ORIGINAL

In the

Supreme Court of the United States

Stanley Marks, Harry Mohney, Guy Weir, American Amusement Company, Inc., and American News Co., Inc.

Petitioners,

v.

United States Of America

Respondent.

No. 75-708

Washington, D. C.
November 1, 1976
November 2, 1976

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Petitioners,	:	
v.	:	No. 75-708
UNITED STATES OF AMERICA,	:	
Respondent.	:	

Washington, D. C.,

Monday, November 1, 1976

The above-entitled matter came on for argument at 2:41 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, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT EUGENE SMITH, ESQ. 1409 Peachtree Street, N.E., Atlanta, Georgia 30309; on behalf of the Petitioners.

ROBERT H. BORK, Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of 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 708, Marks and others against the United States of America.

Mr. Smith, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is a case that arose out of the eastern district of Kentucky. And the charges involve the obscenity laws and conspiracy to violate the federal obscenity laws, 1462 and 65. The conduct occurred beginning, I think, in the period back in 1970 and continued, theoretically, up to February of 1973.

This Court, in June of 1973, enunciated and changed, we suggest, what is the prevailing law and practice; and that is to say, the standard for determining obscenity a la Roth-Memoirs. And the counsel herein has filed in his petition the argument that certainly this is ex post facto judicial law making, the change that occurred, and that the court should not have used the Miller test for conduct which occurred prior to the Miller test.

It had been, we suggest, the law and practice and generally understood (although this Court had not articulated

it) that there were three elements. This is what Mr. Justice Brennan set forth in his Roth-Memoirs decision. In fact, even at one point when Justice Rehnquist, who was appearing before a House committee to testify regarding the views on some obscenity laws, discussed the fact that there seemed to be -- the obscenity law today had three elements to it. Although he did say that the last part of the test, that is to say, the utterly without social value test, had only been joined in by Justices Brennan, Fortas and Chief Justice Warren. But he suggests that until this Court said something else, that it was going to be followed by the lower appellate courts and the lower federal courts of the country. And in fact that was what occurred.

And I think in the Solicitor General's brief in response, and the seeming suggestion of confession of error, he indicates that all the appellate courts that have had occasion to consider this decision did so in light of the Roth-Memoirs test and not -- and thus it sort of had become the law in practice.

The Sixth Circuit, without viewing the film in question -- films in question -- found the particular material obscene, they said, under either test. And of course that was a matter to which Judge McCree dissented.

And so we start with the proposition that there was -- the Roth-Memoirs test was the law in practice. It

was assumed to be the law in practice by defendants, by courts, the lower appellate courts, state courts, federal courts all across the country, even though this Court had not so articulated it; and that there came a time when this Court did articulate new standards, and that was of course in June of 1973.

So all of the conduct for which Mssrs. Marks and Mohney and the associate members of their group were charged occurred prior to this Court's enunciation of a new test. And we say that, based on the law, the Bouie v. City of Columbia and the other cases we have cited in our brief, that obviously this is an expansion, this is a judicial gloss, this is a change, this is a detriment that has occurred to the defendants, and thus they should not be held accountable and chargeable under that more severe test -- certainly severe as to the defendants. And we say that in this context the court erred in not allowing us to have the case tried under the Roth-Memoirs standard, and thus erred in not allowing us to have expert witnesses or other testimony which would have elucidated evidence in light of the Roth-Memoirs standard.

We also --

QUESTION: The statute has always remained the same, hasn't it, Mr. Smith?

MR. SMITH: The statute has remained the same. That is correct, the statute has remained the same. It has not

changed. However, as you -- as you had occasion, sir, when you testified before the House committee, I think, and on page 430 of the report of the hearing before subcommittee number three, I think your honor opted for the fact that it was better to have a general definition of obscenity than to have a more restricted definition. I think you said, Mr. Chairman, I think we have the same reservations as Mr. Hawley expressed. The extremel detailed definition of sexual conduct, sexual excitement and sadomasochistic abuse seems less desirable than the more general phraseology found in the administration bill.

