In the

Supreme Court of the United States

Jerry Lee Smith,

Petitioner,

v.

United States Of America.

Respondent.

No. 75-1439

Washington, D. C.
December 8, 1976

Pages 1 thru 42

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LEE SMITH,

Petitioner,

v. No. 75-1439

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.,

Monday, December 8, 1976

The above-entitled matter came on for argument at 11:10 o'clock, a.m.

BEFORE:

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

APPEARANCES:

TEFFT W. SMITH, ESQ., of Kirkland & Ellis, 200 East Randolph Drive, Chicago, Illinois, 60601; on behalf of the Petitioner.

HOWARD E. SHAPIRO, ESQ., Department of Justice, Washington, D. C. 20530; on behalf on the 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 Smith against the United States.

Mr. Smith, I think you may proceed when you're ready.

ORAL ARGUMENT OF TEFFT W. SMITH, ESQ.,

ON BEHALF OF THE PETITIONER

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

My name is Tefft Smith, representing the petitioner, Jerry Lee Smith. I wish to reserve five minutes for rebuttal.

This case concerns the proper relationship between federal and state law in the obscenity area. Petitioner submits that this case can be simply disposed of andthe constitutional issues avoided by the logical interpretation of the federal statute as being intended to support state policy and thus, as incorporating the state law defintion of obscenity in the circumstances of this case.

The petitioner, Jerry Lee Smith, was convicted by a jury in the Southern District of Iowa and sentenced to six months imprisonment. Under the federal statute prescribing the mailing of obscene matter, he was convicted for mailings which took place solely within the State of Iowa. These mailings were lawful within Iowa.

Iowa law permits the distribution of all sexually

related material to Iowa adults, proscribing solely the distribution of certain specified materials to minors. The case here involves no distribution to minors.

The distributions involved were made exclusively to postal inspectors who directly solicited the material. Hence, these distributions were totally permissible under the law of the state in which they took place.

At trial, the government offered no evidence of any contrary standard; nonetheless, the Court permitted the jury to determine for itself what were the community standards. We submit this was error.

The federal statute should be construed, in the present circumstances, as incorporating Iowa law as the measure of obscenity. That statute precludes, as a matter of law, any finding that the materials involved here are obscene.

QUESTION: Mr. Smith, you represent not only this defendant, but also an amicus here, don't you?

MR. SMITH: Yes, our firm represents the American Library Association, which has filed an extensive amicus brief in this case. But I am here speaking on behalf of the petitioner himself. And my argument is directed to the petitioner's position, although I am prepared to discuss, of course, the amicus brief.

QUESTION: Well, you get a one-two punch when you

do this.

MR. SMITH: Well, your honor, that's one of the advantages, yes, Mr. Justice Blackmun.

QUESTION: Well, then you're not really a friend of the Court, are you?

MR. SMITH: I am here representing Mr. Jerry Lee Smith, the petitioner here.

QUESTION: So this law firm represents the amicus curiae. I don't see how you can do that.

MR. SMITH: Well, your honor --

QUESTION: I understand amicus curiae to mean that I have no interest in the case itself, but I want to see the Court do the right thing.

MR. SMITH: Well, your honor, as you will note from the briefs, the amicus brief was prepared by a Mr. North, and that I have the principal responsibility for preparing --

QUESTION: It's the same firm?

MR. SMITH: It is the same law firm, yes, Mr. Justice.

QUESTION: And it's on the brief, it says that.

MR. SMITH: That's correct.

QUESTION: Have you ever seen that before in this Court?

MR. SMITH: I'm not certain that I have ever, Mr. Justice Marshall.

The federal statute here at issue was enacted in 1873. The statute was enacted with almost no debate. It contains no statement of purpose. And it provides no definition of what is obscene matter.

The statute has subsequently been reenacted on a number of occasions, but it has never been significantly revised, substantially debated, and no definition of the meaning of obscene matter has ever been provided.

Instead, the Congress has left that matter to judicial resolution by this Court.

This Court, in the Miller decision and those that have followed, has firmly stated that the issue of obscenity is one of local concern, not national concern, within the traditional state jurisdiction. The Court has rejected any need for national uniformity in this area, and stated that the obscenity or non-obscenity of materials should be measured by contemporary community standards within the community in which the distribution has effect.

In that the state legislatures are institutionally the voice of the people for setting community standards, the Court has recognized that the individual states have considerable latitude in determining what their community standards shall be. Indeed, the Court has expressly recognized that states have the option of doing precisely what the State of Iowa has done here.

QUESTION: Mr. Smith, what if the Iowa legislature by a rather large voting passed a counterpart of the federal statute and the governor had signed it but the Supreme Court of Iowa had held that it violated Iowa's constitution. What would your position be in that case?

