not do that.

MR. MARSTON: That is right, sir, in response to --

QUESTION: I don't care "in response to." That is what they told the jury. The judge said, "This is no question for the jury."

MR. MARSTON: That was in response, though, to

Mr. McKinney's objection. He said, "I will do this in answer to your objection. I sustain your objection. This is what I will do. I will give these instructions."

QUESTION: Well, what are you going to charge him with, voluntary assumption of risk, or something? That was the judge's rule and I don't care who provoked it.

MR. MARSTON: Yes. Well, that was his --

QUESTION: But he didn't want that ruling, did he?

MR. MARSTON: Well, he objected and when the judge said, "This is what I'll do," he didn't object to it.

QUESTION: Well, he didn't object to it because he wanted to go into the factual part of obscenity.

MR. MARSTON: I don't read the record that way, Mr. Justice Marshall.

QUESTION: Well, that is the way the judge ruled. The judge said, "We feel that it would be the court's duty to limit the purpose." Just before that he says,"to any question of obscenity in the magazine." "Any question."

MR. MARSTON: In response to Mr. McKinney's objection that obscenity was not for the jury. The judge was agreeing with him.

In addition, when the judge gave these charges to the jury, Mr. McKinney made no objection at all.

QUESTION: Mr. Marston --

MR. MARSTON: Yes, sir.

QUESTION: I don't want to prolong discussion as to what the language means, but the first full paragraph on A81 which contains the objection by counsel, I read it as objecting to allowing the jury to see the magazine without the introduction of evidence on behalf of the defendant as to whether or not it was obscene.

The objection really was to the denial of the right to litigate before that jury the issue of obscenity.

MR. MARSTON: Yes, I think that was his objection, that the question of obscenity was not for this jury.

Is that what you are saying?

QUESTION: Only because the judge refused to allow any evidence as to whether or not the magazine was obscene because the judge took a position that already had been determined.

MR. MARSTON: Well, sir, I do not believe this record contains any reference except in response to this objection which Mr. McKinney made, any reference to the judge saying that the question of obscenity was not involved in here at all.

However, we defend the statute on that basis, assuming the correctness of Petitioner's analysis.

Now, the Petitioner relies very heavily on

Smith versus California saying there's no snowing of scienter in this case. There is no requirement for scienter, he says.

I frankly don't know what to say in response to these arguments. I don't know if I understand them. This statute requires scienter in two forms. The accused must know the nature of the contents of the publication and that complies with Smith, as I read Smith.

But then the statute says he must also know, have actual knowledge, of the prior judicial determination and both of these factors were proven. We attempted to prove some other things that would have shown scienter, we think. But on Mr. McKinney's objection they were kept out.

But if we didn't prove scienter in this case, it is just not possible for the state to prove scienter. We handed him a written notice stating "These materials have been judicially declared obscene -- " the case number, the date and the court.

Now, I don't know what we can do beyond that.

Then, just before the sale, he was shown the contents so I can't say anything about scienter except it was required and proven.

Now, this Honorable Court has ruled on numerous occasions that the obscenity of a material arises out of

the thing itself. It is a -- the word "obscenity" describes its nature and if it has that nature, it is unprotected by the First Amendment. Now --

QUESTION: May something under our cases be obscene in Mobile and not obscene in Birmingham?

MR. MARSTON: Yes, sir, if the community involved is the county.

Now, under this statute the community is the state. And this was specifically held by the Alabama Supreme Court.

QUESTION: Well, now, who is the ultimate -- for purposes of constitutional jurisprudence, who finally decides what the community is?

MR. MARSTON: The Alabama Supreme Court , in the case of --

QUESTION: They do?

MR. MARSTON: Yes, sir.

QUESTION: You mean, we are concluded by it?

MR. MARSTON: Oh. Oh. Well, your Honor, this Honorable Court has held in Hamling and in Miller and other cases that the state may use a state standard or a smaller standard. Now, in our statutes that don't use this prior civil proceeding, we use a smaller community for the purposes of banning it.