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QUESTION: Well, I repudiated that testimony first by joining the Chief Justice's opinion in Miller, and then I wrote Hamling.

MR. SMITH: Yes, sir. But I'm saying that before Miller, this is, of course, the concept that we all had. And even your honor at that time was expressing a concept of the department of Justice. So I --

QUESTION: It's not binding on the rest of us, is it?

MR. SMITH: No, sir, of course not.

QUESTION: And it's not binding on him, is it?

MR. SMITH: No, sir.

QUESTION: So what are you relying on?

MR. SMITH: Relying on the fact that the Roth-Memoirs was in fact the test, and that this was a judicial

gloss that changed things.

Well, we think, your honor, we take in essence by adding up figures we think we can come up with seven justices, if I may.

First, we have Mr. Justice Brennan, and joined by Chief Justice Warren and Fortas, who made two significant modifications in the previous Roth standard. And that this, in essence, became the law in practice from 1966 to 1973, because Justices Black, Douglas and Stewart agreed, and could be counted upon to reach the same result but for different reasons.

QUESTION: Justice Fortas wasn't on the Court from 1966 all the way to 1973, was he?

MR. SMITH: No, sir, he was not.

QUESTION: So can you count him for all that period of years?

MR. SMITH: No, sir. But when we took Justice Douglas and Black who say that there are no laws, and Justice Stewart who says, only hard core, and Justice Harlan, who says in federal cases only hard core is applicable, then I think we're dealing with a majority, a clear majority.

QUESTION: Oh, I thought you said a seven man majority.

MR. SMITH: Well, I say if you added that group, I think that at the time of the decision in Roth and Memoirs,

we're talking about adding the figures up, we're talking about approximately seven justices.

QUESTION: Okay. When was the -- what year was the decision, then?

MR. SMITH: 1966.

QUESTION: But you're not suggesting that it subsisted for any given number of years after that?

MR. SMITH: It has not changed. It has become the law in practice as enunciated by every federal appellate court in the country, and almost every state appellate court in the country. Roth-Memoirs was thought to be the law. And as I said, your honor even -- with the Department of Justice -- and I agree that it's not binding, and any Solicitor General's brief on the matter is not binding -- certainly it appeared to be the law of the land upon which defendants would rely in governing their conduct so as not to offend the federal criminal law.

And we say that what occurred certainly was in the connection with the Court's enunciation of the standards in Miller, the Court suggests that this is the first time since Roth that the Court's majority has been able to agree upon the formulation of standards. Mr. Justice Burger refers to the fact that the Roth-Memoirs test was -- at least for the State of California -- was correctly regarded as the appropriate test at the time the conduct was committed. And

so we again say that defendants have the right to rely on that particular factor. And because of the change in the law in Miller, which occurred after the conduct involved here, we certainly think that our clients, certainly under procedural due process, are entitled to this aspect of protection, constitutional protection.

Our second argument primarily directs itself to the failure of the appellate court to review the movies in question. In this instance, they took -- two of the justices -- judges -- looked at the affidavits in support of the search warrants and made their conclusion that this was hard core pornography.

Unfortunately, hard core pornography is not a talisman that says that anything that is hard core pornography is, in and of itself, obscene. Elsewise, it would not have been necessary for this Court through Justice Burger's decision to enunciate three definitive aspects of what is to be used to define material that can be condemned as obscene.

So the appellate court refused to look at the film. We feel that they should have looked at the film. It is the responsibility -- it's a mixed question of law and fact. And we suggest that they erred in avoiding their duty to look at the films, and that they should be required to do so.

QUESTION: Are you telling us this is constitutionally

required?

MR. SMITH: Given the fact that it is -- we suggest, your honor, that given the fact it is a mixed question of law and fact as enunciated by this court, we do feel that they have the responsibility to look at the material and determine not just the normal question of whether the material is -- like a finding of fact, it would not otherwise be reviewed; a jury finding. I think Justice Clark took that position in earlier cases, particularly in the Roth-Memoirs -- in the Memoirs case. But it was never joined in by other members of this Court.