MR. SMITH: In that case, I b elieve, Mr. Justice Rehnquist, that the situation would be that there had not been, as enacted through the governmental structure of Iowa, a statute which e xpressed the intent of the state government, which is the repository for the declaration of society's values, to have obscenity proscribed within the state. And in those circumstances, the remedy for the disagreement that the communities and the legislature would have, in those circumstances, would be the ballot box.

QUESTION: So then your argument doesn't depend on the fact that a majority of the people in Iowa may not agree with the federal statute?

MR. SMITH: That's correct, your honor. Because a majority of people within the State of Iowa speak through their elected representatives.

QUESTION: But what if your hypothetical person in that situation took the material which had been declared permissible in Iowa, by virtue of the state supreme court's action, took them over to Illinois and exhibited them. Would he be subject to prosecution in the state of Illinois, assuming

it was forbidden there?

MR. SMITH: Well, he would not be subject to prosecution, of course, under the statute here, which is a federal mail statute.

#168 QUESTION: No, I'm asking a hypothetical question.

MR. SMITH: He would be taking that material into another state, whose community standard would be different. And in that circumstance, under those community standards, if they were deemed to apply, that material would be proscribable, that conduct could be deemed proscribable. And I believe that the Section 1462 of the Federal Code would apply. But interstate --

QUESTION: That would not be subject to two prosecutions, or at least violating two statutes, the statutes of Illinois, assuming they had statutes that prohibited this, and the federal statutes relating to interstate transportation.

MR. SMITH: That's correct. The State of Illinois could protect its own interests in that situation.

QUESTION: So that the choice of the particular state is binding only on that state, is that not true?

MR. SMITH: That's correct. Here, and that's critical to our case, the distribution took place solely from one point in Iowa into another point in Iowa. And therefore there can be no question of any other

standard applying inthe circumstances of this case. There was no distribution anywhere else outside of that state.

QUESTION: Are there any questions about the nature of the materials here? Do you concede they were all hard core stuff?

MR. SMITH: Well, Mr. Justice Blackmun, the phrase hard core is something that has no legal meaning. It's simply a code word for some material. We don't concede that this material is anything other than sexually related material; as to whether it's hard core or not, the issue here is a question of obscenity. And obscenity is a legal concept which requires a measurement in accordance with the free elements set forth in Miller, subject tothe contemporary community standard.

QUESTION: Let me put it another way. If the federal statute applied, you concede that this subjectibility to it and conviction thereunder would be proper?

MR. SMITH: No, because that is our second argument, Mr. Justice Blackmun, which is, that the application of this statute in the circumstances of this case where state law has permitted the conduct would involve fundamental due process considerations. Therefore, if the -- as a statutory interpretation question, it is decided --

QUESTION: Well, let me start all over again. My premise was, if the statute applied, if it is validly

applicable, do you concede that a conviction thereunder would be proper?

MR. SMITH: No. We would submit that these materials are not obscene as a matter of law.

QUESTION: As a matter of Iowa law, you're saying.

MR. SMITH: As a matter of Iowa law, and therefore as a matter of -- and as a matter of federal law. We do not concede the obscenity of these materials, as that concept is defined by the Court.

QUESTION: As defined by what?

MR. SMITH: By the Court, Mr. Justice Blackmun.

This Court recognizing the absence of any need, and indeed, the absence of any congressionally expressed desire, for national uniformity in this area, has expressly applied the contemporary community standards approach to federal prosecutions. That was the express holding in the Hamling case.

In these circumstances, we submit, that the Iowa statutory decision here constitutes those contemporary community standards, and should be applied in the circumstances of a federal prosecution for distribution solely within the State of Iowa.

QUESTION: Well, yesterday, in a case that was argued involving the intestacy statutes of Illinois that exclude illegitimate children from -- fathers from this

intestate succession from a decedent father, we were told that the state law does not reflect state public opinion and community standards. Indeed, we were told that a poll had shown that a vast majority of people in Illinois thought that that state law was contrary to what they thought would be good state policy.

MR. SMITH: Well, I would submit, Mr. Justice Stewart, that that is an improper statement. Because the remedy for disagreement between the people -- is the ballot box. That's the essential nature of a democratic republic. In our brief we quote from James Madison in Federalist No. 10 where that proposition was definitively stated at the outset of the formation of this nation, and this Court has repeatedly recognized that it is the legislatures, and through the legislatures, following up on Mr. Justice Rehnquist's point, the -- then further given our system of checks and balances, the application of the governor in those situations to decide what is to be that society's values.

Now, our argument is consistent with the doctrine of cooperative federalism which has been well articulated by this Court. In our federalist system, federal law is interstitial in nature, often being incomplete, not having considered all circumstances.

QUESTION: This is an argument of statutory construction, I take it.

MR. SMITH: That is correct, Mr. Justice Rehnquist.

QUESTION: You don't have any doubt that if the federal government says the National Labor Relations Act shall apply in all 50 states, even though the people of Iowa may not like it, it can nonetheless do that.

MR. SMITH: That is correct.

It has therefore been appropriate to evaluate and interpret the meanings of federal law with reference tothe backdrop of state law.