Of course, the First Amendment would protect all

of it without regard but the Supreme Court of Alabama has held that the standard -- the community under this statute is the state as a whole.

We argue in brief that since the nature of the material is the issue when we are talking about obscenity that an in rem proceeding is most appropriate to determine it. Now, the Petitioner argues that he was not confronted by his accusers. He was not proven guilty beyond a reasonable doubt.

But this argument totally ignores the peculiar corpus delicti of his crime. As I think has already been pointed out, he was not charged and he is not convicted with merely selling obscenity. He is charged with selling materials that had been judicially declared obscene -- judicially found to be obscene and his crime has overtones of contempt of court.

Now, I am not saying that he is guilty of contempt of court but it is that sort of a crime, the disregard of this judicial determination.

"I don't care what the judge says, I am going to go on and sell it."

And with regard to the corpus delicti of his crime, he confronted each witness, cross-examined each witness and was proven guilty beyond a reasonable doubt.

The jury was thoroughly charged on reasonable

doubt and the corpus delicti by the trial judge.

QUESTION: Absent an objection from Mr. Smith, would the issue of obscenity been submitted to the jury?

MR. MARSTON: Not to the jury, no, sir. As I read this statute and the Alabama -- now, at that time, Mr. Chief Justice -- I am really answering your question academically because I don't know.

At that time we weren't sure about the instruction.

QUESTION: Well, I got the impression that you were suggesting that Mr. Smith had some responsibility for keeping this issue away from the jury.

MR. MARSTON: Well, I am not Mr. Smith, but Mr. McKinney's counsel.

QUESTION: Well, the man who was trying the case.

MR. MARSTON: I think it was. I think they did have some responsibility but whether they did or not, I think that the most they could have gotten under this statute as interpreted by the Alabama Supreme Court would be if they could have gotten the trial judge to have looked at this thing under the Jenkins precedent to see --

QUESTION: Well, now, what -- I don't understand that. You seem to say that the obscenity issue was in this proceeding. It may not have been to the jury or it may have been to the judge. You seem to think that the defendant really did have some right under this statute,

even though he was only charged with selling something that had already been declared to be obscene, some right to raise the obscenity issue and have it adjudicated, to some extent, anyway.

MR. MARSTON: Let me say this, sir --

QUESTION: That certainly -- that certainly doesn't seem to be what the statute is talking about.

MR. MARSTON: Well, let me say this. This -- I believe, under this statute, that if you had a material such as the motion picture "Carnal Knowledge" which was involved in Jenkins, if you had a material where there was really a serious question as to the validity of this other determination of obscenity that you could relitigate it.

Now, I don't necessarily mean only in --

QUESTION: And you are urging us to accept that as a construction of the Alabama statute?

MR. MARSTON: No, sir, not necessarily but I do believe --

QUESTION: Well, are you or aren't you? I mean, we ought to judge the case on one basis or the other.

MR. MARSTON: I believe under this statute he could have reopened it in another -- his own civil proceeding.

QUESTION: Are you suggesting then that if it had been "Carnal Knowledge" that had been involved in this

civil proceeding and in Mobile and it had there been held that "Carnal Knowledge" was obscene and then "Carnal Knowledge" was shown in Birmingham, that in that instance the defendant would not be foreclosed from challenging the obscenity of "Carnal Knowledge"?

MR. MARSTON: Let me say this, sir. Maybe on -- I am thinking ahead of myself. In our brief we simply say, and this is our position, that under the decision of the Alabama Supreme Court, the question of obscenity, it is not clear that the question of obscenity is closed forever and for all time.

Now, how he could raise it is just not presented by this case because Mr. McKinney didn't attempt it. Whether or not he could have brought another civil proceeding under the '69 Act, which creates a right to declaratory judgment, once you receive this notice -- and you know, he received the notice under the '69 Act and he, that permits a suit for declaratory judgment to determine whether the material is obscene.

Now, whether or not he could do that, I don't -- we say that the decision of the Alabama Supreme Court is not clear on this.