QUESTION: What provision of the constitution do you rely on when you say that it must be viewed by the appellate court?

MR. SMITH: We draw our strength, if we may, from the penumbra of the First Amendment, and say that this is necessary to avoid a chilling that may occur in a particular region, because an appelate court -- or in a particular jurisdiction, because a court in that jurisdiction may be conservative, perhaps, more narrow in its point of view. And I think it's important that, at least within the region, that the appellate courts be required to assert the responsibility --

QUESTION: You mean your clients would be chilled if we didn't look at these movies?

MR. SMITH: Your honor, it's not just our clients being chilled.

212 QUESTION: Well, isn't that the supposition?

MR. SMITH: I'm suggesting that there would be a chilling effect on other things, not just my clients, your honor. I'm arguing for a broader approach. And I'm not saying that you should look at them.

QUESTION: Well, are you arguing for -- oh, you don't think we have to look at them?

MR. SMITH: I didn't say that in this case, for the resolution of these issues, that it was necessary for this Court to look at these films.

QUESTION: Well, why was it necessary for the court of appeals to?

MR. SMITH: Because this is a discretionary review on the part of your honor, and your honors, as to whether or not you decide to grant review in a petition for certiorari.

QUESTION: Well, we granted the review. Now do we have to look at it?

MR. SMITH: No, sir. I don't think it's necessary for the resolution of the arguments in this case. Because I think these are legal arguments. Now the question of whether --

QUESTION: And it wasn't a legal argument in the court of appeals?

MR. SMITH: We weren't permitted -- the court refused to look at it. We argued to them, we said, you know, you must review --

QUESTION: Excuse me.

MR. SMITH: -- yes, sir.

QUESTION: You complain about the fact that they did not look at it.

MR. SMITH: Did not look at it.

QUESTION: If we don't look at it, are you going to complain about us not looking at it?

MR. SMITH: No, I am not. Because I don't think it's necessary to the resolution of these three issues.

QUESTION: What if you had a judge in the court of appeals who was blind? And there have been judges in state and federal courts who were blind. What do you think about that? Can that vacuum not be filled by having an explicit description of the materials?

MR. SMITH: Yes, sir. But an explicit description of the materials accompanied by the sound track to which he could listen, and not the -- we suggest -- the possible prejudice involved of an FBI agent who's trying to get a search warrant, and who may not discuss the potential serious literary, artistice values that may exist. So I do think, yes, in a different kind of environment, with a neutral -- it's like a translator in a court, your honor. If someone

speaks Greek, and he's coming up for trial, the court will arrange certainly through -- if possible, to get a witness or a defendant involved -- to get a translator. But it's approved by the court. It's not somebody who is working in the prosecutor's office and who says, oh, well, I can come and do it. So I am suggesting, your honor, that there are probably ways that that can be accomplished. But I don't think it's through the affidavit of the FBI agent in this particular regard.

And so we feel that it becomes necessary -- and there is certainly a conflict in the circuit -- we think it is necessary for the Court to resolve this issue; that at least at the appellate level we should get a complete review of the law and certainly the facts as are required.

The third point to which I address myself, which is not -- which is a matter that is in controversy between the Solicitor General and myself -- relates to the concept of contemporary community standards.

The Court, over and over again in its charge to the jury, suggests -- or it was said -- that the jury was to take the concept of community standards as the Eastern District of Kentucky. Now the Eastern District of Kentucky -- the jurors are not all drawn from the Eastern District. Those which sit in Covington are drawn from the contiguous counties around Covington. Then there's a court sitting in

Frankfurt, they're drawn from around there. And if they're sitting in Gatlinsburg, Kentucky, down along the West Virginia line, they're drawn from there. But the court did not delineate, or limit it, to the area from which the jury itself came, but to the entire Eastern District, relying in their concept on the words of Mr. Chief Justice -- or Mr. Justice Rehnquist in the Hamling case.

We opted for something different. We opted for, primarily, a standard that would encompass the contemporary community that would include the Cincinnati area. We suggested that through the voir dire process, that at least half the jurors worked -- or their significant other spouses -- worked in the Covington area.