As the cases discussed in our brief at pages 23-30 demonstrate, the Court has in the past often looked to state law to determine the meaning of congressional enactment, particularly in the circumstances presented here, where the matters at issue are considered local in nature, and there has been no demonstrated need for national uniformity.

QUESTION: Well, now, hasn't Congress, in an analogous situations when it wanted to exempt the force of federal laws from operation in states where the state policy was otherwise, hasn't it explicitly so determined? I'm thinking for example, it's a violation -- a criminal violation of federal law, I think, to mail slot machines, in interstate commerce. But hasn't Congress expressly exempted the mailing of slot machines from one place to another in Nevada, for example?

MR. SMITH: Congress has taken this approach in certain of its more recent statutory enactments. But the decisions that we cite and discuss in our brief do not involve situations where there was such an express Congressional intent. Moreover, in he relatively recent decision of Mr. Justice Marshall, inthe United States versus Bath, the Court expressly refused to extend the prescriptions under the federal statute proscribing the possession of handguns by a convicted felon to an intrastate possession absent some clear manifestation of Congressional intent.

Mr. Justice Marshall emphasized in his opinion in that circumstance that the absence of any comment in the legislative history or in the statute on this subject matter should be deemed persuasive.

QUESTION:: But you, Mr. Smith, as I understand it, would concede -- assuming Illinois has the kind of law that's described by the Chief Justice -- you would concede that this federal statute would be applicable to a mail shipment from one point to another in Illinois, would you not?

MR. SMITH: That is correct.

QUESTION: So it's not just the intrastate character of this.

MR. SMITH: No the significance as I tried to articulate earlier of the intrastate element here is solely

that only one standard here can possibly be determined to be at issue. It can be solely the Iowa standard that we have to evaluate. And that's the only standard that the jury could have been instructed to apply in the circumstances of this case.

QUESTION: You don't raise any constitutional question that what Congress could have said, whether or not legal in the states?

MR. SMITH: Well, we do raise -- and that is our second argument -- that there are fundamental notice problems in that circumstance, again referring back to the decision in United States versus Bath. The Court there -- although that was not the factual situation in that case -- noted that there would be real notice problems if any application of federal lwa --

QUESTION: But you wouldn't put it on any commerce clause argument, would you?

MR. SMITH: No, I would not. But it's a due process argument and a notice argument.

Here, no federal interest can possibly be deemed to be served by this prosecution. The Court, in evaluating the question of the nature of obscenity has identified no federal interest. Mr. Justice Harlan, in dissenting in the Roth case, expressly rejected any notion of an independent federal interest, emphasizing instead the paramount obligation

of the federal government to ensure full protection of first amendment rights.

Justice Harlan, dissenting in the Memoirs case, articulated what we would submit is the most logical and most reasonable interpretation of the federal statutes.

QUESTION: Weren't those both dissenting opinions?

MR. SMITH: Both of those were dissenting opinions, Mr. Justice Black.

In the Memoirs dissent, Mr. Justice Harlan stated that there would be a limited federal interest in proscribing certain materials for the purpose of assuring the federal instrumentalities like the mails would not be utilized to thwart state laws.

In the circumstances presented here, the interpretation adopted below and urged by the government is precisely the opposite. It thwarts state law.

QUESTION: Suppose, Mr. Smith, thatyou had a state that for some reason or other simply decided not to make bank robbery a crime, but the federal statute, of course, makes it a crimeto transfer the proceeds over a state line, and also makes it a federal crime to rob a national bank.

Do you think the Iowa view of -- the Iowa legislature's view of bank robbery would prevail over the federal statute?

MR. SMITH: Not if the federal statute had manifested a clear intent that there were legitimate federal interests that were involved here and were concerned here.

QUESTION: Well, doesn't it manifest it just by the passage of it?

MR. SMITH: No, because there is no expression within the statute of any intent. And indeed, the nature of the subject matter, as recognized by this Court as such, that it is a matter of local concern that there are no national interests here.

Indeed, the very purpose that was articulated by Mr. Chief Justice himself in the Miller case for eliminating the national standard was precisely --

QUESTION: That's the national standard.

MR. SMITH: Standard.

QUESTION: Not the -- that's the judgement of the jury, in which I expressed the same view as my predecessor Chief Justice Warren expressed, that this is essentially a matter of local community standards.

MR. SMITH: That's correct. And the thrust of that reasoning, it seems to me, Mr. Chief Justice, is, that you should permit material to be distributed in a local community where they are acceptable. And in the circumstances where the state legislature had evaluated the matter, and as

a legislative policy judgement --

QUESTION: Well, then, this would apply to bank robbery too; that would be your answer to that question. Unless the federal statute made out some sort of case that there is a special reason why the national bank, nationally chartered banks, is a bad thing.