It is clear that Mr. Justice Faulkner in his opinion talks about "shifts in standards of obscenity." He says "The standards of obscenity not having changed from

the time of the trial until the time of the sale" and so on. Now, this implies that the question is not closed once and for all.

QUESTION: Would you answer my question directly?

MR. MARSTON: Yes, sir. Exactly what was your question? I thought I was answering it.

QUESTION: If "Carnal Knowledge" had been declared obscene in Mobile and then this prosecution was brought against an exhibitor of "Carnal Knowledge" in Birmingham, would or would not the exhibitor have a defense that "Carnal Knowledge" is not obscene?

MR. MARSTON: Is simply not obscene.

My answer is, either he would have the right to do that or to file a declaratory judgment. Now, in this case --

QUESTION: So that in any criminal proceeding, your answer is yes, he could have raised the issue of the obscenity of "Carnal Knowledge."

MR. MARSTON: Either that or a declaratory judgment of his own. Now --

QUESTION: But let me -- but my question is, could he in the criminal proceeding? And as I understand you, the answer is yes.

MR. MARSTON: The answer is, I am not sure. Because of the contempt overtones of this particular corpus

corpus delicti.

QUESTION: How do you have a contempt by "over-tones"? Isn't that --

MR. MARSTON: Disregard of a judicial order, having knowledge of it.

QUESTION: Well, but, it was a judicial order over in Mobile, wasn't it?

MR. MARSTON: Yes, sir.

QUESTION: And how is he --

MR. MARSTON: He was not -- could not be held in contempt. There is no question about that. But this crime, the way it is defined, involves disregard of a judicial determination which is like contempt.

We are not saying that he was convicted of contempt of court but we are saying that the gravamen of this offense was the disregard of a judicial order rather than just selling obscenity and because of this, were this question to come up in the civil trial, the argument could be made that your crime was disregarding the judicial order and therefore you could not raise it in the criminal case. But that doesn't mean you couldn't have brought your own action.

QUESTION: How could he disobey an order to which he was not a party?

MR. MARSTON: Well, it was an in rem proceeding.

The parties don't make any difference in an in rem proceeding.

QUESTION: Well, he was prosecuted for selling something.

MR. MARSTON: Yes, sir.

QUESTION: Is that an in rem proceeding?

MR. MARSTON: No, sir, that is a criminal proceeding. But he was prosecuted for selling something the status of which had been determined in a judicial proceeding.

QUESTION: How did he disobey the order?

MR. MARSTON: Well, he wouldn't be disobeying the order.

QUESTION: Are you saying he is not a party?

MR. MARSTON: He would be selling something that had been judicially determined to be obscene.

QUESTION: What bothers me, Mr. Marston, about this particular case is that the complaint, which I gather is equivalent in your practice to an information or an indictment --

MR. MARSTON: Yes.

QUESTION: The complaint seems to telescope two alternative provisions of the criminal statute. If you look on page 5 of Petition for Writ of Certiorari, which is the Court's opinion, it starts with the statement,

"The Petitioner was charged by complaint that he did sell obscene printed or written material;" then, that "said material had been judicially found to be obscene."

Whereas, the statute, if you look on page 5 of the Brief for the Petitioner, makes it a criminal offense to sell obscene material or to sell material that has just judicially been determined to be obscene.

And it seems to me in this particular case, the prosecution, by alleging that he sold obscene material as a matter of fact puts the obscenity of that material very much in issue.

MR. MARSTON: Well, sir, I don't believe so. I --

QUESTION: Well, why not?

MR. MARSTON: Well --

QUESTION: Will you look at page 5 of the Petition for Writ of Certiorari?

MR. MARSTON: Yes, sir.

QUESTION: "The Petitioner was charged by complaint that he: --"

Now, read the first four lines of that,"that he did sell obscene printed or written material;"

Do you see that?

MR. MARSTON: Yes.

QUESTION: Now, that has nothing to do with any charge that he sold anything that had been judicially

determined to be obscene.

MR. MARSTON: Yes, sir. Well, the words -- excuse me.