QUESTION: Are you saying that some of the jurors were from outside the Eastern District of Kentucky?

MR. SMITH: No, sir. I said, some of the -- all of the jurors were from the area contiguous to Covington. Half of the jurors, or their significant others or spouses, worked in Cincinnati. They lived in the residency in Kentucky, but they worked in Cincinnati. Their whole social intercourse primarily --

QUESTION: So the entire jury venire, then, was drawn from the Eastern District of Kentucky?

MR. SMITH: No, from the area contiguous to Covington.

QUESTION: Which is not part of the Eastern District

of Kentucky?

MR. SMITH: It is part of -- but not from the entire Eastern District.

QUESTION: Well, I didn't say anything -- I said the entire jury venire --

MR. SMITH: Yes, sir.

QUESTION: -- was drawn from the Eastern District of Kentucky, is that correct?

MR. SMITH: That's correct.

And, as I stand, we could stand on the courthouse steps in Covington, and you could see Cincinnati across the river, the newspapers are published in Cincinnati, there were --

QUESTION: A good number of your venire came from metropolitan Cincinnati on the Kentucky side?

MR. SMITH: That is correct. But the judge said they must disregard, in essence -- by only using the Eastern District, they must disregard the Cincinnati area. And we felt that that was grossly unfair in view of the -- and we opt, really, more than anything else, for what Mr. Justice Rehnquist said, in essence, in Jenkins. And that is, without a definition of a geographical standard, but just using community in a general sense -- which I think was one of the imports of the holding in the Jenkins case --

QUESTION: Well, on your theory, I take it that if

a person lived in Connecticut, spent three days a week there as so many of them do, and spent four days a week on his profession or business in New York City, that he could not divorce himself from the off-Broadway standards -- the off-Broadway show standards. Is that the general idea?

MR. SMITH: Sir, I think it is not from this standpoint, if I may: Newport, where the film was shown, is just right across the river from Cincinnati.

QUESTION: I can understand the prosecution making that argument. I'm a little -- I'm not quite so clear about your making it.

MR. SMITH: Your honor, this is the only adult theater in the whole Eastern District of Kentucky. But there were adult theaters and there were adult bookstores in Cincinnati. And if you're going to talk about the level of tolerance and the community standard, we certainly are opting to have the larger community, that is to say, the metropolitan community, included to make it meaningful. And that's why I would have preferred, certainly, had the judge given the charge of the contemporary community standards without defining a geographical limit so that we could have argued to the jury about what is the community, what is the definition of the community, and make it, we suggest, more meaningful.

But when the judge says, you must consider the standards of the Eastern District of Kentucky, and that's

the entire district, not just where the jury's drawn, and you consider that most of the Eastern District is Appalachia, we're not dealing with anything that is meaningful in terms of these defendants in this particular case.

QUESTION: But you can argue, certainly, to the jury, can't you, that Covington and Newport are part of the Eastern District of Kentucky?

MR. SMITH: They are.

QUESTION: And that the people who live there are as capable of contributing to the standards of the Eastern District as are people in which -- or, what is Appalachia.

MR. SMITH: That's true. But we also opted, as I said, because Cincinnati did have -- that was more the cultural level, the cultural center, the center in terms of the entertainment industry and such like that, that that became a relevant part of the standard. And so we felt it was extremely important that the jury be allowed to consider that of which they knew, whatever they knew about that community standard, to be incorporated into part of the whole in this particular regard. So for that reason, we move to ask thatthe community be enlarged.

Now there was some evidence that was adduced by some of the experts in cross-examination and direct examination regarding their background, and that they were basing their opinions in part on what occurred in other places. But the

jury was effectively precluded from considering that by virtue of the court's instructions regarding the Eastern District. And we were effectively precluded from presenting evidence of the materials of the community --

MR. CHIEF JUSTICE BURGER: We'll resume there at 10:00 o'clock in the morning, counsel.

[Whereupon the Court was recessed at 3:00 o'clock p.m., to be reconvened at 10:00 o'clock a.m., the next morning.]