MR. SMITH: That, I think, is somewhat the logic of my position, although I would submit that the differences here are, of course, that what we're concerned with is further, the question of the impact of these rulings on First Amendment rights, the serious notice problems that are involved in applying a federal proscription to conduct which is lawful under state law.

QUESTION: Well, I thought your arguments -- at least one of your arguments was simply that as a matter of defirition of the offense there couldn't be an offense in your state.

MR. SMITH: That is correct.

QUESTION: I mean, whether or not there's been a bank robbery is an objectively identifiable question. And the answer is, that one can tell by objective measurement. But since the test of whether or not there's even been a violation in this kind of case depends on contemporary community standards, and since the legislature of this state has stated what the contemporary community standards are,

and they do not include this, then there's not even an offense. Isn't that your point?

MR. SMITH: I certainly would agree with everything that Justice Stewart has --

QUESTION: And that makes it quite different from the bank robbery case.

MR. SMITH: Yes, it does.

QUESTION: There cannot even be an offense. There can't be a bank robbery.

MR. SMITH: The bank robbery situation involves a question of conduct, where this -- the issue here that we're concerned with is a question of how do you evaluate the standards in determining what that conduct has been.

QUESTION: Mr. Smith, could I ask a question?

Your argument, as I understand it, relates the concept of contemporary community standards to the whole problem of defining whether something is obscene or not.

The government responds, as I understand their brief, by saying that the Miller test has two parts to it, the first of which is this business of appealing to the prurient interest. And as I understand them, they say that the contemporary community standard reference only modifies that first part of the three part Miller test.

Do you -- what is your response to that? It has a limited application rather than applying to the whole

concept of obscenity.

MR. SMITH: Well, Mr. Justice Stevens, we would submit that that is a distortion of the Miller decision. And the opinion of Mr. Chief Justice in the Miller decision states as its summary, we hold that obscenity -- and that's at page 37 of the opinion -- it states that we hold that obscenity -- utilizing the broad word obscenity -- is to be determined by applying contemporary community standards, not national standards.

QUESTION: You said the three-part test is a conjunctive test and not a disjunctive test, is it? That the material has to --

MR. SMITH: Yes. The three independent elements must conjoin for a finding of obscenity. Moreover, the subsequent opinion of Mr. Justice Rehnquist in Hamlin repeatedly referred to the contemporary community standards test as broadly applying to the concept of obscenity.

Similarly, the opinion in the Jenkins versus Georgia case so refers, expressly referring to the first two tests of prurient interest and patently offensive appeal.

The -- Mr. Chief Justice, in the Miller case, in rejecting the national standards approach, expressly stated that there will be varying, from community to community, standards of precisely -- and I'm quoting from page 30 of the opinion -- of precisely what appeals to the prurient

interest or is patently offensive.

The history of the formulation of the patently offensive test further confirms this fact, in that when it was first fully articulated by Mr. Justice Brennan in the Memoirs case, he stated that material is patently offensive because it affronts contemporary community standards relating to the description of sexual matter.

And within the Court's own formulation, and moreover within the logic of why it is that you proscribe obscenity, is where it is offensive to the community. If it is not offensive to the community, it is not obscene.

The results that occurred below, and as urged by the government, expressly has certain adverse consequences. First, it effectively nullifies Iowa law. And by the same logic, the laws of at least six other states. The Court has recognized, in Lamont versus Postmaster General, that the U.S. mails have a predominant influence in the nation. Whatever -- the Court stated, whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted.

Hence, the federal statute s would become the dominant statutes. Indeed, in the circumstances here, that result runs directly contrary to what the Court has repeatedly stated is the right of the individual state legislatures to

take the course followed by the State of Iowa, and to choose to permit the regulation -- the distribution of all sexually related material to their citizenry.

The further adverse consequence of this decision -- and we would submit that the constitutional issue of notice can be avoided by the interpretation of the statute which we submit -- is the fundamental fairness consideration that a person has a legitimate expectation that if he conducts himself in accordance with the laws of the state of his residence, his conduct there will not lead him to criminal proscription.

QUESTION: What about somebody in Iowa who mis-brands drugs, and the Iowa legislature has chosen not to make that criminally punishable. Would that give him a defense to a federal charge?

MR. SMITH: Not in a situation where, again, the federal government has expressly enacted a statute which has its own standards which govern that conduct.

QUESTION: Well, in the mis-branding of drugs, the violation itself doesn't depend on community standards, does it?

MR. SMITH: No, and that is --

QUESTION: The very essence of this defense, as this Court has said, depends upon whether or not -- depends upon the standards of the communities.

MR. SMITH: That is correct, Mr. Justice Stewart.

QUESTION: But when a federal jury, sitting in Iowa, on a federal mis-branding case, such as suggested by Mr. Justice Rehnquist, they do, as every jury does, apply their own standards consistent, of course, it is hoped, with instructions from the Court. But is it not elementary that every jury applies its own concept of morality and of rights?