QUESTION: It is simply is a claim that he sold obscene printed or written material which puts in issue the question of whether or not the printed or written material is obscene. Does it not?

MR. MARSTON: No, sir, I don't think so.

QUESTION: Well, why not?

MR. MARSTON: Because that word "obscene" there -- now, the complaint could be construed that way but that isn't how the Alabama Supreme Court construed and it and I don't believe that is the way it has been construed all along. He --

QUESTION: Whereas, the statute makes it an offense to sell obscene material and also makes it an offense to sell material that has judicially been determined to be obscene, whether or not it is obscene, if you look at Section 374 (4) 1. on page 5 of the Brief of the Petitioner.

Here the complaint telescoped two alternative sections of the criminal statute and therefore made it incumbent upon the prosecution to show both that the material was obscene and also that the material was known to him to have been judicially declared to be obscene.

Do you see my point?

MR. MARSTON: Yes, sir, I think so. Because they say "obscene printed material that has been judicially determined to be obscene." I believe that the word "obscene" when it says "obscene printed material" or whatever, is simply describing the thing.

QUESTION: Well, that is quite different from what the statute says, which makes it an offense to sell "any mailable material known by such person to have been judicially found to be obscene under this chapter." Quite different.

MR. MARSTON: Mr. Justice, I do not see the distinction. I can't -- I simply can't answer your question. I think that the statement, "obscene material" is simply describing the thing and then, why is it obscene? Because it has been judicially determined to be obscene.

QUESTION: Well, the Trial Court, in any event, said that the charge -- or the offense that has been charged doesn't include the issue of obscenity.

MR. MARSTON: Yes, that's right, that was charged --

QUESTION: That was in the lower court ruling, wasn't it?

MR. MARSTON: That was charged to the jury, yes, sir, without objection by the Plaintiff.

QUESTION: Well, yes, but in the colloquy before

that , the judge made that ruling, didn't he?

MR. MARSTON: Yes.

QUESTION: Mr. Marson, may I put this case to you? Assume that the Court in Mobile, instead of having this particular matter being before it, had had the art catalogue of the state museum and had found it to be obscene. Would that sustain a prosecution under this section of the Alabama statute?

MR. MARSTON: Yes. Well, sir, of course, this is why I say that in spite of this, that the Petitioner's interpretation of the Alabama Supreme Court decision to the effect that the question of obscenity is closed without regard to anything else is simply not so.

Obviously, in this case, he couldn't -- there must be a way that an individual who is not a part to that suit can obtain relief from it and Alabama law provides two possibilities.

One would be -- and this one I am certain of -- his own declaratory judgment action and possibly -- and I think probably, in that sort of a case where the thing is obviously not obscene, he could raise it in his criminal trial, under this statute.

QUESTION: But a declaratory judgment won't do him much good if he is already in jail as a result of a criminal prosecution.

MR. MARSTON: Well, as soon as he found out about it, he could file that criminal prosecution.

Mr. McKinney, in this case, when he got that notice, he could have sought declaratory judgment at that point.

QUESTION: Could he have used that declaratory judgment in the criminal case? I thought you said you couldn't use a civil case in a criminal case.

MR. MARSTON: Well, he couldn't -- after he got arrested, he couldn't have -- I guess he could have still filed a declaratory judgment action then.

QUESTION: Well, could he have used it in a criminal case?

MR. MARSTON: No, sir.

QUESTION: He'd still go to jail, but he would have a declaratory judgment.

MR. MARSTON: Yes, sir.

QUESTION: To keep him warm.

QUESTION: Who would have the burden of proof in that declaratory judgment?

MR. MARSTON: The law of Alabama is very clear that the would-be censor has the burden of proof and that case came up in a case cited, I believe, by both parties I know by us, Visual Educators v. Koeppell which happened to involve a suit by a theatre, an expresser, against a

city that didn't want to license them and the Alabama Supreme Court ruled in no uncertain terms, of course, they say, the burden is on the would-be censor in that case, in spite of the fact that it was the expresser that brought the suit.