MR. SMITH: Yes, that is true, especially in evaluating conduct. But this Court has very carefully stated --

QUESTION: One set of jurors might look at a particular label or brand on a drug or some grocery item and say, no, this is not a mis-branding, it doesn't mislead us. But another jury in another town in the state of Iowa might look at it and say, it is a mis-branding. So you can get that variation, even on a subject of this kind, could you not?

MR. SMITH: Well, Mr. Chief Justice, there are standards provided in those kinds of statutes. The jury is not free at its will to exercise whatever its judgement on the morality or immorality of the conduct is.

QUESTION: Well, I said hopefully the jury follows the instructions of the court. But we know that juries don't always do it.

MR. SMITH: But jurors must be required to consider

things objectively. And here, in the circumstances of this case, and under this Court's precedents, it has been directly decided, thatthe jury must apply an objective test based upon the community standards of the average person in the community. They're not supposed to apply their own standards. They are supposed to apply the standards that prevail within the community.

QUESTION: Mr. Smith,,are those -- is the definition of the contemporary community standard, or the local community standard, is that an issue of fact or an issue of law in your judgement?

MR. SMITH: I think that it is an issue of law, in the present circumstances of this case, in that the Iowa legislature has enacted a legal pronouncement on that issue.

MR. CHIEF JUSTICE BURGER: Mr. Smith, your time has expired.

Mr. Shapiro.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think it would be useful to just review the facts of the case before we discuss the law.

The material involved in this case consists of five magazines, five photographs, and two films which

petitioner deposited in the mails. They were all sent to addresses within the State of Iowa.

The case was tried to a jury. The defendant put on evidence of community standard, which consisted largely of photographs and magazines similar in nature to the material which is alleged to be obscene here.

I would characterize both the material we have charged to be obscene and the defensive material as obvious hard-core pornography.

The District Court permitted the defense, over the government's objection, to introduce the Iowa statute which limits the crime of obscenity to distribution to minors. The judge also in his instructions, charged the jury to consider the effect of that statute along with the other evidence in determining what the community standard in the -- I think it's the central district of Iowa is.

The jury, after being charged under the Miller test -- Miller and Hamling -- these mailings all took place after Miller -- convicted the defendant on all counts.

The Court of Appeals --

QUESTION: What did the instructions have to say with respect to community standards? Are they in the --

MR. SHAPIRO: Yes, they're in the record, 22 and 23. Actually, let's see, they begin with instruction number 8 at 21, and then they carry on -- they're very close to the

Miller's test. At page 22, there's almost a literal repetition of the Miller test. And I won't read it, but it's stated quite clearly, including a definition of what patently offensive means, and referring to what we would call hard-core pornography.

QUESTION: Do you recall, Mr. Shapiro, who the judge was?

MR. SHAPIRO: I regret, your honor, I do not.

QUESTION: The District Judge was Judge Stuart, was it not?

MR. SHAPIRO: Judge Stuart, I think.

QUESTION: Well, he's an old time Iowa judge, he used to be on the Supreme Court of Iowa until fairly recently.

MR. SHAPIRO : Now, at page 23 -- at the bottom of page 22 and page 23, is part of the instructions, it's quite important.

In determining the views of the average person s of the community, you are each entitled to draw on your own knowledge of the views of the average persons in the community from which you come, as well as consider the evidence presented as to the state law on obscenity, and materials available for purchase in certain stores as shown by the evidence.

The Court of Appeals agreed with the District Judge that it was proper for the jury to consider the effect of the

state statute, and it also concluded that this was simply an element in determining community standards, it was not in itself conclusive as the petitioner here contends.

QUESTION: Mr. Shapiro, just to put the same question out: is it your view that the determination of the contemporary community standard is a question of fact or a question of law?

MR. SHAPIRO: Well, the first two elements of the test, in Miller, we believe are primarily questions of fact. The Court so said in Miller, at page 30 of the opinion.

The last element, dealing with whether the material lacks a serious literary, artistic, political or scientific value is much more of a legal question. I also thing that that last element is not subject to a community standard limitation, because otherwise we would find that what are considered serious matters in one part of the country could not flow into another part of the country. So you can't really limit the third part of the test by community standards factor.

QUESTION: Mr. Shapiro, I don't think that quite answers the question. You suggested the first two parts of the Miller test are questions of fact, and the third part might be a question of law. My question is, whether the community standard, the definition of community standard itself, is a question of law or a question of fact, which apparently, at least according to your opponent, applied to

all three parts of the Miller test?

MR. SHAPIRO: I would regard it principally as a question of fact, subject to one qualification: the Court has said in Hamling that under the constitutional tests in Miller, the state may, for state purposes, constitutionally define the geographical reach of the community in which the standard is to be applied.

And that brings me to another element of the community standard test which it's most important to explicate. That is, that the contemporary community standards element of the test refers to the contemporary mores of the community, and that is independently of the state statutory policy, which either makes the distribution of obscene material criminal or non-criminal.

QUESTION: Mr. Shapiro, maybe I missed it: what evidence did the government put on as community standards? You said what the defendant put on. What did the government put on?

MR. SHAPIRO: The government relied on decisions in I think it is, Paris Adult Theater and Hamling, that it need not put on evidence of community standards in order to make this determination.

QUESTION: What more reliable evidence is there of the mores of a community than the laws of a selected -- an elected representatives?

MR. SHAPIRO: Well, let me illustrate it if I may, your honor.

In a state which has a statute condemning obscenity, the Miller test itself recognizes that that law does not express the community standard. It still has to be determined by the jury, despite the state law.

Well, the converse is equally true. The jury must determine for itself the community standards .

QUESTION: Well, we're talking about mores. Your word was mores, which means, customs or standards.

MR. SHAPIRO: Yes. Now, this means that the state statute is a factor to be considered. But all the state statute in Iowa does, in fact all the state statutes in the six states that we know about that have decriminalized obscenity do, is to say that we will give up on trying to prosecute this stuff criminally. It certainly isn't an approval of it, it isn't an encouragement of it, it doesn't necessarily reflect what this Court is talking about when it speaks of a constitutional standard under the First Amendment of contemporary community standards dealing with recognition by the average person of a matter that appeals to the prurient interest, or to the extent that the community standard applies to the patently offensive element, to what is patently offensive.

QUESTION: Would you make that same argument if

the State of Iowa had decriminalized marijuana or heroin and got a federal prosecution?

MR. SHAPIRO: Yes, your honor, we would. And some states have.

Of course, it has been pointed out . I don't want to -- there is a difference between this problem of conduct and problem of defining obscenity which rests on a constitutional definition under the First Amendment.

QUESTION: And whether or not an offense has been committed depends on community standards, on this particular offense.

MR. SHAPIRO: Yes.

QUESTION: Whether or not somebody smoked marijuana doesn't depend whatsoever on community standards.

MR. SHAPIRO: Well, whether it can be constitutionally punished, at least, I would rather express it in that way.

Now, as I said --

QUESTION: May I just interrupt once more, Mr. Shapiro. We're vacillating back and forth between the contemporary community standard being a question of fact and being a constitutional standard, which normally would be a legal standard. And you've reminded us that the Court does not require the government to offer evidence on such contemporary community standards.

Is there anything in the record which would enable

an appellate judge to determine what the contemporary community standard is?

MR. SHAPIRO: In the defendant's view, the material that he offered and the state statutes. And in the government's view, the state statute is a factor, but this goes to an element that the jury is to decide.

QUESTION: Is it subject to appellate review, or is this an issue that --

MR. SHAPIRO: It is subject to appellate review.

QUESTION: And how does an appellate judge go about reviewing the question of whether or not the correct community standard was applied?

MR. SHAPIRO: On the first two elements, he gives the greatest weight to the jury. The constitutional test in Miller, as the Court has recognized when it dealt with the question of the geographic scope of standards, is essentially factual.

What the Court said in Miller was that under a national constitution there can be variation from community to community. And then it went on to say there aren't fixed national standards of precisely what appeals to the prurient interest or is patently offensive. These are essentially questions of fact.

QUESTION: I understand. But are they questions of fact that can be decided without any evidence being in the

record to tell us what the standard is in Iowa? As I understand your position, the government need offer no evidence --

MR. SHAPIRO: That is correct.

QUESTION: And we may not look to the Iowa law, and we don't have to accept the defendant's evidence. So what do we look at to see what the standard is?

MR. SHAPIRO: You look at the jury's determination. Because this is the aspect of the issue --

QUESTION: And they can determine this on the basis of their own knowledge of what happens in the community, which is not in the record for us to review, is that it?

MR. SHAPIRO: That is the basis of the test as it has been defined in the Court's decision.

QUESTION: Now, you told us that the Iowa law was admissible in evidence?

MR. SHAPIRO: Yes.

QUESTION: Why? In your view?

MR. SHAPIRO: So that the jury may consider it, since the jury is permitted to consider any evidence, any relevant evidence relating to what constitutes the community standards with respect to what appeals to the prurient interest, or what is patently offensive.

And the statute could be considered by them. I suppose --

QUESTION: In a federal prosecution for possession

of marijuana, would it be -- would the absence of a state criminal law criminalizing the possession of marijuana be permissible into evidence?

MR. SHAPIRO: No, your honor, it would not.

QUESTION: Well, what's the difference?

MR. SHAPIRO: Well, I think the difference is that the state statute here dealing with the decision to criminalize or not criminalize obscenity would to some extent reflect comunity mores. But the weight to be given that is for the jury.

Now, the state law, of course, in this case didn't purport to determine community standards. All it said was that we will not prosecute -- I'm paraphrasing grossly, but -- we will not prosecute obscenity as a crime.

Now, it doesn't follow from this that the community mores in Iowa do not recognize hard core pornography to be obscene. But basically that's what you're dealing with. Is this material obscene or not?