QUESTION: I take it, then, you think that if a publication is declared obscene in Mobile in a civil proceeding brought by the state against Mr. A and then the state attorney general takes a copy of that declaration and injunction and mails it to all the bookstores in the state and the law says that anybody who sells in the face of that declaration is guilty of contempt, everybody else with notice is bound by that injunction; that any bookseller selling the book could automatically be found in contempt without any hearing other than going to the sale.

If he sold it, he is guilty of contempt.

MR. MARSTON: Now -- under this statute?

QUESTION: Well, I would say under the Constitution. If the state --

MR. MARSTON: Passed a statute like that.

QUESTION: If the state provided -- had that sort of a provision. I would think a fortiorari you would say that would be constitutional.

MR. MARSTON: I think rather obviously, if you are talking about contempt, now.

QUESTION: Yes.

MR. MARSTON: If you sent notice around to them, joining them as parties or giving them an opportunity to come in as parties, they would be bound but you are talking there about straight contempt. No, I don't --

QUESTION: You don't think so?

MR. MARSTON: No, sir, I don't think so.

QUESTION: [Simultaneous -- not transcribable.]

MR. MARSTON: Thank you so much.

MR. CHIEF JUSTICE BURGER: Mr. Smith, do you have anything further?

REBUTTAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.

MR. SMITH: If it please the Court, just a few observations.

Number one, Counsel said that it is clear under Alabama law that the burden of proof is on the censor in the civil declaratory judgment cases. That was in 1972 that that decision was rendered so in 1970 that question was not as open and shut as it was in 1972 in the Koeppell case.

We also point out, if the Court please, that taking page A5 of my Appendix, which is the -- part of the majority opinion, Justice Faulkner, the first sentence in the first paragraph says, "Neither McKinney nor the state introduced evidence in the trial on the question of

obscenity vel non. McKinney raised that issue in a motion to quash the complaint which the trial judge overruled," and then, continuing to page A7, Justice Faulkner says, "We now decide the question of whether the Mobile Circuit Court decree is binding on McKinney, since he was not a party to the action and since obscenity vel non was not permitted as an issue by the Trial Court."

And even Justice Heflin says on page A9, "Thus there was no finding by the jury that the matter alleged to be obscene was obscene and, indeed, no such determination could have been made under the Trial Court's charge."

QUESTION: Where are you on A9?

MR. SMITH: A9, the first full paragraph, your Honor, the last sentence.

QUESTION: I see it. Thank you.

MR. SMITH: So the last thing I would like to point out to the Court is that the -- with Justice Brennan's question regarding "Carnal Knowledge."

If "Carnal Knowledge" was found obscene the day before the decision of this Court in Jenkins in Mobile, Alabama and notice were given in Birmingham, Alabama to Mr. McKinney if he were a theatre exhibitor, he could still be held accountable for having violated the crime of having displayed or exhibited material which had previously or judicially been declared obscene, even though this Court's --

QUESTION: Well, why do you put it the day before? What about two months afterwards?

MR. SMITH: Well, then I would think these are not the sensitive tools because this Court, in a rarely unanimous opinion -- at least in the area of obscenity -- ruled, I thought, that "Carnal Knowledge" was not obscene.

QUESTION: Do you know what the community was in the civil proceeding of Mobile? Did you tell us that?

MR. SMITH: I said that at the time, your Honors, the only decision of the Court --

QUESTION: No, what was? What was?

MR. SMITH: I don't know. And I say, the only decision of a court in Alabama was the Court of Criminal Appeals and at that time, the parameters were the community from which the jury was drawn and that is the City of Birmingham versus Jones and that is 45 Alabama Appeals 86.

QUESTION: Well, presumably that was the community involved in the Mobile proceedings.

MR. SMITH: And the first time the Court said, it is the state standard is in this case.

QUESTION: Well, except the Mobile proceedings, would that involve a jury?

MR. SMITH: That was not a jury but we are saying, the area from which the veniremen were drawn.

That's all.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:58 o'clock p.m., the case was submitted.]