Moreover, the Iowastatute didn't purport to regulate the federal mails. There's no conflict or nullification here of state law. There's no conflict with federal law. There are simply different policies within each jurisdiction's respective sphere of constitutional responsibility.

QUESTION: You said the basic question was whether this material is or is not obscene quote obscene

unquote.

MR. SHAPIRO: Within the meaning of the federal statute.

QUESTION: Within the meaning of the federal statute.

And hasn't it been determined that whether or not material is obscene depends, at least -- depends, among other things, upon whether or not it offends community standards.

MR. SHAPIRO: Everything that depends --

QUESTION: And if the community has said through its elected representatives that it does not offend our community standards, isn't that the end of it?

MR. SHAPIRO: But the Iowa statute doesn't say that. All it says is that it shall not be a crime. It doesn't say anything else.

QUESTION: But isn't it true that your position is, that the case, a matter is obscene or not depending solely upon the whims of twelve people . And I emphasize solely. Isn't that your position?

MR. SHAPIRO: No, your honor. It is that twelve people applying instructions --

QUESTION: Maybe I'm wrong. Isn't it that it's up to the whims of twelve people without any guidance or evidence of any kind?

MR. SHAPIRO: Under this Court's decision, there is

guidance. Guidance is the guidance set forth in the Miller test, and that guidance applies in a meaningful way, as Jenkins against Georgia demonstrates.

QUESTION: Well, you didn't even --

MR. SHAPIRO: There are limits on the --

QUESTION: Did you put on anybody who said that there is a single -- there's at least one person in Iowa who does not like obscenity?

MR. SHAPIRO: That, I don't think, is the issue. Whether one likes obscenity or not.

QUESTION: But the community standards?

MR. SHAPIRO: It's a community standard which goes -- does this material --

QUESTION: What is the community standard now in Iowa?

MR. SHAPIRO: Well, I think the community standard in Iowa as reflected in this jury's determination is, that hard core pornography can be recognized as material which tothe average person appeals to the prurient interest, and which is patently offensive in its depiction of explicit sex.

QUESTION: The next jury can amend that law and change it.

MR. SHAPIRO: There is a possibility of inconsistent jury verdicts.

QUESTION: Of change inthe law. Of change in the law.

MR. SHAPIRO: There is a possibility of inconsistent jury verdicts. The Court has recognized that in its decision both in Hamling and in Roth.

QUESTION: Mr. Shapiro, what law was introduced before the jury?

MR. SHAPIRO: The statute appears in the record.

QUESTION: Is that the statute at page 47 of the Appendix?

MR. SHAPIRO: Yes, your honor.

QUESTION: In its entirety?

MR. SHAPIRO: In its -- I believe that is the entirety.

QUESTION: With its definition of quote obscene material unquote?

MR. SHAPIRO: That is the statute in its entirety. Now, it has been amended.

QUESTION: I understand. I understand.

MR. SHAPIRO: Recently, to exclude certain matter.

QUESTION: But this version, it defined obscene material and just made it criminal only in the cases -- it's deliberate or displayed to minors.

MR. SHAPIRO: That is correct.

QUESTION: But the definition of obscene material is in the statute.

MR. SHAPIRO: Yes, your honor.

Well, there was a question about the scope of the federal responsibility here. Now, I've said that what we've got when a state decriminalizes obscenity is a difference in policy between a -- the federal policy and the state policy. Each has a responsibility of its own under the constitution. The federal responsibility in this case rests on the postal power. That power extends to both interstate and intrastate mailings, and it may be exercised for the nation as a whole.

In exercising it, Congress may -- and we think in 18 USC 1461 has -- adopted a nationwide prohibition barring obscene matter from the mails, whether mailed interstate or intrastate.

As a constitutional matter, that test is subject in the determination -- that statute -- in the determination of obscenity, is subject to the contemporary community standards element. But it is not subject to any sort of state interposition between the people of the state and federal law governing the mails. And it's not subject to any sort of local option. And this is primarily because a state statute, while it is evidence of the mores of a community, is not conclusive on it.

Like any state legislature concerned about matters in its sphere of responsibility, Congress may determine that certain activities are pernicious. Now, the petitioner's

suggestion that as applied to hard core pornography this is somehow inconsistent with our federalism, and therefore requires that the statute be read to create a local option exception, simply turns federalism upside down by making state legislatures supreme over Congress.

Congress could make federal obscenity law subject to state law. It hasn't done so. When it wishes to do so, it does so expressly.

This statute, which dates from 1872, has been uniformly construed to apply across the nation as a whole. It is part of a pattern of statutes expressing the federal interest in the limitation of the distribution of obscenity. The material cannot be imported, even though the importer lives in Iowa. The material cannot be carried by a common carrier to a resident of Iowa. It can't be transported for purposes of sale or distribution there. And under the -- under this statute, it cannot be mailed at all in Iowa.

Iowa, if it wishes, can permit the distribution of this material by not making it a crime. It's Iowa's business and Iowa's responsibility. The federal congress, if it wishes, can also bar the material from the mail, either interstate or intrastate.

Now, the petitioner claims that the statute is unduly vague as applied to the facts in this case. Well, in Hamling the Court clearly indicated what the statute applies

to: hard core pornography. Petitioner was distributing hard core pornography within the state. He was not committing a crime under state law, but he certainly was on notice that he was committing a crime by distributing it by mail. And that is what he was convicted for, quite properly.

QUESTION: Mr. Shapiro, on this question of vagueness and perhaps the allied argument of over-breadth, since this is arguably a First Amendment case, as well as a due process notice case, do we -- is it a complete answer to say thatthe statute was not vague as applied to these facts, or should we look at the potential over-breadth, in view of the First Amendment implications?

Do I make my question clear?

MR. SHAPIRO: Yes, I think you do, your honor.

I don't think you have to reach any over-breadth question on the facts here. This is a claim of vagueness made in circumstances where it's clear that the statute applies.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, Mr. Shapiro.

[Whereupon, the Court was recessed until 1:00 o'clock, p.m., on December 8, 1976.]

MR. CHIEF JUSTICE BURGER: Mr. Shapiro, you may resume.

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

I believe I was responding to a question from Mr. Justice Stevens concerning whether the Court, in this case, should reach the question of over-breadth. And my answer, as I stated it then, was that in this case there's no reason for the Court to reach the issue of over-breadth. In this case, the facts involved show clearly that the defendant was within the scope of the statute as it was construed in Hamling.

This statute, 18 U.S.C. 1461, was construed in Hamling to be confined to patently offensive hard core materials. Thatis what is involved in this case. That is what the petitioner mailed. He was on nqtice fromthe time thatthe Roth decision came down that if he mailed such materials he would be violating federal law.

So there is no reason to be concerned with any question of over-breadth.

Now, there's been some discussion about what the court of appeals is to consider in reviewing one of these decisions. The Court, in Hamling, noted that a juror was entitled to call upon his own knowledge of community customs, the customary candor in the community. This decision -- this kind of dteermination was compared to a knowledge of what reasonable conduct is, what a standard of due care is. And that's about all you can do in this area when you're trying to determine what community mores are, to be sure a defendant is entitled if he wishes to introduce evidence

concerning what community mores are, but it is not mandatory that the government do so. The jurors knowledge is very much analogous to the reasonable man standard.

This comes into play also when we consider the last issue which petitioner presented in his brief, that his rights were violated by the voir dire of the jury. Now, of course the questions to be put to jurors in an obscenity case must assure that the jurors are neutral and objective. It's been said that it's appropriate to inquire, within the limits of the judges -- district judge's power to control voir dire -- into the political moral, religious or sexual opinions which might affect neutrality and objectivity.

But the questions that the defendant here wished to propound to the jury were, essentially, what do you know about community standards? Where did you learn it? Do you know about the Iowa statute here? That's part of what the jurors have to decided. The petitioner can put in evidence on that issue, as he did. But he can't question the jurors about their understanding of these matters anymore than he can question them about their knowledge of the case, about their knowledge of a standard of due care.

Now, --

QUESTION: Mr. Shapiro, let me just ask one other question that's been on my mind.

Is it your understanding that the matter of establishing

the contemporary community standard is part of the governments affirmative case, or is it part of the defense that the defendant may assert? Who has the burden on that issue?

MR. SHAPIRO: Well, of course, since it's a criminal case, there's always a burden of persuasion on the government to establish beyond a reasonable doubt that the material involved offends community standards within the Miller test.

On the other hand, the Court's decisions make clear, there's no burden on the government of coming forward with evidence on that issue.

Now, I think the -- the case can be summed up by trying to decide whether something that is offensive necessarily has to be illegal.

The Constitutional test in Miller does not equate offensiveness to the community with illegality in the community. And that's really the essence of our position. This concept of community mores, that the statute involves -- that the Miller test involves -- simply reflects a practical and realistic way of handling what the Court has described as an intractable problem.

There are all kinds of things that are offesnive in our society. Lying may be offensive, using vulgar language is offensive. These things offends community mores. They aren't illegal, necessarily.

The distribution of obscenity in Iowa to adults is not a crime. But it still may offend community mores. The jury in this case concluded under the instructions based on the Miller test that the contemporary community standards were being offended wtihin the Miller.

The Court of Appeals affirmed that. We think that's all that the constitution requires in a federal prosecution. The defendant had the advantage of consideration by the jury of the effect of the Iowa decriminalization of obscenity. The jury concluded, as well it might, that that did not mean that this material did not offend community standards. And so this defendant was convicted. And so that conviction should be confirmed.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

[Whereupon, at 1:07 o'clock, p.m., on December 8, 1976, the case in the above-entitled matter was submitted.]